Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

A DIGEST

OF THE

CIVIL LAW OF CEYLON.

BY

P. ARUNACHALAM, M.A. CANTAB.,

of Lincoln's Inn, Barrister-at-Law; and of the Ceylon Civil Service; Member of the Legislative Council of Ceylon.

Volume I.

PERSONS

NATURAL AND JURISTIC.

J.M.SWAMINATHAN
I.P.,U.M.,LL.B.,LL.M.,M.Phil.,Hon.LLD
Attorney-At-Law & Notary Public
119, Rosmead Place, Colombo.

LONDON:

STEVENS AND HAYNES,

Law Publishers,

BELL YARD, TEMPLE BAR,

1910.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

All rights reserved.

PRINTERS:
COLOMBO APOTHECARIES CO., LTD.,
COLOMBO, CEYLON.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Dedicated

BY PERMISSION

TO THE RIGHT HONOURABLE

THE EARL OF CREWE, K.G.,

His Majesty's Principal Secretary of State

for the Colonies.

J.M.SWAMINATHAN
LL.B.,LL.M.,M.Phil.,Hon.LL.D
Attorney-At-Law & Notary Public
119, Kanatte Place, Colombo.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

A DIGEST

OF THE

CIVIL LAW OF CEYLON.

PLAN OF THE WORK.

BOOK I. . GENERAL.

BOOK II. .. LAW OF OBLIGATIONS.

BOOK III. .. LAW OF THINGS.

BOOK IV. .. LAW OF THE FAMILY.

BOOK V. .. LAW OF SUCCESSION.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

BOOK I.—GENERAL.

PART I.—PERSONS.

TITLE I.—*NATURAL PERSONS.*

(*a*) BIRTH AND LIMITATION OF PERSONALITY. .. .. Ch. I.

(*b*) DOMICILE: SUBJECTION OF PERSON TO TERRITORIAL LAW. Ch. II.

(*c*) END OF PERSONALITY: JUDICIAL DECLARATION OF DEATH. .. Ch. III.

TITLE II.—*JURISTIC PERSONS (CORPORATIONS.)*

(*a*) GENERAL PROVISIONS. .. Ch. IV.

(*b*) REGISTERED COMPANIES. .. Ch. V.

(*c*) FOUNDATIONS. .. .. Ch. VI.

TITLE III.—*JURISTIC PERSONS OF PUBLIC LAW.*

(*a*) MUNICIPALITIES, ETC. .. Ch. VII.

(*b*) THE FISC, OR THE STATE .. Ch. VIII.

PART II.—THINGS. .. .. Ch. IX.

PART III.—JURISTIC ACTS.

(*a*) CAPACITY FOR JURISTIC ACTS. Ch. X.

(*b*) DECLARATION OF INTENTION. Ch. XI.

(*c*) CONTRACT. .. .. Ch. XII.

(*d*) CONDITIONS. .. .. Ch. XIII.

(*e*) AGENCY. .. .. Ch. XIV.

PART IV.—TIME. .. .. Ch. XV.

PART V.—LIMITATION OF ACTIONS. Ch. XVI.

PART VI.—EXERCISE OF RIGHTS. SELF-DEFENCE AND SELF-HELP. .. Ch. XVII.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

PREFACE.

THE Civil Law of Ceylon is in the main what is known as the Roman-Dutch Law. In spite of the admirable principles underlying it, principles instinct with a remarkable vitality and power of adaptation to changing times and needs, it remains for the most part a huge, indeterminate mass of legal lore buried in tomes of mediæval Latin and Dutch, which are the terror of the modern lawyer. He has scarcely the courage or the patience to explore what seems a gloomy and intricate forest guarded by old-world dragons. He picks up the law as he goes from English translations, not always accurate, of portions of the ancient writings, from local Ordinances dealing hap-hazard with some aspects of the law, from reports of decisions of Courts, at times confusing and conflicting, and from such books as Thomson's or Pereira's Institutes.

Valuable as these authorities are, they are not free from the failing noted of old by Cicero,—*Jurisconsulti saepe, quod positum est in una cognitione, id in infinitum dispertiuntur*—*, and bewilder the average practitioner by a mass of detail, a multiplicity of isolated facts and decisions, which he is wholly unable to systematize. He finds it easier to apply the English law which, though scarcely less open to objection on this ground, at least provides scores of current text-books and reports, under the ægis of which one is secure until the next decision and can save himself the trouble of thinking.

The true fountains, the underlying rules and principles, are thus too often hidden away, and labour and time are spent in following rivulets. The administration of justice is beset with "uncertainty, the mother of contention and confusion;"† and we may almost say with Lord Bacon, "The inheritances of this realm are tossed at this day like a ship upon the sea in such sort that it is hard to say which bark

* *De Legibus*, II. 19 † Coke, Litt. 9a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

will sink and which will get to haven."* Our precious inheritance of the Roman-Dutch Law itself stands in danger of being lost through neglect or of being swept away in some ill-advised attempt at reform.

I am no opponent of reform. One of the primary functions of a legislature is, I conceive, to sweep into the dust-bin the rubbish that inevitably accumulates in the course of legal history. But, as Mr. Gladstone once said in the House of Commons, you should get a comprehensive account of what the law is, before you commence amending it. Many an attempt at reform has failed for want of this indispensable preliminary. The greatest legislative reform of the age, the German Civil Code, has proved a splendid success, because it was preceded by an exhaustive inquiry into and digest of the existing law.

My aim in this work has been to reduce our Civil Law into a compact and systematic form distributed according to the natural and logical division of the subject matter, to ascertain and compress into rules as far as possible the law regarding each subject,—in fact, to make a digest of the existing law which might be used in the preparation of an authoritative code embodying such reforms as may be deemed expedient. To frame a statement of any legal matter which shall be quite accurate is possible only to those who, having legislative authority, can adapt the law to their statement. It is rarely in the power of others to frame any statement to which exception may not be taken. In the present state of our law the task is one of vast difficulty, and demands infinite labour and research. I would gladly have seen it undertaken by others of greater competence and leisure.

I have tried to state the law, as I understand it, in clear propositions admitting of definite assent or definite denial. It will be a satisfaction to me if more accurate propositions are substituted. I shall at least have stirred up thought and debate, and helped towards a sounder knowledge of the law and

* Law Tracts, 299.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

made the way easier for its codification and reform. I have supported my statements of the law as far as possible by reference to their sources and by citation of the instances in which the questions have been discussed by our Courts or by the English Courts. But, as every lawyer knows, for some elementary legal propositions it is difficult, if not impossible, to find express authority. Notes have been added to make the book more easily intelligible to the young student and to help him to realize the relation of the various propositions to the general scheme.

In the preparation of this work I have derived much help from the works of Savigny (especially his *System des heutigen römischen Rechts*) and Pothier (*Pandectæ Justinianæ* and the collected edition of his French writings by Professor Bugnet), from Johannes Voet's *Commentarius ad Pandectas*, my chief authority on the Roman-Dutch Law, and from the various Civil Codes of Europe, but, above all, from the Civil Code of Germany—*Bürgerliches Gesetzbuch für das Deutsche Reich*—which was enacted in 1896 and came into force on the 1st of January, 1900.

That Code sums up the juristic thought and research of centuries. Its preparation occupied a number of the best intellects of Germany for nearly a generation. It is, as the late Professor F. W. Maitland said, "the most carefully considered statement of a nation's laws that the world has seen, and the German people are able to face modern times with modern ideas, modern machinery, modern weapons". As a complete and scientific exposition of actual law it occupies a unique position and is destined to exercise a far-reaching influence. Already it has been adopted by Japan as the model for the Civil Code of that country, and it must be the model for every other code that may be undertaken. While this volume is passing through the press, some parts have appeared of a proposed codification of the English Civil Law *(Das bürgerliche Recht Englands)* prepared under the auspices of the Berlin Society of Comparative Jurisprudence and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Political Economy with the help of English lawyers and edited with a learned commentary by Dr. Gustav Schirrmeister, and an English edition by Mr. Edward Jenks (*A Digest of English Civil Law*) without a commentary.

The German Code will repay careful study by lawyers as well as laymen. When I began this work, the Code was available only in the original German. Translations may now be had in many languages. The best is the French translation now being issued with excellent notes by *Le Comité de Législation Étrangère* under the authority of the Minister of Justice. An English translation made by a learned Chinese lawyer, Chung Hui Wang, has also appeared. The most luminous and useful commentary is that of Planck in German: no better guide can be desired.

The present work, when complete, will consist of five books. 1. General. 2. The Law of Obligations. 3. The Law of Things. 4. The Law of the Family. 5. The Law of Succession. This classification, first made by Savigny (*System des h. r. R. II.* § 58) and now adopted by the German Code, is a great improvement on the classification of Gaius and Justinian followed in the Roman-Dutch Law works. The first Book deals with the general part of law, *i.e.*, the Law of Persons and other subjects which recur, possibly with modifications, in the Law of Obligations, Things, Family and Succession, and are usually treated in a fragmentary and cursory manner. They receive here a systematic treatment which, while it renders repetition unnecessary, aims at a complete understanding of the common element which exists in all these branches of law.

Persons (or the subjects of rights) are treated under two heads: Natural Persons, and Juristic Persons or Corporations. In the first Title is treated the capacity of Natural Persons to have rights, from its beginning at birth until its termination by death, with all its limitations and modifications arising from family relationship, age and domicile; and in connexion with death, the presumptions of death from disap-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

pearance and of survival among *commorientes* and the practical application of those presumptions.

The important subject of Juristic Persons finds its place in Title II. An attempt has been made to state the general principles of Corporation Law, which should be known to every lawyer but have been thrust out of sight here, as in Great Britain, by the part which Joint Stock Companies play in modern life. I have endeavoured in the Introduction to the Title to trace briefly the growth and history of Corporations, to explain wherein and why our law of Corporations differs from the English law, which is by virtue of the Ordinance No. 22 of 1866 the law mainly in force here, to show the inapplicability of the Corporation Sole to our system, and to emphasise the importance of the conception, which we have inherited from Rome, of the Fisc or the State.

With the wide expansion of commerce and industry Joint Stock Companies have attained vast proportions and ramifications and introduced great complications into the law of Corporations, and a voluminous law has grown up as to Companies. An abstract of the principles and the important features of Company Law is included. To have done more was impossible without exceeding the just proportion and disturbing the natural connexion of subjects. To determine any legal question relating to companies it is indispensable to attend closely to the language of the statutes by which they are governed, and reference should be made to the statutes in every case. For this purpose the local Ordinances are given at length in the Appendix, with references to the English Acts. A Manual of Ceylon Company Law has been a long felt want and will, I hope, be supplied by this work. The Title concludes with the provisions specially applicable to Corporate Foundations.

Title III. is devoted to Juristic Persons of Public Law, and mainly to the Fisc or the State, a towering personality in Ceylon with a legal status complicated by our inheritance from the Roman and Roman-Dutch Laws, by the influence of English Constitutional Law and by local enactments. This

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

part of the work covers a wide range of subjects bristling with doubt and difficulty, and some requiring each almost a treatise for itself. I have added in the Appendix the principal Ordinances relating to the Crown, such as the Waste Lands Ordinances 1897 to 1903, Crown Lands Encroachment Ordinance No. 12 of 1840, Crown Debts Ordinance No. 14 of 1843; some valuable and interesting, but not easily accessible, judgments as to the rights of the Crown in Ceylon; and a paper on the Kandyan Provinces in which are discussed the history and legal significance of the expression "the districts formerly comprised in the Kandyan Provinces" in section 6 of the Ordinance No. 12 of 1840.

The second part of Book I. deals in a general manner with Things as objects of rights; and the third with Juristic Acts or Acts in the Law (the principal factors by which rights are created, transferred and extinguished), with the capacity of the parties to such acts, the nature and effect of declarations, of intention, contract, conditions and agency. Part 4 deals with Time and its computation in statutes, judicial orders, etc., and Part 5 with the Extinctive Prescription of rights (limitation of actions), Acquisitive Prescription being relegated to its natural place under the heading Usucapion among the modes of acquisition of ownership in Book III. The sixth and concluding part of Book I. deals with the law as to the exercise of rights, self-help and the defence of oneself and one's property, matters of great importance underlying the very conception of public law.

The first volume now issued treats of the Law of Persons, Natural and Juristic. The succeeding volumes will deal with the remainder of the General Part (Book I.) and with the 2nd, 3rd, 4th and 5th Books. Owing to the number and difficulty of the questions treated and the indeterminate state of our law I cannot expect, in spite of the time and labour I have bestowed, to have avoided errors and omissions. I shall be grateful for corrections and suggestions for the improvement of the work. I venture to hope that, with all its imperfections, it will be useful to the professional lawyer and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

student, and to every one who takes an intelligent interest in the laws of his country.

The tendency of the times has been more and more to separate the practice of law from its theory. Nothing is more common, in estimating the merits of a practical lawyer, than to attach exclusive value to mere dexterity and quickness, although these useful qualities are quite compatible with the most unconscientious superficiality. Savigny has well said that the practitioner amid his practical occupations ought always to cherish a sense and feeling for the science of law and should never forget that that science, rightly apprehended, is only the generalization of the rules which it is his function to make known and apply in detail. Law studied and practised in this spirit is as fascinating to the student and the practitioner as it is pregnant with benefit to the community. Even those who look upon the study of law exclusively as a help to professional success, have begun to see in Europe and America that the grasp of principles is of greater value than mere knowledge of cases and isolated rules. My labour will not have been in vain, if it helps to develope a similar feeling in this Island.

It is to me a matter of deep regret that I was not able to publish this work in the life-time of my friend Mr. F. W. Maitland, late Downing Professor of Law at Cambridge, who was much interested in the project and helped me with advice and encouragement. For like help given throughout the work I have to thank my friend Sir Joseph Hutchinson, Chief Justice of Ceylon. I am also indebted for valuable suggestions to the acting Attorney-General, Mr. Walter Pereira, K.C.; to Mr. F. J. de Saram Senr. in respect of Ceylon Company Law; and to the Heads of various public Departments for information relating to the Crown. It is due to the several gentlemen to say that for the opinions and statements in this work I am alone responsible.

P. ARUNACHALAM.

Ponklar, Colombo,
18th August, 1910.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CONTENTS OF VOL. I.

PERSONS.

TITLE I.—NATURAL PERSONS.

Chapter I.—Birth and Limitation of Personality.

Article.	Subject.	Page.
1.	Beginning of legal capacity at birth	1
2.	Birth defined. Child *en ventre sa mère*	2
3.	Age of Majority	3
4.	Letters *Venia ætatis*	5
5.	Effect thereof	6
6.	Interdict of mentally incapacitated persons, prodigals, etc.	6

Chapter II.—Domicile.

Subjection of Person to Territorial Law.

	Introduction	8
7.	Domicile of choice	11
8.	Domicile how extinguished	13
9.	Domicile how retained	13
10.	Domicile of person *non sui juris*	14
11.	Married woman's domicile	15
12.	Domicile of a child	18
13.	When domicile of origin revives	19
14.	Presumption of change of domicile...	20
15.	Presumption when domicile not known	21
16.	Domicile for special purpose	21

Chapter III.—End of Personality.

17.	Adjudication of death of untraceable person	22
18.	Burden of proving death	22
19.	When adjudication of death may be made	23
20.	Presumption of death from seven years absence ...	24
21.	Time of death	25
22.	When ship presumed lost	26
23.	Revocation of adjudication	26
24.	Effect thereof	26
25.	Presumption of survival among persons dying together by a common calamity	26

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

TITLE II.—JURISTIC PERSONS. (CORPORATIONS.)

CHAPTER IV.—GENERAL PROVISIONS.

ARTICLE.	SUBJECT.	PAGE.
	Introduction	30
26.	Birth of a Juristic Person	41
27.	Authority of State, how granted and when implied... ...	42
28.	Corporation, definition of	42
29.	Constitution of corporation	43
30.	Function of Corporation...	43
31.	Name of Corporation	45
32.	Perpetual succession	46
33.	Power to make bye-laws	47
34.	Common seal	48
35.	When corporate acts should be under seal	48
36.	Juristic acts between corporation and its members ...	53
37.	Mortmain	53
38.	Restriction on dealing with property	55
39.	Powers and liabilities of corporations	56
40.	Directorate and its powers	64
41.	Appointment of Directors	66
42.	Appointment of special agents	67
43.	Decision of directors, how taken	67
44.	The government of a corporation	67
45.	The will of the majority at corporate meeting is the will of the corporation	68
46.	Unanimity when required	71
47.	Vote of interested person	73
48.	Reservation of members' special rights	74
49.	When general meeting to be called by directors	75
50.	When Court may authorise calling of general meeting ...	75
51.	Rights of membership, transfer of	76
52.	Amotion from membership or office	76
53.	Member's right of withdrawal	77
54.	Domicile of corporation...	77
55.	Inspectors	78
56.	Their duties	78
57.	Dissolution of corporation and its effect	80
58.	Mode of dissolution	80
59.	Compulsory dissolution	81
60.	Devolution of property on dissolution of corporation ...	82
61.	Escheat to the Crown	86
62.	*Cy-pres*	86
63.	Liquidation	87
64.	Appointment of Liquidators	87
65.	Duties of Liquidators	87
66.	Existence of corporation pending liquidation	87
67.	Unincorporate association, legal status of	88

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Chapter V.—Registered Companies.

Article.	Subject.	Page.
	Introduction	89
68.	Prohibition of partnership exceeding certain number ...	92
69.	Mode of forming registered company	92
70.	Company with limited and unlimited liability	94
71.	Memorandum of Association	95
72.	Articles of Association	99
73.	Registration of memorandum and articles of association ...	100
74.	Effect of registration	102
75.	Memorandum and articles of association, how far binding on members and others	104
76.	Restriction on alteration of memorandum of association...	106
77.	Name of company and change of name	106
78.	Change of objects	108
79.	Alteration of articles of association	110
80.	Promoters	112
81.	Prospectus	114
82.	Nature of shares	116
83.	Certificate of shares	117
84.	Transfer of shares	118
85.	Who are members	119
86.	Register of members	122
87.	Annual list of members and summary	123
88.	Penalty for not keeping proper register or sending list ...	124
89.	Entry of trusts in register	124
90.	Inspection and copy of register and list	124
91.	Power to close register	125
92.	Power of Court to rectify register	126
93.	Register as evidence	130
94.	Power of company to alter its share capital	131
95.	Increase of share capital	132
96.	Consolidation and subdivision of share capital ...	132
97.	Conversion of shares into stock	133
98.	Cancellation of unissued shares	134
99.	Reduction of share capital, how effected...	135
100.	Registered office	139
101.	Change of office within a town	140
102.	Publication of name by limited company	142
103.	Penalty on company for non-publication...	143
104.	Annual general meeting	144
105.	Special resolution	145
106.	Minutes and proceedings of meetings and directors ...	146
107.	Contracts, how made	146
108.	Bills of exchange and promissory notes	148
109.	Borrowing powers of companies	149
110.	Company's register of mortgages	154

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article.	Subject.	Page.
111.	Calls on shares	155
112.	Accounts	157
113.	Balance sheet	158
114.	Audit	159
115.	Payment of dividend out of capital prohibited	160
116.	Prohibition of carrying on business with less than seven members	165
117.	Modes of winding-up	165
118.	When winding-up commences	166
119.	Winding-up by court, grounds for	166
120.	Company when deemed unable to pay its debts	167
121.	Application for winding-up by court	168
122.	Effect of the winding-up order	169
123.	Appointment and duties of official liquidators	169
124.	Powers of official liquidator	170
125.	Liability of present and past members as contributories	172
126.	Power of court to make calls	175
127.	Dissolution of company	175
128.	Voluntary winding-up, grounds for	176
129.	Effect of voluntary winding-up on the company's status	176
130.	Consequences of voluntary winding-up	177
131.	Final meeting and dissolution of company	178
132.	Liquidator's duty, if affairs not wound up in a year	179
133.	Saving of rights of creditors	180

Chapter VI.—Foundations.

	Introduction	181
134.	A corporate foundation, requisites of	182
135.	Mode of endowment and incorporation	182
136.	Instrument of endowment	184
137.	Endowment by deed *inter vivos* revocable until incorporation	184
138.	Endowment by last will	185
139.	Obligation of founder, on incorporation	185
140.	Constitution of the foundation	185
141.	Statutes of the founder	186
142.	Defect in endowment supplied by Crown or the court	186
143.	Alteration of constitution	190
144.	Patronage and visitation	191
145.	Duties of visitors	192
146.	Suppression of foundation	193
147.	Change of object	193
148.	*Cy-pres* when applicable	196
149.	*Cy-pres* when not applicable	197
150.	Actions relating to public charities	198

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

TITLE III.—JURISTIC PERSONS OF PUBLIC LAW.

CHAPTER VII.—MUNICIPALITIES, ETC.

ARTICLE.	SUBJECT.	PAGE.
	Introduction...	200
151.	Municipalities and Local Boards	200

CHAPTER VIII.—THE FISC, OR THE STATE.

	Introduction	207
152.	The Crown the owner of *res nullius*...	218
153.	Escheat to Crown, on failure of heirs	220
154.	Illegitimate child, succession of	221
155.	Devolution of void legacy on the Crown	223
156.	Treasure-trove	227
157.	Antiquities	229
158.	Wrecks	231
159.	Pearl fishery	233
160.	Salt collection and manufacture	240
161.	Sea and foreshore, and navigable rivers...	242
162.	Alluvion, diluvion, new islands	252
163.	Mines on Crown and private land and under the sea; royalty on plumbago; license for working mines of gold, etc. ...	262
164.	Customs duties	266
165.	Manufacture and sale of intoxicating liquor	271
166.	Postal service	275
167.	Telegraph and telephone	280
168.	Stamp duty	282
169.	Necessary facts for determination of duty to be set forth in instrument	288
170.	Cancellation of adhesive stamps	285
171.	When instrument deemed duly stamped	289
172.	Instrument not duly stamped inadmissible in civil cases or by public officer	290
173.	Instrument not duly stamped, when admissible in civil cases	293
174.	Executing or negotiating instruments not duly stamped, penalty for	294
175.	Forest, waste and unoccupied land, presumed to be Crown property; chenas in Kandyan districts and elsewhere. Ord. 12 of 1840 § 6	295
176.	Summary proceeding for ejectment from Crown land ...	304
177.	Forest, chena, waste and unoccupied lands: notice to claimants. Ord. 1 of 1897	305
178.	Inquiry into claims	313
179.	Disputed claims, reference of, to District Judge or Commissioner	314
180.	Procedure in court...	315
181.	Hearing of reference	316

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article.	Subject.	Page.
182.	Irregularities in notices cured after appearance of claimant ...	318
183.	Limitation of time for preferring claim	319
184.	If claim established and land sold, compensation to be awarded	319
185.	Prohibition of building, clearing, etc., pending investigation ...	320
186.	Presumption as to forest, waste, chena, unoccupied land. Ord. 1 of 1897	322
187.	Abandoned lands, resumption by Crown. Ord. 4 of 1887...	324
188.	Forest Ordinance, 1907; meaning of "forest," etc.	327
189.	Proclamation of reserved forest	330
190.	Constitution of village forests...	332
191.	Questions of title under the Forest Ordinance, how decided	333
192.	Drift timber, etc., presumed to be the property of the Crown ...	333
193.	Presumption that timber or forest produce belongs to the Crown	334
194.	Crown not liable for loss or damage	335
195.	Acquisition of land for public purpose. Ord. 3 of 1876. ...	335
196.	Right of Crown to *restitutio in integrum*	339
197.	No laches imputable to the Crown	343
198.	Prescription against the Crown	344
199.	Prescription against the Crown in land suits	345
200.	Crown debtors: preference and tacit hypothec of the Crown	345
201.	Dealings with property of Crown debtor in fraud of the Crown, void and punishable	350
202.	Crown grants, construction of	351
203.	Crown grant, title on	352
204.	Liability of Crown to a statute	356
205.	Taxation of Crown property	358
206.	Actions by the Crown	359
207.	Actions against the Crown	360
208.	Crown appointments, tenure of; no right of action for dismissal	366
209.	Colonial Governor, powers of	368
210.	Governor's legal liability	370
211.	Liability of Crown servant for official contract ...	379
212.	Liability *ex delicto* of Crown servants	380
213.	No action against Judge for act or speech in judicial capacity	383
214.	Ministerial officers of court, liability of	386
215.	Police Officer's privilege...	388

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDICES.

PAGE.

APPENDIX I.

1. The Joint Stock Companies Ordinances, 1861 to 1909 —
   Ordinance 4 of 1861
   Do 9 of 1867
   Do 4 of 1868
   Do 6 of 1888
   Do 3 of 1893
   Do 13 of 1905
   Do 17 of 1907
   Do 19 of 1909 ... ... i—lx.
2. The Joint Stock Banking Ordinance, 1897. (No. 2 of 1897) ... ... lx—lxv.
3. Fees and Stamps under the Joint Stock Companies Ordinances, Table of ... ... lxvi—lxvii.

APPENDIX II.

Ordinances relating to the Crown.

1. Crown Lands Encroachments: Ordinances Nos. 12 of 1840 and 9 of 1841.
2. Waste Lands Ordinances, 1897 to 1903.
3. Crown Lands (Boundaries and Surveys): Ordinances No. 1 of 1844 and No. 4 of 1866.
4. Evidence Ordinance No. 14 of 1905, Sec. 82: Proof of plans, etc.
5. Crown Landmarks Ordinance No. 7 of 1909.
6. Crown Grants Signature: Ordinances Nos. 11 and 30 of 1884.
7. Lands Resumption Ordinance, 1887.
8. Land Acquisition Ordinances, 1876 to 1905.
9. Crown Debts Ordinance No. 14 of 1843 ... lxviii—xciv.

APPENDIX III.

Decisions under the Waste Lands Ordinances ... xcv—xcviii.

APPENDIX IV.

The Adippola Sannas Case ... ... xcix—cxxvi.

APPENDIX V.

Kandyan Provinces ... ... cxxvii—cxl.

APPENDIX VI.

Stamp Ordinance Notification... ... ... cxli.

APPENDIX VII.

Prescription against the Crown in Land Suits:
Judgment of Berwick D. J. ... cxlii—cxlviii.

APPENDIX VIII.

Title on Crown Grant:
Judgment of Baumgartner C. R. ... ... cxlix—clix.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

TABLE OF CASES.

[Arabic numerals indicate the pages in the Text : Roman numerals the pages in the Appendix.]

A.

	Page.
Aaron Reefs v. Twiss ..	129
Aberajendra v. Govt. Agent, C.P.	318
Abeywardena v. Chairman, Municipal Council, Galle, *et al* ..	71
Abrath v. North Eastern Railway Company	58
Adippola Sannas Case 298, 303, 310, 317, 318, 323, xcvii., xcviii., xcix.—cxxvi.	
Agra Bank Re Barber & Company, *Ex parte*	149
Aikman v. Aikman	20
Allen v. Gold Reefs .. 72, 75,	112
Alston, *Ex parte*	247
Amarasekera v. Baiya	299
Amarasuriya v. Andris de Silva	354
Anderson v. Gorrie	385
Anderson & Murison v. Colonial Government	246
Andrews v. Gas Meter Co. 72, 75,	111
Andrews v. Marris	387
Appuhami v. Sinne Lebbe	cxxv.
Appurala v. Dawson 301, 302,	xcv., xcvi.
Arms, Case of	376
Arnot v. United African Lands ..	146
Arnot's Case	120
Arumokam v. Tampaiya ..	251
Ashbury Carriage Co. v. Riche ..	57
Ashbury Co. v. Riche .. 96,	106
Atkins & Co. v. Wardle ..	144
Attorney General v. British Museum Trustees	229
Attorney General v. Chambers 247, 248,	260
" v. Dulwich College	191
Attorney General v. G.E. Railway Company	44
Attorney General v. Iron Mongers' Company	87
Attorney General v. Leigh ..	191
" v. Lewin ..	54
Attorney General v. London County Council	44
Attorney General v. Rajapaksa	348
" v. Richards ..	247
" v. Samarasinha 299, 300,	cvii., cxiii.
" v. Stewart ..	54
" v. Wanduragala 300,	xcv, xcvi.
Automatic Self-cleansing, &c. Co. v. Cunningham	104

B.

Badger, Re	149
Baillies' Case	121
Baily v. British Equitable Assurance Co.	112
Bailey v. Birkenhead Railway Co.	156
Bainbridge v. P.M.G.	383
Barned's Banking Co. E.P. Contract Corporation	94
Barwick v. English Joint Stock Bank 60,	128
Bateman's Trust, Re	210
Bawa v. Ashmore	385
Bayley v. Manchester, Sheffield & Lincolnshire Railway Co. ..	61
Beaumont, Re	19
Bechuanaland Exploration Co. v. London Trading Bank ..	152
Bell v. Kennedy .. 10,	12, 13
Bellerby v. Rowland	138
Beynon—In the goods of 24, 25,	28, 29
Birchell v. Bullough	293
Bishop's Case	121
Black & Co.'s Case	170
Blackburn Soc. v. Brooks ..	149
Blasson v. Blasson	3
Blundell v. Catterall .. 247,	248
Borland's Trustee v. Steel Bros. 105,	116
Bottomley's Case .. 156,	157
Bottomley v. Brougham ..	358

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

	PAGE.
Bowden v. Henderson	25
Bradlaugh v. De Run	394
Bridport Old Brewery Co., Re ..	69
Brinckman v. Matley ..	249, 250
British & Foreign Gas, &c., Co.	140
British India, &c., Co. v. Commissioners of Inland Revenue ..	151
British Mutual Banking Co. v. Charnwood Forest Co. ..	128
Briton Medical Association ..	130
Broderip v. Salomon	93
Brojomohan Dass v. Hurrolall ..	199
Broom v. Hadley	62
Broughton v. The Manchester Water Works	50
Bruce v. Bruce	21
Byrde v. Daundasekera ..	317

C.

Calcutta Jute Mills Company v. Nicholson	140
Calder v. Halket	385
Cameron v. Kyte	372
Campbell v. Hall ..	216, 218
Caratal (New) Mines Case ..	146
Carlill v. Rawter	341
Case of Arms	376
Case of Mines	263
Case of Monopolies ..	209, 217
Case of Proclamations	217
Casipillai v. Ramanathar	353, 355
Ceylon Company Ltd. v. Queens Advocate	363
Chairman, District Road Committee v. Juse Fernando ..	251
Challis' Case	121
Chapleo v. Brunswick Building Society	151
Cherry v. Mott	87
Chilaw D.C., 643	cxvi.
Citizens' Life Assurance Co. v. Brown	59, 63, 64
Clarke v. Haughan	293
Clarke v. Hart	157
Clarke v. Woods	388
Cochrane v. Moore ..	355, clv.
Cockrell v. Cockrell ..	12, 13
Collector of Customs v. Cape Central Railway	208
Collector of Customs v. Cape Central Railway	340
Colombo D.C., 1245	345, cxlii—cxlviii.
Colombo D.C., 15126	355
Colombo D.C., 60664 ..	263, 264, cliii
Commissioners of Income Tax v. Pemsel	188
Conservators, River Tone v. Ash	183, 205, 206
Copleston v. Dingiappu ..	37
Coppock v. Bower	293
Corea v. Andirala	299
Corea v. Punchirala ..	299, 323, xcv.
Cornford v. Carlton Bank ..	59
County of Gloucester Bank v. Rudry Merthyr &c. Co. ..	105, 106
C. R. Galle 2366	354, cxlix—clix.
C. R. Panadure 14635	301
Coxon v. Gorst	176
Cross v. London Anti-Vivisection Society	188
Curtis' Case	130

D.

D' Arcy v. Tamer, Kithill and Callington Railway Co. ..	52
David Payne & Co.	151
Dawkins v. Rokeby	385
Day v. Brownrigg	108
Derby Canal Co. v. Wilmot ..	52
Delhi Bank's Case	170
Derry v. Peek	114, 129
Dick Harwayer v. Adrian Jacob Bruijus	cliii.
Dias v. The Assistant Government Agent, Matara ..	309, cvii
District Road Committee, Chairman v. Juse Fernando ..	251
D. C. Chilaw 643	cxvi.
D. C. Colombo, 1245, 345,	cxlii.—cxlviii.
D. C. Colombo 15126 ..	355
D. C. Colombo 60664 ..	263, 264, cliii.
D. C. Kegalla, 2939 ..	xcvii.
Doe dem Raja Sub Krish v. East India Co.	244
Dolphin v. Robins	16
Donaldson v. McClure ..	20
Don Louis v. Veyado	251
Duck v. Tower Galvanizing Co.	106
Dundee Magistrates v. Morris ..	187
Dutton v. Marsh	149

E.

Earle's Case	76
East London Water Works Co. v. Bailey	49

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

PAGE.

Eastern Archipelago Co. v. the Queen 97
East India Co. v. Sandys 209, 217
Ebbw Vale Co. Case 138
Edelstein v. Schuler & Co. .. 152
Edmonds v. Blaina Co. .. 151
Edwards v. L. & N.W. Railway Co. 61
Election of a Councillor for Galupiadda ward of the Galle Municipality, In re 71
Eley v. Positive Government &c Co. 104
Entick v. Carrington .. 373, 381
Ernest v. Nicholls 65
Evans v. Prothero 293
Exchange Bank of Canada v. the Queen 210

E.

Fabrigas v. Mostyn 369
Farr v. Price 294
Farrell v. Bowman 364
Feather v. the Queen 380
Feather v. R. 352
Fernando v. the A.G.A. Kegalle xcvii.
Fernando v. the Queen's Advocate 353
Fishmongers' Co. v. Roertson .. 52
Fitz Harding (Lord) v. Purcell .. 250
Folgate's Case 121
Fortune Copper Mining Co. .. 140
Foster v. Coles 162
Foveaux, Re 188
Franconia Case .. 236, 237
Fraser v. Queen's Advocate 361, 366, 368

G.

Galle C. R. 2366 354, cxlix—clix.
Galle Municipality—Election of a member for Galupiadde ward, In re 71
General Auction Co. v. Smith .. 149
German Date Coffee Co. Case .. 97
Gibson v. Burton 144
Gidley v. Lord Palmerston .. 379
Gilbert's Case 156
Giles v. Grover 347
Gluckstein v. Barnes 113
Godinho v. Konig 54
Gommell v. the Commissioner of Woods & Forests 237
Goodwin v. Robarts 152
Government Stock Investment Co. 110

PAGE.

Grant v. Secretary of State for India 366
Green v. the London General Omnibus Co. 57
Gregory v. Fraser 293

H.

Hadleigh Castle Gold Mines .. 146
Haigh v. Brooks 293
Harris Case 121
Hascard v. Somany 69
Hebb's Case 121
Henderson v. Lacon 128
Hendrick v. Queen's Advocate .. 364
Hennessey v. Wright 378
Henry v. Great Northern Railway Company 160, 162
Herbert v. Turball 4
Higginson and Dean, In re 78, 84
Hill v. Bigge 369, 371
Holmes v. Sixsmith 293
Horbury Bridge Co., Re .. 70
Horn v. Ivy 50
Hornsey Urban District Council v. Hennell 359
Horsfall v. Queen's Advocate .. 359
Houlden v. Smith 385
Houldsworth v. City of Glasgow Bank 60
Howard v. Patent Ivory Co. .. 66
Howbeach v. Teague 156
Hull and Selby Railway Co. .. 261
Hutton v. West Cork Railway Co. 66

I.

Imp. Hydropathic Co. v. Hampson 65
Income Tax, Commrs. of v. Pemsel 188
Iron Monger Co. v. the Attorney General 195
Iron Ship Co. v. Blount .. 156
Isaac's Case 105
Ismail v. Andris 354

J.

Jayawardana v. Fernando .. 365
Jayawardana v Fernando & the Queen's Advocate 361
Jelks v. Hayword 388
Jennings v. Broughton 128
John Crossley & Sons 139

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

PAGE.

John Foster & Sons Ltd. v. Commissioner of Inland Revenue .. 53
Jones v. Jackson .. 149
Jones v. Scottish Accident Insurance Co. 77
Jones v. Williams 188

K.

Kachy v. Cooray 332
Kanakal v. Velupillai 292
Kandasami v. the Municipal Council of Colombo .. 63, 64, 203
Karawiti Agara Case .. cxvi
Karonchihami v. Angohami 223, 225
Kegalla D.C. 2939 .. xcvii.
Kidderminster v. Hardwick .. 52
King v. Benchers of Gray's Inn 204
Kingston Cotton Mills 160
Kiribanda v. Booth .. .. xcvi.
Kirihami v. G. Fernando Appuhami 299, 301, 302, xcv.

L.

Lagunas Nitrate Co. v. Lagunas Syndicate 66, 116
Land Credit Co. of Ireland, In re 66
Land Credit Co. of Ireland E. p. Overend Gurney & Co. .. 148
Landudno Urban Council v. Woods 250
Lane v. Cotton .. 382, 383
Langer's Case 121
Law v. Llewellyn 385
Lawford v. Bellericay Rural District Council 51
Lawler v. Egan 62
Lee v. Newchatel Asphalte Co. .. 163
Lee v. Newchatel Co. 162
Leeds and Hanley Theatre of Varieties 116
Legge v. Bood 232
Le Mesurier v. Attorney General 363, 364, 365, clviii.
Le Mesurier v. Le Mesurier 17, 18
Lewis v. Kiriappu .. 300, 301
Limpus v. London General Omnibus Co. 61
Liquidators of the Maritime Bank of Canada v. Receiver General of Brunswick 210
London and General Bank Case 160

PAGE.

Lokoo Banda v. Adochia .. 302
Lord Advocate v. Wemyss .. 248
Luby v. Wodehouse 372
Lumsden's Case 119

M.

Macduff Macduff v. Macduff .. 188
Macheath v. Haldemund .. 379
Mackay v. Commercial Bank of New Brunswick 60
Macreight, In re 12
Magistrate's Cases 236
Mahony v. East Holyford Mining Co. 106
Manby v. Long 50
Mangham v. Hubbard 293
Marine Investment Co. v. Hairside 294
Maritime Bank of Canada, Liquidators of, v. Receiver General of New Brunswick. .. 210
Marshalsea Case 387
Matheson v. Ross 293
Mayor and Corporation of Stafford v. Till 50
Mayor of Lyons v. East India Co. 210
Mayor of Manchester v. Williams 68
Meera Lebbe v. Fernando 302, cx., cxiii.
Mersey Docks v. Gibbs .. 382, 383
Middleton v. Spicer 84
Mines, Case of 263
Moggridge v. Thackwell 187, 189, 190
Monopolies, Case of .. 209, 217
Moorhouse v. Lord 21
Morice v. Archbishop of Canterbury 190
Morrison v. Trustees Corporation 157
Mudaliyar of Pitigal Korale North v. Kiri Banda 332
Mulkadoowame v. Rang Ettena 298
Munasinha v. Asst. Government Agent, Puttalam 357
Munday v. Stubbs 386
Musgrave v. Pulido .. 369, 371, 372

N.

Nariagama Case .. .. xcvi.
Nassaw Steam Press v. Tyler .. 144
National Dwellings v. Sykes .. 70
Nepean v. Doe 25
New Balkis v. Randt Gold .. 157

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

	Page.
Newman v. Queen's Advocate ..	364
New Sombrero v. Erlanger ..	113
New Zealand &c. Co. v. Peacock ..	156
Nicholson v. Bradfield Union ..	51
North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.	108
North West Transportation Co. v. Beatty	73

O.

Oakbank Oil Co. v. Crum ..	161
Oakes v. Turquand	129
Odessa Trans. Co. v. Mendel ..	156
Ogden v. Ogden ..	5, 16, 18
Okell v. Charles	149
Ommaney v. Stilwell	28

P.

Palmer v. Hutchinson	379
Panadura C.R. 14635	301
Pellatt's Case	121
Peek v. Derry	115
Peering, In re	361
Penrose v. Mortyr	144
Phené's Trusts, In re	25
Philips v. Bury	192
Philips v. Eyre ..	372, 375
Pitigal Korale North, Mudaliyar of v Kiri Banda	332
Pitt v. Pitt	16
Plumbago Case, 1873 ..	263, 264, cliii.
Podda v. Pabuli	355
Potinger v. Wightman ..	16
Poulton v. L. & S. W. Railway Co.	61
Power v. Banks	54
Prentice v. Harrison	386
Prison Charities, Re	195
Proclamations, Case of ..	217
Punt v. Symons ..	111, 112
Pyne, Re	190

Q.

Queen v. Eyre	375
Queen v. Fernando	365
Queen v. Habibu Mohammadu ..	296
Queen v. Lords Commissioners of the Treasury	381
Queen v. M. A. Fernando ..	365
Queen's Advocate v. K. Appuhami	299, xcv, cx.
Queen's Advocate v. Kirimenika	300
Queen's Advocate v. Sivagamipulle	348
Queen's College Cambridge ..	191

R.

Rabot v. de Silva ..	223, 225
Railway Co. of Venezuela v. Kisch	128
Raleigh v. Goschen	382
Rambert v. Cohen	294
Randal v. Deane	50
Ratanapala Unnanse v. Kevitiagala Unnanse	37
Reddaway v. Banham	108
Reese River Co. Smith's Case	127, 129
R. v. Archdall	cxv.
R. v. Arnolis	369
R. v. Benchers of Gray's Inn ..	204
R. v. Chetwynd	69
R. v. Cotton	347
R. v. De Bedelier	348
R. v. Eyre	375
R. v. Fernando	365
R. v. M. A. Fernando	365
R. v. Gompertz	293
R. v. Habibu Mohammadu ..	296
R. v. Harris	69
R. v. Hughes	184
R. v. Inhabitants of Wigan ..	376
R. v. Keyn	236
R. v. Langhorn	69
R. v. Long Buckley	294
R. v. Lord Commissioners of the Treasury	381
R. v. Mayor of Liverpool ..	76
R. v. Monday	69
R. v. Pasmore	80
R. v. Richardson	76
R. v. Saddlers' Co.	77
R. v. Shawe	375
R. v. Taylor	77
R. v. Tylor	62
R. v. Westwood	48
R. v. Yarborough	260
Reppiner v. Wright	294
Richie v. Ashbury Railway Carriage Co.	44

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

	PAGE.
Rivertone Conservators v. Ash	180, 205, 206
Robertson's case ..	cxxxiii.
Robinson v. Lord Vernon ..	292
Rodrigo, an alleged lunatic, In re	7
Rodrigo v. Livera	353
Rorke v. Dayrell	209
Rowel v. Pieris	250
Royal Bank of India Case ..	94
Royal British Bank v. Turquand	66, 106, 150

S.

Saibo v. Andris ..	353, cxii.
Saibo Dore v. Bawa	348
Salaman, In re	3
Salomon v. Salomon & Co. ..	93
Salton v. New Beeston	105
Sanford v. Waring 362, 364, 365,	clviii, clix.
San Paulo Brazilian Railway Co. v. Carter	140
St. John's College v. Todington ..	186
St. Louis Breweries Ltd. v. Apthorpe	140
Satterthwaite v. Powell ..	29
Scott v. Stansfield	385
Scrutton v. Brown	247
Secretary of State for War v. Wynne	358
Seddon v. N. E. Salt Co. ..	116
Sergeants' Case	204
Sella Naide v. Christie	354
Selot's Trusts, Re	7
Sharpe v. Crispin	14
Sharpley v. Louth Railway Co. ..	127
Shaw v. Gould	16
Shenton v. Smith ..	366, 368
Sillick v. Booth	28
Silva v. Abaran	354
Siman Appu *et al.* v. Queen's Advocate	362, 364, 365, clviii.
Siman v. Johannis	353
Sinnoappu v. Abayawickrama ..	223
Sivapragasam v. Swaminatha Aiyar	38
Slark v. The Highgate Archway Co.	50
Small v. Smith	44
Smith v Anderson	92
Smith's Case	127, 129
Smith v. Kerr	204
Smyth v. Darley	69
Société Panhard et Levassor v. Panhard Levassor Co. ..	108
Sottomayar v. De Barros ..	5
South of Ireland Colliery Co. v. Waddle	51
Spackmon v. Evans	121
Sprigg v. Sigcau	373
Staple of England v. Bank of England	52, 69
Street v. Union Bank of Spain ..	108
Subadar Sawel v. Surawirage Don Henrick	349
Sullivan v. Earl Spencer ..	372
Suppar v. Kanapatipulle	354, 356
Sutton's Hospital, Case of	30, 31, 41, 47, 77, 182, 183
Swabey v. Port Darwin ..	105
Swire v. Francis	60

T.

Taff Vale Railway Co. v. the Amalgamated Society of Railway Servants	41
Tenniswood v. Pattison .	387
Thackersey Sewraj v. Hurbhum	199
Tobin v. the Queen	380
Trevor v. Whitworth ..	137, 138
Trusts, Bateman's, Re	210
Trusts, Phené's, In re	28
Trusts, Selots, Re	7
Tufnell, In re	366
Turburn v. Stewart	cliv.
Turton v. Turton	108
Twee Gebrœders Case ..	239
Twycross v. Grant	113

U.

Udny v. Udny	4, 10, 11, 12, 20, 21
United States v. Hoar	211, 357
Do do v. Kirkpatrick	214, 343
Urquhart v. Butterfield	14, 15, 19

V.

Van Reeth v. de Silva	37
Velanagedara Appuhami v. Queen's Advocate	364
Verner v. General and Commercial Co.	163

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

	Page.
Villar v. Gilbey	3
Viscount Canterbury v. Attorney General	213

W.

Walker v. London Tramways Co.	111
Wall v. London and Northern Corp.	70
Ward, E. P.	127
Webb v. Earle	162
Webb v. Whiffen	174
Weerasekera v. Seelawanka	299, 301 302
Weir v. Crum Broun	187
Wells v. Mayor of Kensington-upon-Hull	51
Wenlock v. River Dee Co. ..	151
Whitfield v. Lord Despencer ..	382
Whitfield v. South Eastern Counties Railway Co.	57
Whaley Bridge Co. v. Green ..	113
Wickramaratna v. Tene ..	cix.
Wickramanayaka v. Perera	223, 225
Wijesinha v. Wijesinha	cxxviii, cxxix.
Wiltshire Iron Co., In re., *Ex parte*	88
Wimalasekera v. Silva	353
Winans v. Attorney General	13, 20, 21
Windsor etc. Railway Co. v. the Queen	380
Wing v. Angrave ..	22, 28, 29
Wollaston's Case	121
Wright v. Horton	155

Y.

Yarborough v. the Bank of England	57, 58
Young v. Adams	366

Z.

Zafaryab v. Bakhtawar Singh ..	199

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

For Addenda et Corrigenda

See Appendix, Pages clx. et seq.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

A DIGEST
OF THE
CIVIL LAW OF CEYLON.

BOOK I.—GENERAL.

PART I.—PERSONS.

TITLE I.—NATURAL PERSONS.

CHAPTER I.—BIRTH AND LIMITATION OF PERSONALITY.

ARTICLE 1.

A man's capacity for the enjoyment of rights begins at his birth.

Beginning of legal capacity at birth.

Comment.

A Person, in law, is distinguished by having the capacity for rights and duties, and is either

(1) A Natural Person (the subject of this Title), *i.e.* a human being having the capacity for rights and duties, or

(2) a Juristic Person (the subject of Title II. pp. 30 *et seq*), *i.e.* an aggregate of human beings or of property which the law regards as a person capable of rights and duties.

The capacity for rights is of two kinds:

(1) the capacity for the enjoyment of rights, and
(2) the capacity for the exercise of rights.

In the case of Natural Persons, the first kind of capacity is declared by Article I. to begin at a man's birth.

The second kind of capacity (also called the capacity to perform juristic acts) begins on the attainment of majority (Articles 3 and 4) and is treated at length in Part III. "Juristic Acts."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 2.

Birth defined.

A man is deemed born when he

(*a*) is completely separated from the body of his mother,

(*b*) is at the time of such separation alive, though not necessarily capable of continued existence, and

(*c*) has a human shape.

Child *en ventre sa mère*.

A child *en ventre sa mère* is deemed already born, if it is for his benefit to be so deemed.

Comment.

The best exposition of the law on the subject is Savigny, System des heutigen römischen Rechts II. §§. 61-2 and Appendix III. See also Dig. 1. 5. 14; 25. 4. 1; 28. 2. 12; 50. 16. 38 and 129. Cod. 6. 29. 3. Thibaut, System des Pandekten Rechts, Introd. § 102-4. Voet ad Pandectas, 1. 5. 5; 1. 6. 13. FitzJames Stephen's Digest of Crim. Law, Art. 218. Colquhoun's Rom. Civ. Law, I. 354. Holland's Jurisprudence (9th edition) pp. 88-90. Markby's Elements of Law §§ 131-2.

Birth.

To constitute the birth of a Natural Person

(*a*) there must be complete separation of the child from the body of the mother (whether or not the navel-string be cut) and even if the child be cut out of the mother's body;

(*b*) the child must be born alive, though not necessarily capable of continued existence and though it dies immediately after birth;

(*c*) the child must not be a monster or prodigy, *i.e.* it must bear a human shape notwithstanding deviations from the ordinary human form, as *e.g.* too many members or too few.

The question of birth becomes important in such a case as this. Property is left to A's children, if he has any, and to their next of kin after them; if A has no children, the property to go to B. If a child is born to A, even though it may be cut out of the mother's womb

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

after her death and live but an instant and dies immediately thereafter, the property goes to the child's next of kin, not to B.

Fœtus, when deemed born.

The fœtus or even the embryo in the womb is regarded as born when it is a question of receiving a benefit (*Qui in utero est pro jam nato habetur quoties de commodo ejus agitur*, Pothier, Œuvres, ed. Bugnet tome VIII. p. 7; tome I. p. 484) and is deemed capable of rights, as *e.g.* to take by devise or inheritance. Savigny loc. cit; Dig. 1. 5. 7; Voet 1. 5. 5; Grotius, Introd. to Dutch Jurisp. 1. 3. 4; Pothier ad Pand. 1. 5. 6; Broom and Hadley's Commentaries on the Laws of England I. 154, II. 248. *Blasson* v. *Blasson* (1864) 33 L. J. (Ch.) 403, 2 D. J. & S. 665, where Lord Westbury, L. C. in varying the decision of Kindersley V.-C., said that "the child *en ventre sa mère* is only to be treated as a born child where such construction is necessary for the benefit of the child." This ruling has been authoritatively accepted by the House of Lords in *Villar* v. *Gilbey* (1907) A.C. 139, and followed by the Court of Appeal *In re Salaman* (1908) 1 Ch. D. 4.

The true meaning seems to be not that the unborn child really takes, but that the right is reserved for the child until the moment of its birth (*Antiqui libero ventri ita prospexerunt ut in tempus nascendi omnia ei jura integra reservarent.* Dig. 5. 4. 3). An unborn child has the right to be protected from injury; for which purpose, and for the administration of the property which may come to it on birth, a *curator ventris* may be appointed (Dig. 37. 9; Pothier, Œuvres XI. p. 77; Voet, loc. cit. and 37. 9).

For the birth of a Juristic Person see Title II. "Juristic Persons," p. 30 and Articles 26-7.

Article 3.

Age of Majority.

He attains majority on the completion of his twenty-first year.

Comment.

The age is the same for males and females and is fixed by the Ordinance 7 of 1865; previously it was 25 under the Roman-Dutch Law (Voet, 4. 4. 1; Grotius, 1. 7. 3; van der Linden, 1. 5. 1).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

A major is capable not only of enjoying rights but of exercising them and of managing himself and his affairs. See further under Part III. "Juristic Acts."

Computation of age of majority.

In computing the period when minority expires, the rule *ultimus dies cœptus pro completo habetur* is adopted when it is for the minor's advantage. Majority is thus attained on the first instant of the day immediately preceding the 21st birthday. A man born at any hour on the 1st day of February, 1900, (even a few minutes before 12 o'clock of the night of that day) would be of full age on the first instant on the morning of 31st January, 1921, although 48 hours before he had (according to years, days, hours and minutes) actually attained the full age of 21. *Herbert* v. *Turball*, (1663) 1 Keb. 589; Dig. 28. 1. 5; 50. 16. 134. The rule is not adopted if the effect would be to deprive him of an advantage, such as his remedy by *restitutio in integrum* against acts done during minority. Voet 4. 4. 1; Burge's Commentary on Colonial and Foreign Laws (1838), I. 116.

Age of majority determined by law of domicile.

The age of majority is determined for a person by the law of his domicile (pages 9-21 *infra*), according to the general principle of law that civil status follows a man everywhere (*qualitas sicut umbra personam sequitur*) and that "the principle of domicile is the criterion established by law for the purpose of determining civil status": per Lord *Westbury*, in *Udny* v. *Udny* (1869) L. R. 1 H. of L. Sc. Ap. 457. So a person 22 years old domiciled in Prussia (where minority lasts till 24) will be considered a minor in England or Ceylon, and a person 22 years old domiciled in England or Ceylon will be considered of full age in Prussia.

Legal effects of majority, how determined.

But a distinction is drawn between the abstract existence of the status of minority or majority and its legal effects. The question whether any one is under age or not—*i.e.* to say, what is the limit of minority—is decided according to the law of domicile, but not the rights and restrictions of the minor and other consequences of the status imposed by the law of domicile. Savigny thinks this distinction arbitrary and illogical (§362, Conflict of Laws, being Vol. VIII. of his System des heutigen römischen Rechts).

In regard to real property.

Voet is decisive that the personal capacity conferred by the law of domicile can never enable a person to alienate real property when he is incapacitated by the *lex loci rei sitæ*, nor will a personal incapacity imposed by the law of the domicile disable him from alienating it if no such incapacity exists *in loco rei sitæ* (Voet 1. 4. 7).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The paramount effect of the *lex loci rei sitæ* when it is at variance with that of the domicile, in every question which involves the capacity or incapacity of the person in respect of real property, is well established in England (Burge I. 125; Dicey 516).

In regard to contracts.

In relation to contracts, the capacity to enter into them is governed by the *lex loci contractus*. (Burge I. 132 *et seq*; Story §§ 87, 103). In England this was the view till 40 years ago (Dicey 480); now the preponderance of opinion is in favour of the *lex domicilii* (*ibid.* 547). In *Sottomayor* v. *De Barros*, (1877) 3 P. D. (C. A.) 1, 5, the Court of Appeal held it to be "a well-recognized principle of law that the question of personal capacity is to be decided by the law of domicile....As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile". But opinion seems to be again veering. See judgment of the Court of Appeal in *Ogden* v. *Ogden*, (1908) P. 46, 77 L. J. P. 34, C. A. from which it would appear that the Court, though it does not overrule, looks with little favour on, the ruling in *Sottomayor* v. *De Barros*. See p. 18 *infra*.

Article 4.

Letters *Venia ætatis*.

A minor, who from his conduct and discretion is deemed capable of managing his affairs, may be declared a major by an order of the Governor.

The order shall not be made except when

(*a*) it is required by his interests, and

(*b*) he consents thereto.

Comment.

The Governor exercises this power as the representative of the Sovereign in whom the power vests: the exercise of the power amounting to a relaxation of the general law and the introduction of a special law in regard to each individual (Voet. 4. 4. 4). If he is under parental power, the parent should be heard before the order is made. For a minor widow this is not necessary.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

There is no special age fixed in Ceylon. In Holland it was usually 20 for males and 18 for females (Voet 4. 4. 3; van der L. 1. 4. 3).

By the Ordinance 21 of 1844, section 3, the Governor's power is extended from the maritime provinces to the whole Island.

Article 5.

Effect thereof.

By the order the minor acquires the status of a major.

But he may not alienate or mortgage immovable property unless expressly authorized by the order.

Comment.

According to Voet the better opinion is that this effect is restricted to dealings with property situated within the territory of the ruler who grants the letters *Venia ætatis* (Voet. 4. 4. 8).

For the restriction in para 2 see Voet. 4. 4. 5; Grotius 1. 10. 3.

For the emancipation of a minor by the practice of a trade or profession see under Part III., "Capacity for Juristic Acts."

For emancipation by marriage see *ibid.* and Book IV. "Law of the Family," Ch. 1. "Husband and Wife," and Ch. 2. "Parent and Child."

Article 6.

Interdict of mentally incapacitated persons, prodigals, inebriates.

Whoever

(*a*) is unable by reason of mental disease or infirmity to manage his own affairs, or

(*b*) through prodigal expenditure exposes himself or his family to the danger of poverty, or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*c*) by reason of habitual drunkenness is unable to manage his own affairs, or exposes himself or his family to the danger of poverty,

may be interdicted from the management of his affairs.

In cases (*b*) and (*c*) the interdict shall be publicly notified.

The interdict may be removed when the reason for it has ceased.

Comment.

(*a*) Voet 27. 10. 3.

(*b*) Dig. 26. 5. 12; Grot. 1. 11. 3; Voet 27. 10. 6; Pothier, Œuvres, Vol. IX., pp. 74-6; Ramanathan's Reports, 1872-6, p. 40, *In the matter of Rodrigo, an alleged lunatic*. The restrictions on the disposing powers of a person on the ground of extravagance are derived from the ideas of Roman law, which attribute to the natural heirs of a person owning property an inchoate right to such property entitling them to take steps to prevent its wasteful consumption by the actual owner. (For a luminous account of these ideas see Sohm's Institutes of Roman Law, translated by Ledlie, edition 1901, Chapter on the Law of Inheritance, p. 523 *et seq*). The English law takes the opposite view and entirely discards the notion of incapacity on the ground of prodigality. *Re Selot's Trusts* (1902) 1 Ch. 488. Prodigals.

(*c*) Is required by the exigencies of modern times, and would appear to be covered by the principles of our law. The person interdicted in (*c*) would belong to the class of persons "*Qui in ea causa sunt ut superesse rebus suis non possint*" and "*Sic tractant bona ad se pertinentia ut, nisi subveniatur his, deducantur in egestatem*" (Dig. 26. 5. 12). Inebriates.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

An interdict is not necessary to render void the acts of a lunatic. Every act of his done during lunacy is void.

In cases (*b*) and (*c*), the patient's acts are not void until the interdict is published, and after publication his acts continue to be void until the interdict is removed by public notice (Voet. 27. 10. 8; Grot. 1. 1. 4.)

See further under Part III., "Capacity for Juristic Acts.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CHAPTER II.—DOMICILE.

Subjection of Person to Territorial Law.

Conflict of laws.

The multifarious and active intercourse, which conquest and commerce have introduced between nations, often gives rise to nice questions of competition between the laws of different nations, wherein it is not always easy to determine by which law the case should be governed. For example, at a particular place a law suit has to be decided by a tribunal as to a marriage, a sale, a last will, or the ownership of a thing. But the contract was entered into, the will made or the thing in dispute is situated, at another place than that of the tribunal; the two places have different territorial laws. Or the parties to the cause may belong to the place of the Court or to a foreign place or to different places. Which of the different local laws with which the legal relation in dispute in any way comes in contact, is to be applied in the decision of the question?

Thus arises what is usually called "a Conflict of Laws." But the truth aimed at in the phrase is (as Westlake points out) that the main problem is the selection of a law for each given case. The selection was determined in old times by considerations of nationality or religion and still is to a certain extent in some countries, *e.g.* in India among the Hindus and Muhammadans, in Ceylon among the Kandyans, the Moors, and the Tamils of Jaffna. It has been held by the British Courts, in dealing with members of the Hindu and Muhammadan communities of India, that wherever such persons go within the limits of British territory they carry with them, as a personal law applicable to their family and possessions, Hindu or Muhammadan law respectively. But in Ceylon, as in most countries, the selection of the law is mainly determined by considerations of Domicile, *i.e.* residence viewed in the light of certain technical rules.

Nationality.

Domicile.

Authorities.

On the subject of Domicile, see Dig. 50. 1 (*ad municipalem et de incolis*) and 4 (*de muneribus et honoribus*); Cod. 10. 38 (*de municipibus et originariis*) and 10. 39 (*de incolis et ubi quis domicilium habere videtur*, &c.);

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Voet 5. 1. 91 *et seq;* Pothier ad Pand. 50. 1. 15-28; Pothier, Œuvres, Vol. I., ch. 1; Savigny on the Conflict of Laws (being the 8th Vol. of his System des heutigen römischen Rechts); Burge's Commentaries on Colonial and Foreign Laws (1838), Vol. I., pp. 32-56; Story's Conflict of Laws, ch. 3; Encyclopædia Brittanica, Art. "Domicile" and "International Law (Private)"; Dicey's Conflict of Laws; *Udny* v. *Udny* (1869) L. R. 1 House of Lords, Scotch Appeals 441; *Bell* v. *Kennedy*, 1868, *ibid.* 307.

Civil Domicile.

The domicile dealt with in the following Articles is what is called the Civil Domicile, *i.e.* the domicile acquired by residence in a place in such circumstances as to its origin or continuance that the numerous civil rights of the person are determined by the law of that place.

There is a domicile which has relation to the exercise of political rights and is called the Political Domicile. It is not dealt with in this Digest.

There is also the Forensic Domicile, which is either

(1) the foundation of jurisdiction in consequence of a temporary residence (*e. g.*, in Scotland, forty days' residence renders a man liable to be sued there), or

(2) part of an agreement that a certain place shall be considered the domicile for the purpose of enforcing the execution of the agreement by the institution of legal proceedings. (2) is dealt with in Article 16.

To what matters law of domicile applies.

The question what constitutes civil domicile, how it is acquired and how it may be changed, is of great importance, as it is the law of the place of domicile which to a large extent determines the status, capacities and rights of persons (as *e.g.* legitimacy, majority, marriage, succession, testacy or intestacy) and their title to movable or personal property.

Area of domicile.

In the expression "the law of the place of domicile" the place meant is not the whole of a country under one Sovereign, but the whole of a territory subject to one system of law, *territorium legis*, or what the French would call "ressort d'une loi" and the Germans "Rechts gebiet," "the territory of a law." Thus England, Scotland, Ceylon, India are countries under one Sovereign, but each has a separate system of law and is therefore a separate place in regard to civil domicile. Savigny, VIII. § 359; Dicey 67.

It is a settled principle that no person can be without a domicile. This means that for the purpose of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

determining a person's legal rights or liabilities the Courts will invariably hold that there is some country in which he has a home; they will not admit the possibility of his being in fact homeless, and if he is in fact homeless, will assign him one by a presumption or fiction of law. *Udny* v. *Udny* (1869) L. R. 1 Sc. App. 457, per Lord *Westbury*.

Domicile of choice.

Domicile is, therefore, either

(1) of choice (Art. 7), or

(2) of law, which attributes

Domicile of origin.

(*a*) to every child, at birth, the domicile of his father or, if illegitimate, of his mother (this domicile is commonly called "the domicile of origin") and afterwards whatever domicile may be adopted by the parent (Art. 12), and

(*b*) to every married woman the domicile of her husband (Art. 11).

Can one have more than one domicile?

Can a person have more than one domicile? He can (according to Savigny, VIII. § 354) if he uses the several places alike as centres of his connections and affairs and distributes his actual residence among the places according to need. So also Voet (5. 1. 92): *duobus locis posse aliquem habere domicilium si utrobique ita se instruxit ut non ideo minus apud alteros se collocasse videatur.* The tendency of modern English decisions is that no person can have (at least for the same purpose) more than one domicile at the same time (Dicey 96). This is in some cases provided for by statute. Thus a person within the operation of the Domicile Act, 1861 (24 and 25 Vict. c. 121), may have one domicile for the purpose of testate or intestate succession and another domicile for all other purposes.

Article 7.

Domicile of choice.

Whoever fixes his habitation in a place with the intention of residing there permanently or for an indefinite period, establishes his domicile in that place.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Essential elements.

The two essential elements for the establishment of a domicile of choice at a place are

(1) actual residence in the place (the *factum*), and
(2) the intention of residing there permanently or for an indefinite period (the *animus*).

Udny v. *Udny* (1869) L. R. 1 Sc. App. 441, 449, 458 per Lords *Hatherley* L. C. and *Westbury; Cockrell* v. *Cockrell* (1856) 25 L. J. (Ch.) 730, per *Kindersley* V. C.; Dicey 104.

If that intention be clearly established, a domicile may be acquired by residence, however short (*Bell* v. *Kennedy*, 1868, L. R. 1 Sc. Ap. 307, 319, per Lord *Chelmsford;* Burge I. 41). *Uno solo die constituitur domicilium, si de voluntate appareat* (Pothier).

Political status not affected.

The intention (it is now settled) need not be an intention to change allegiance. "To suppose that for a change of domicile there must be a change of natural allegiance is to confound the political and civil status, to destroy the distinction between *patria* and *domicilium*" (*Udny* v. *Udny*, per Lord *Westbury*, L. R. 1 Sc. App. 460). A British subject *e.g.* may establish his domicile in the United States without any intention of becoming an American citizen.

Constrained or official residence.

Constrained residence (as of a prisoner or exile) has no effect on his domicile (Burge I. 46; Dicey 141-2); nor official residence, unless the office requires permanent residence and the office is held not during pleasure but for life (*ibid.* 146; Burge I. 47-53); nor the residence of an ambassador in the country to which he is accredited (Dicey 147); nor of a soldier or sailor at the place where he serves as such. But under the Roman law the exile's domicile was at the place of his banishment, and the soldier's or sailor's at the place of his service (Dig. 50. 1. 22 and 23; Savigny VIII. 353). The modern rule is that (in the absence of evidence of a contrary intention) a soldier or sailor has his domicile in the territory of the sovereign whom he serves; retaining (if in his own sovereign's service) the domicile he had when entering the service, and (if a foreign sovereign's service) probably acquiring the foreign domicile. (Dicey 148; *In re Macreight*, 1885, 30 Ch. D. 165).

Ambassador, Soldier.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 8.

Domicile is extinguished when residence is given up with the intention of abandoning it.

Domicile, how extinguished.

Comment.

As the domicile of choice can only be acquired *animo et facto* (Voet), "par le concours de la volonte et du fait" (Pothier), so it (or a domicile of origin) can only be lost with the loss of both these elements (Dig. 50. 1. 20; Pothier ad Pand. 50. 1. 26). "The only principle which can be laid down as governing all questions of domicile is this, that where a party is alleged to have abandoned his domicile of origin and to have acquired a new one, it is necessary to show that there was both the *factum* and the *animus*. There must be the act and there must be the intention" (per *Kindersley* V. C., *Cockrell* v. *Cockrell* (1856) 25 L. J. (Ch.) 730, 731). The intention must be a fixed and settled one of abandoning the first domicile and acquiring another: per Lords *Halsbury* and *Macnaghten* in *Winans* v. *Attorney General* (1904) A. C. 287. "A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there": per Lord *Chelmsford* in *Bell* v. *Kennedy* (1868), L. R. 1 Sc. App. 319.

Article 9.

Domicile may be retained without residence by the intention to retain it.

Domicile, how retained.

Comment.

The domicile may be retained without residence by intention alone, the intention to return, no other residence having been established (Burge I. 41). If, therefore, a person should go on a voyage or to a foreign country for health, or for pleasure, or for business of a temporary nature, with an intention to return, such a transitory residence would not constitute a new domicile or amount to an abandonment of the old one, for it is

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

not the mere inhabitancy in a place which makes it the domicile, but it is the fact coupled with the intention of remaining there, *animo manendi* (Story, sec. 44).

Article 10.

Domicile of person *non sui juris.*

A person incapable of the exercise of rights, or whose capacity for the exercise of rights has been restrained, can neither establish nor abandon a domicile by his own act.

Comment.

A minor can no more change his domicile than he can enter into a contract (Voet 5. 1. 100). The domicile of choice being that which the person himself establishes, it can only be acquired by one who is *sui juris*. It cannot therefore be acquired by a lunatic or a minor. Burge I. 38; *Sharpe* v. *Crispin* (1869) L. R. 1 P. and D. 618; *Urquhart* v. *Butterfield* (1887) 37 Ch. D. 382.

Change of domicile by parent.

The domicile of the father or of the mother, being a widow, is that of the child, and a change by either parent of his or her former domicile would necessarily operate as a change of the child's domicile. It is, however, only during the mother's widowhood that she could change the domicile of her infant. The domicile which she acquired on her second marriage would not become that of the infant, but his domicile would continue to be that which the mother possessed previously to her second marriage. The power which the parent thus possesses of changing the domicile of his child is assimilated to that which the guardian of an infant possesses of binding him by contracts entered into by him on behalf of the infant. Pothier, Œuvres I. p. 6; Burge I. 38-9. See further under Art. 12.

By guardian.

Whether a guardian has authority to change the domicile of his ward from one country to another, has been much discussed (Story §§ 505-6). Voet maintained the affirmative (5. 1. 100). Pothier, however, while citing Bretonnier and Boullenois to the contrary, draws a distinction between the change of domicile by a parent and that by a guardian, and holds that in the former case, if a change is made without fraud, the minor

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

follows the domicile of his parents and of the survivor, but in the latter case no such effect follows, for the minor is no part of the family of the guardian but is like a stranger there and only for a time during the pendency of the guardianship, and the minor's domicile is what he had from his father until it is changed by the ward's act on the attainment of majority (Pothier, Œuvres I. p. 5).

English cases favour the view that the domicile of a lunatic cannot be changed and that he retains the domicile he possessed at the time he became insane or, more strictly, when he began to be legally treated as insane. Dicey 142; *Urquhart* v. *Butterfield* (1887) 37 Ch. D. 382.

Article 11.

A married woman shares the domicile of her husband, even though she is living apart from him. Married woman's domicile.

Comment.

Uti uxor mariti dignitatem sequitur, ita et domicilium ejus (Voet 5. 1. 95). This results from the general principle that a person, who is under the power and authority of another, possesses no right to choose a domicile (Pothier, Œuvres I. p. 3). The domicile is assigned by law only to the woman actually in the married state, and begins and ends with the marriage. *Mulier quamdiu nupta in domicilio mariti moratur* (Voet 5. 1. 92). *Mulierem, quamdiu nupta est, incolam ejusdem civitatis videri cujus maritus ejus est* (Pothier ad Pand. 50. 1. 24).

Its origin and duration.

On marriage she acquires, even before leaving her residence, the domicile of her husband, unless he should deliberately fix his domicile in the place of her original domicile (Voet 5. 1. 95). But this would be tantamount to her sharing his domicile, for it is a domicile selected by him. A husband's change of domicile will necessarily operate as a change of hers. A contract whereby the husband binds himself not to change his domicile or the wife is exempted from following the husband, is void as being *contra bonos mores*. But she may by ante-nuptial contract secure that she shall not be prejudiced in her rights by a change of the husband's domicile (Voet

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

5. 1. 101; Burge I. 80; Story § 143; Dicey 652). On the dissolution of the marriage she retains her husband's domicile until she remarries or establishes another domicile (Voet 5. 1. 95; Poth. Pand. 50. 1. 28; Dicey 130).

Effect of judicial separation.

In *Dolphin* v. *Robins*, (1859) 7 H.L.C. 390, Lord *Cranworth* was in favour of the view that a judicial separation would enable a wife to acquire a separate domicile from her husband, but Lord *Kingsdown* expressly declined to commit himself to that view and left it an open question. It has not been finally decided. But according to Pothier (Œuvres, VI., Traité du Contrat de Mariage, Ch. 3 § 522) a judicial separation entitles a wife to establish a separate domicile at her pleasure.

Effect of husband's change of domicile on wife.

Lord Westbury doubted (*Pitt* v. *Pitt*, 1864, 2 Macph. H. of L. 28) whether in every case the wife's domicile is by attraction or construction so inevitably and inflexibly the same as the husband's as to make her subject, for the purpose of divorce, to the tribunals of any country which he may choose. Sometimes serious injustice might be done to a wife by a husband changing his domicile to impede or frustrate her claim to a divorce. If a wife who marries a husband domiciled in England can under no circumstances obtain a divorce in England unless her husband retains his English domicile, he clearly may, by becoming domiciled in a country (*e.g.* Italy) where divorce is not allowed, deprive her of the means of obtaining a divorce.

The principle, it is submitted, should be that the husband's change of domicile, in order to affect the wife, must be made *bona fide*, as is the law in regard to the change of a minor's domicile by his parent or guardian. See Art. 12 (4) and note thereon, p. 19.

In *Dolphin* v. *Robins* (1859) 7 H.L.C. 390, and *Shaw* v. *Gould* (1868) L. R. 3 E. and I. Ap. 55, where the husband took up residence in Scotland to enable his wife to sue him for divorce on the ground of adultery, it was held that such residence was not *bona fide* and did not change his domicile. If, then, a domicile assumed by a husband for the purpose of founding jurisdiction and helping his wife, whom he had wronged, to a divorce is not *bona fide*, a domicile assumed by him to evade jurisdiction and deprive her of her right to divorce, would be much more open to objection. In *Ogden* v. *Ogden*, 1908, P. 78, the Court of Appeal expressed the opinion that in such a case a divorce could be granted in the country of his former domicile, and that such a decree "is justified, either by considering

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

that the husband cannot be heard to say that he has changed his domicile or, as some have thought, that the wife must *ex necessitate* be entitled to treat the country of the previous matrimonial domicile as still being the country of her domicile, and to require its Courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicile, and any domicile with which it were sought to fix him." This seems to be the principle underlying the provision in the German Code: "A married woman does not share her husband's domicile when he establishes his domicile abroad in a place whither she has not followed him and is not bound to follow him."

Divorce jurisdiction based on domicile, *Le Mesurier* v. *Le Mesurier*.

In *Le Mesurier* v. *Le Mesurier*, 1895, A.C. 517, 1 N. L. R. 160, it was held by the Privy Council that the Matrimonial Law applicable to British and European residents in Ceylon was the Roman Dutch Law; that that law did not give jurisdiction to the Courts of the country in which spouses domiciled elsewhere were for the time resident to entertain a divorce suit; that neither section 597 of the Civil Procedure Code nor previous enactments to a similar effect empowered a District Court to entertain a divorce suit which was not previously cognizable by the Courts of the Island; and that according to International Law, which was authoritative in the absence of any Municipal Law to the contrary, the true domicile of the married pair, as distinguished from their so-called matrimonial domicile, afforded the only test of jurisdiction to dissolve their marriage, and the Courts of England would not recognize as effectual the decree of a foreign Court divorcing spouses who at the date had their domicile in England. It was further held that, although a District Court of the Island could not decree a dissolution of marriage in the case of the residents referred to above, yet it might under the rules of International Law administer other remedies for matrimonial misconduct, such as judicial separation on the ground of cruelty, &c. and alimony for desertion.

The law on the subject is thus summarised in 5 Campbell's Ruling Cases 703: "The Court of competent jurisdiction in the country where the husband is domiciled is the proper Court to determine any question regarding the marriage status, and in particular to pronounce a judgment dissolving the marriage; and a judgment of divorce duly pronounced by such Court is valid everywhere."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Rule qualified in *Ogden* v. *Ogden*.

In *Ogden* v. *Ogden*, 1908, P. 46, 77 L. J. P. 34, the Court of Appeal threw out the suggestion for the benefit of any woman placed, as was the appellant, in the awkward position of being held in England married to a French citizen, whilst her marriage with him was declared a nullity by the French Courts, that in such circumstances the wife might probably be treated by the English Divorce Court as having a domicile in England to support proceedings for the dissolution of her marriage. "The suggestion is not in itself unreasonable," says the Law Quarterly Review (April, 1908, p. 113), "but it has had the bad effect of introducing a new and, as things now stand, a hypothetical and very uncertain exception to the established rule that divorce jurisdiction is and ought to be based on domicile (*Le Mesurier* v. *Le Mesurier*, 1895, A.C. 517). With Courts, as with Parliaments, hard cases are apt to produce dubious, if not bad, law."

Article 12.

Domicile of a child.

A legitimate child shares the domicile of his father, an illegitimate child shares that of his mother, an adopted child that of his adopting parent.

A legitimate child, on his father's death, shares the domicile of his mother so long as she does not remarry.

The child retains such domicile until it is lawfully terminated.

A change of domicile made by the parent, unless made *bona fide*, has no effect on the child's domicile.

The legitimation or adoption of a child after he attains majority has no effect on his domicile.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Domicile of child.

At birth, a legitimate child has the domicile of his father (*Patris originem unusquisque sequitur.* Cod. 10. 31. 36); an illegitimate child that of his mother (*Ejus qui justum patrem non habet, prima origo a matre.* Dig. 50. 1. 9). The domicile has no reference to the actual place of the child's birth, but is the parent's domicile at the time of the birth. Thus if the child of an Englishman domiciled in France is born on a journey in Italy, the child's domicile is France (Dicey 103).

The child, if legitimate, continues to share the father's domicile (or the mother's, if she is a widow and so long as she does not remarry), and if illegitimate, the mother's domicile; and the change of domicile by such parent would operate as a change of the child's domicile. See note to Article 10; Voet 5. 1. 100; Story § 46; Pothier, Œuvres I. p. 6; Dicey 120. *Re Beaumont* (1893) 3 Ch. 490; *Potinger* v. *Wightman* (1817) 3 Mer. 67; *Urquhart* v. *Butterfield* (1887) 37 Ch. D. 382.

This Article applies to major as well as minor children, to the former so long as they have not acquired a domicile under Article 7. A minor's domicile may be terminated or changed by his parent and possibly also his guardian. See note to Article 10.

Change of domicile by parent or guardian.

The parent's or guardian's change of domicile should be *bona fide* in order to affect the child's domicile. It would not be *bona fide*, if *e.g.* a sick child was removed from a place in which, according to the law of succession there prevailing, the parent would not succeed to the child's estate, to another place which admitted of such succession. The removal, being a fraud on those who would otherwise have succeeded, will not avail to affect the child's domicile. Voet 5. 1. 100; Burge I. 39; Poth. Œuvres I. pp. 5-6. Dicey 126-7; *Potinger* v. *Wightman* (1817) 3 Mer. 67.

Adoption is recognized in Ceylon by the Kandyan law and the Tesavalamai of Jaffna. The adopted child shares the domicile of the adopting parent: "*adoptato adjicitur per adoptionem originis novæ temporarium jus in loco ubi adoptans originarius est, duraturus usque ad adoptionis dissolutionem*" (Voet 5. 1. 91).

Article 13.

When domicile of origin revives.

If the domicile acquired under Article 7 is abandoned, and no new domicile is established, the domicile received at birth revives.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Special intention to revert to the domicile of origin is not necessary, for this domicile differs from an acquired domicile in being suspended, not destroyed, by the acquisition of a new domicile, and is restored *ipso facto* by the abandonment of the acquired domicile (per Lord *Chelmsford*, *Udny* v. *Udny*, 1869, L. R. 1 H. of L. Sc. App. 453).

Article 14.

Presumption of change of domicile.

A change of domicile is not presumed. The burden of proving a change is on him who alleges it.

Comment.

Voet 5. 1. 99; Pothier, Œuvres I. p. 6. "The change must be *animo et facto* and the burden of proof unquestionably lies on the party who asserts that change." (*Aikman* v. *Aikman* (1861) 3 Macq. 854 per Lord *Wensleydale*).

"The *animus* to abandon one domicile for another imports an intention not only to relinquish those peculiar rights, privileges and immunities which the law and constitution of the domicile confers, in the domestic relations, in purchases and sales and other business transactions, in [political or] municipal status, and in the daily affairs of common life, but also the laws by which succession to property is regulated after death. The abandonment or change of a domicile is, therefore, a proceeding of a very serious nature, and an intention to make such a change requires to be proved by very satisfactory evidence."—per Lord *Curriehill* in *Donaldson* v. *McClure* (20 D. 307. 321 aff. 3 Macq. 852).

"The law is plain, that where a domicile of origin is proved, it lies upon the person who asserts a change of domicile to establish it, and it is necessary to prove that the person who is alleged to have changed his domicile had a fixed and determined purpose to make the place of his new domicile his permanent home": per Lord *Halsbury*, L. C. in *Winans* v. *Attorney General* (1904), A. C. 288.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The words I have put within brackets in Lord Curriehill's judgment are not law. *Udny* v. *Udny* per Lord *Westbury*, L. R. 1 H. of L. Sc. App. 460, cited p. 10 *supra*. "An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in *Moorhouse* v. *Lord* (1863, 10 H of L. 272); but that view was decided to be incorrect in *Udny* v. *Udny*": per Lord *Lindley* in *Winans* v. *Attorney General (uti supra.)*

Article 15.

Presumption when domicile not known.

If a person's domicile is not known, the place of his actual residence is deemed to be his domicile.

Comment.

"A person's being in a place is *prima facie* evidence of his being domiciled there, and it lies on those who say otherwise to rebut this presumption": per Lord *Thurlow* in *Bruce* v. *Bruce* (1790), 2 B. and P. 229. Savigny VIII. 359 *ad fin*; Dicey 132; Story § 46.

Article 16.

Domicile for special purpose.

If for the purpose of any act a special domicile has been chosen by the parties to the act, that is deemed to be the domicile in regard to such act.

For the domicile of a Corporation see Title II., Juristic Persons.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CHAPTER III.—END OF PERSONALITY.

Judicial Declaration of Death.

Article 17.

Adjudication of death of untraceable person.

Subject to the provisions of Articles 18 to 25, a person who is absent from the place of his domicile may, on the application of any person interested or of the Attorney General, be declared by an adjudication of the District Court to be dead.

Comment.

When necessary.

A person's legal capacity, as it begins at birth (Art. 1), so ceases at death. This and the following articles specify the conditions under which an absent person may be adjudged by a Court to be dead. Such adjudication is necessary not only to provide for the administration of the absent person's property and the devolution of his succession, but in regard to all rights and juridical relations the regulation of which depends on proof of death.

The presumptive heir of an absent person may thus be authorized by the Court to take provisional possession of the estate and make a division of it under adequate security to make restitution to the absent person, should he be alive and return.

On the whole subject see Voet 1. 2. 18-20; Pothier, Œuvres I. pp. 495-6; VIII. (Traité des Successions), pp. 107-9; Savigny II. 63; Thibaut, Introd. 105; Burge IV., pp. 5 *et seq.* "Opening of Succession"; Powles and Oakley on Probate, 3rd edn., 343—349; *Wing* v. *Angrave*, 1860, 8 H. of L. 183, cited p. 28 *infra;* Best on Evidence (10th edn. §§ 409-410). Cf. also the Presumption of Life (Scotland) Act, 1891, 54 & 55 Ket. c. 29.

Article 18.

Burden of proving death.

The burden of proving the death is on the person who asserts the fact.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Is qui mortem alterius asserit, id ipsum probare debet (Voet 10. 2. 18)—the legal presumption being in favour of the continuance of life, conformably to the rule that a state of circumstances once appearing to exist is presumed to continue until some reason to the contrary can be shown. (Thibaut, Introd. 105 and note thereon of Lindley; Best on Evidence, § 408).

Article 19.

When adjudication of death may be made.

The absent person may be declared dead if there has been no news of his existence for such a period as under the circumstances may be deemed by the Court reasonable to conclude that he is dead.

Comment.

The difficulty of establishing by proof the death of a person who has not been heard of for a long time or has disappeared in a shipwreck or other calamity has induced some positive rules of law to be framed. Death might be presumed, according to Grotius, after 16 years' absence; after 10 years, according to Pothier, where no period is fixed. According to Voet (10. 2. 20), the lapse of time after which and the circumstances in which death would be presumed were left, when no limit of time had been fixed by the law, to the discretion of the judge based on the various considerations which may be suggested by the age, station in life, occupation and particularly the peril incurred by the person. I have in this Article adopted Voet's view. The time is computed from the period when intelligence of the person was last received (Burge IV. 7).

According to Voet.

The following is an example of the circumstances under which applications for declaration of death are made and allowed:

"Sir Gorell Barnes, President of the Court of Probate, heard an application for leave to swear the death of George Darby Haviland. Mr. Willock for the applicant said that Mr. George Darby Haviland

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

was a bachelor of medicine, a naturalist, and a gentleman of private means, and in 1900 was staying with his brother at Slievyre, near Estcourt, Natal. One morning in July of that year he left Slievyre alone, taking with him his bicycle and a knapsack; and it was believed that he went on an expedition to the hill country near Colenso, since which date no authentic news of him had been received. In August, 1902, his bicycle was found under a bush in an unfrequented spot in the Natal mountains. A reward was offered through the medium of native chiefs for information of Dr. Haviland, but without result. Dr. Haviland had been in the habit of corresponding with his relatives; but, as from the time of his departure from his brother's, that correspondence ceased, nor had he made any drafts on his bank account since July 4, 1900. Last year advertisements were inserted in London and South African papers and elicited a reply from a Mr. Gordon, who wrote circumstantially stating that he had seen Dr. Haviland recently, and that he expected that he would shortly hear from him from an address in Pietermaritzburg. Inquiries were made at that address, which proved to be a girls' school and naturally those inquiries came to nothing. The estate amounted to about £14,000, and the last cheque drawn was in respect of the purchase of some bee-hives, as in July, 1900, Dr. Haviland entertained the idea of keeping bees in partnership with a gentleman in Natal. Mr. George-Rose, who had supplied the bee-hives and other appliances, had written to the following effect:—'I do not know where I got the idea from now, but the conclusion we came to somehow was that soon after the arrival of the goods, and before he got them out of the depot in fact, he was commandeered by the Boers, refused, and was shot.' Dr. Haviland executed a will in 1898 by which he left his estate to his brothers and sisters. The President, having perused the affidavits, gave leave to swear the death on or since July 6, 1900." (London *Times*, Feb. 8, 1907). See also *In the goods of Beynon*, p. 29 *infra*.

Article 20.

Presumption of death from seven years' absence.

A person, who for a period of seven years prior to the date of the application has not been heard of by those who would naturally

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

have heard of him if he had been alive, is presumed to be dead unless the circumstances are such as to account for his not being heard of without assuming his death.

But there is no presumption as to the precise time of his death.

FitzJames Stephen, Digest of the Law of Evidence. Art. 90. The precise time of death must be proved, *Nepean* v. *Doe*, 2 Meeson and Welsby, 914; *In re Phené's Trusts*, 1870, L. R. 5 Ch. App. 139. Ceylon Evidence Ordinance 1895 § 108; *Bowden* v. *Henderson*, 1854, 2 Sm. and G. 360.

Article 21.

Time of death.

A person who has been declared dead is deemed to have died at the time specified in the adjudication.

A person may be deemed to have died on the day the last news of him was received.

A person who has gone to the seat of a war or has been on a ship which has been lost, or who has come into any other peril of his life, may be deemed to have died on the day the war was ended or the ship was lost or other peril incurred.

Pothier, Œuvres I. pp. 495-6, VIII. p. 107; Burge IV. 8. *In the goods of Beynon*, 1901, 1 P. 141, where death was believed to have occurred in a general massacre in China on July 9, 1900, leave was granted on 4th March, 1901, to presume the death as from 9th July, 1900.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 22.

When ship presumed lost.

A ship is presumed to be lost on the expiration of the time fully sufficient for the completion of the voyage.

Pothier, *ibid.*; Burge, *ibid.*

Article 23.

Revocation of adjudication.

If it is proved that the person who has been declared dead is living or that he died at a different time from that mentioned in the last article, the adjudication may be revoked or amended.

Article 24.

Effect thereof.

Such revocation or amendment shall not affect the validity of acts done in good faith between the adjudication and its revocation or amendment.

A person who has acquired property under the adjudication, but by its revocation or amendment loses his right, is bound to restore such property only so far as he is still enriched by it.

Article 25.

Presumption of survival among persons dying together by a common calamity.

When two or more persons who are entitled to be heirs one of another, or one of whom if he survives another derives some right in his property, have died by the same

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

occurrence, and it cannot be proved which of them died first, the presumption of survival is determined by the circumstances of each case and by considerations of age and sex.

Comment.

This states the rather arbitrary theory of our law as to survival among *commorientes*. For example, in a battle one who served in the front rank is presumed to have died before one who served in the rear; in a fire he who was in a room where the fire began is presumed to have died before one who was in another room; if a father and son died in a shipwreck, the son, if arrived at the age of puberty, will be presumed to have died after the father, as being deemed more vigorous; if not arrived at the age of puberty, he will be presumed to have died before; if a male and female died, other things being equal, the female, as being weaker, is presumed to have died first. Voet 34. 5. 3; Pothier Pand. 34. 5; Savigny II. § 63; Thibaut, Introd. § 105; Burge IV., pp. 11-26.

In what cases presumption made.

The presumption is made from necessity, says Duplessis, where a parent and child, or others in a similar position of being heirs one of another, die together intestate. An heir being indispensable to prevent the inheritance becoming vacant, it is necessary to pretend that one survived the other. There is no such necessity in the case *e.g.* of a testator and legatee dying together. Here the legatee's representatives have not the benefit of the presumption and must, to succeed in their claim to the legacy, prove the survival of the legatee (1 Duplessis 774). The necessity does not exist when the claim is derived from those whom the testator has himself instituted heirs, or those whom the law would not call to the succession, or from a person to whom he has bequeathed any part of his property. In these cases, therefore, there is no presumption of survival, and the claimants must prove that the devisee or legatee survived the testator. The presumption is made in some cases *ut actus magis valeat quam pereat:* as *e.g.* in the case of a gift *inter vivos*, where its validity depends on the donor dying before the donee, the presumption is that the donor died first; so in donations *mortis causa* between husband and wife and which have

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

been delivered; so in fidei-commissary successions the presumption which will give effect to the trust is favoured.

It seems desirable to consider all *commorientes* to die at the same moment (subject to proof to the contrary) rather than to resort to fanciful suppositions of survivorship based on degrees of robustness and other circumstances, for in such accidents the battle is not always to the strong. This is the tendency of the decisions of English Courts. Burge IV., p. 27-9; Best on Evidence, sec. 410; *Wing* v. *Angrave* (1860) 8 H. L. C. 183; *In the goods of Beynon* (1901) 1 P. 141.

No presumption in English law.

"The English law," says Best *(ibid)*, "has judged more wisely (than the Roman and French law); for notwithstanding some questionable dicta, the true conclusion from the authorities seems to be that it recognizes no artificial presumption in cases of this nature, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight, *i.e.* as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof.....If it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary both individuals may have died at the same moment."

In Wing v. *Angrave*, 1860, 8 H of L. 183, where the husband, wife and two children perished at sea, being all swept off the deck of a wrecked vessel by one wave, and all disappearing together, Mr. Roundell Palmer (afterwards Lord Chancellor Selborne) relied on *Sillick* v. *Booth*, 23 Beav. 323, where a father and two sons (one 28 years old and the other under age) having perished on a ship lost in a hurricane, the elder being the stronger and also the more accustomed to the sea was deemed to have survived the other, and it was distinctly held that "by the law of England, evidence of health, strength, age or other circumstances may be given in cases of this nature, tending to the judicial presumption that one party survived the other." He also relied on *Ommaney* v. *Stillwell*, where two persons, father and son, the latter being a strong young man, accompanied Sir John Franklin's expedition and perished with him, and it was held on the principle laid down in *Sillick* v. *Booth* that the presumption of fact was in favour of the survivorship of the younger and stronger man.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Wing v. *Angrave*.

However, in *Wing* v. *Angrave* the House of Lords finally decided that there was no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause, nor is there any presumption of law that all died at the same time; that the question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined; and that the *onus probandi* is on the person asserting the affirmative.

Effect of the rule.

This rule is sometimes attended in its working with inconvenience, the practical result being that none of the persons can be credited with any rights which would have accrued to him had he been held to have survived any of the others. In *Satterthwaite* v. *Powell*, 1 Curt. 705, where a man, his wife and four children were drowned in a vessel which was lost in the Bristol Channel and everyone on board perished, Sir H. J. Fust said: "The principle has been frequently acted upon that where a party dies possessed of property, the right to that property passes to his next of kin, unless it be shown to have passed to another by survivorship. Here the next of kin of the husband claims the property which was vested in his wife; that claim must be made out; it must be shown that the husband survived. The property remains where it is found to be vested, unless there be evidence to show that it has been divested. The parties in this case must be presumed to have died at the same time, and there being nothing to show that the husband survived his wife, the administration must pass to her next of kin." So *In the goods of Beynon, presumed deceased*, 1901, 1 P. 141, where a Christian missionary and wife with all their children were believed to have died in a massacre which occurred in China on 1st July, 1900, the Court upon affidavits that they were believed to have died in the massacre and died intestate and uninsured, and that there was no means of ascertaining whether the husband survived the wife or *vice versa* or whether both perished at the same moment, granted on 4th March, 1901, letters of administration in the estate of the husband to his next of kin, and in the estate of the wife to her next of kin, and granted leave to the respective administrators to swear that the husband and wife perished at the same time on 9th July, 1900, and that after due inquiries there was no reason to believe that either survived the other.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

TITLE II.—JURISTIC PERSONS (CORPORATIONS).

CHAPTER IV.—GENERAL PROVISIONS.

The rights of a Natural Person die with him. But the public interest requires particular rights to be kept on foot and continued for the advancement of religion, learning, commerce, charity or other object of public utility. To secure this it has been found necessary to constitute certain abstract bodies or artificial persons who may maintain a perpetual succession and enjoy a kind of legal immortality. Such bodies, being creatures of the law and being invested by it with legal capacity or personality, are called Juristic Persons.

Juristic Person or Corporation.

A Juristic Person, then, is an aggregate of human beings or of property, which in the eye of the law "sustains the place of a Person" (*personæ vice fungitur*), as the Roman jurists put it; or, in other words, which the law regards as capable of rights and duties, and consequently capable of owning property and of possessing and enforcing claims against others and subject to corresponding duties. A Juristic Person is what the English law calls a Corporation.

Its origin.

A Juristic Person comes into existence by the authority, express or implied, of the State. "None but the King alone," says Coke, "can make or create a corporation" (10 Reports, 33b. *The Case of Sutton's Hospital*). "Lawful authority of incorporation, and that may be by four means, *scilicet* by the Common Law, as the King himself, &c.; by authority of Parliament; by the King's charter and by prescription" (*ibid.* 29b). Authority is implied in the case of corporations existing by the force of the Common Law (such as, in England, bishops, parsons, deans,) and in the case of corporations by prescription, *i.e.* corporations which have from time immemorial had the capacity for the enjoyment of rights, such as the City of London. In Ceylon no such implied authority has so far been recognised.

Value of the Institution.

"The invention of corporations," says Grant, "has perhaps more than any other human device contributed to the civilization of Europe and the freedom of its States. By this means Municipalities were furnished with a form of government which never wore out.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Charitable trusts were secured to the objects of them so long as such objects should continue to be found; the protection and encouragement of trades and arts were permanently provided for, and learning and religion kept alive and cherished in times through which probably no other means can be mentioned that would appear equally qualified to preserve them." (Grant on Corporations, p. 4).

On the whole subject of Juristic Persons see

Authorities.

(1) Dig. 3. 4, *Quod cujuscumque universitatis nomine*; 47. 22, *de collegiis et corporibus*; 49 14, *de jure fisci*; Cod. Just. 10. 1, *de jure fisci*; Cod. Theod. 10. 1, *de jure fisci*; Paulus, 5. 12, *de jure fisci et populi.*

(2) Voet ad Pand. 3. 4; 47. 22; 49. 14.

(3) Pothier ad Pand, 3. 4; 47. 22; 49. 14; Œuvres, IX. 78-86, Des Communautés.

(4) Savigny, System des heutigen römischen Rechts II. § 85-103.

(5) Thibaut, System des Pandekten Rechts, Introd. § 112-117.

(6) Accarias, Precis de Droit Romain, I. 185 *et seq.*

(7) Girard, Droit Romain, 232-235.

(8) Sohm, Institutes of Roman Law. Part 2, Ch. 2. "Juristic Persons."

(9) Colquhoun, Civil Law I. 626-668.

(10) Coke's Reports, X. 23-35. *(The Case of Sutton's Hospital.)*.

(11) Grant on Corporations.

(12) Markby's Elements of Law, 83-90.

(13) Holland's Jurisprudence, 91-3; 320-30.

(14) Broom and Hadley's Commentaries on the Laws of England. I. 568 *et seq.*

(15) Encyclopædia Brittanica, VI. 532 *et seq.* "Corporation"; VI. 221 *et seq.*, XXVII. 172 *et seq.* "Company."

(16) O. Gierke, Political Theories of the Middle Age (translated, with introduction, by F. W. Maitland).

(17) F. W. Maitland, "The Corporation Sole," (Law Quarterly Review, October, 1900); "The Crown as Corporation," (*ibid.* April, 1901).

(18) Story's Equity Jurisprudence, II., Ch. 32., "Charities."

(19) Brice on Ultra Vires.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(20) Lindley on Company Law.
(21) Buckley on the Companies Acts.

English law of Corporations introduced into Ceylon.

By the Ordinance 22 of 1866 the English law of corporations was introduced into Ceylon. The Ordinance enacts that "the law to be observed in this Island on all questions or issues which may hereafter arise or which may have to be decided in this Colony in respect of the law of partnerships, *joint stock companies, corporations, banks and banking*, principals and agents, carriers by land, life and fire insurance shall be the same as would be administered in England at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in the Colony or hereafter to be enacted." At the time this law was enacted the Ordinance in force in Ceylon was the Joint Stock Companies Ordinance 4 of 1861 which is based on the now repealed English Act of 1856 (Joint Stock Companies Act 1856, 19 and 20 Vict. c 47). The Ordinance 4 of 1861 is still in force as amended by the Ordinances 9 of 1867, 4 of 1888, 6 of 1888, 3 of 1893, 2 of 1897, 13 of 1905 § 5 and 17 of 1907.

Corporation in Roman law.

The English law has taken the conception of the corporation full grown from the Roman law and has worked out the attributes of a corporation with great fullness and ingenuity. In the Roman law a *collegium* or, as a more general term, *universitas* must have consisted of at least three persons to have a *corpus (habere corpus) i.e.* to be corporate (Dig. 50. 16. 85). They could hold property in common and had a common chest. They might sue and be sued by their agent (*syndicus* or *actor*). *Proprium est universitatis habere res communes, arcam communem, et actorem sive syndicum per quem quod communiter agi fierique oportet, agatur, fiat.* Dig. 3. 4. 1. 1. There was a complete separation between the rights of the corporate body and its individual members. *Universitas distat a singulis. Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent.* Dig. 3. 4. 7. 1. The body remained in existence, although all its members were changed. *Nihil refert utrum omnes iidem maneant, an pars maneat vel omnes immutati sunt.* Dig. 3. 4. 7. 2. If the number of members was reduced below three, say to even one, the corporate capacity continued in the single survivor. *Si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, quum jus omnium in unum reciderit et stet nomen universitatis.* Dig.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

3. 4. § 2. It was governed by its own laws, provided they were not contrary to the common law. *His potestatem facit lex pactionem quam velint sibi ferre dum ne quid ex publica lege corrumpant.* Dig. 47. 22. 4. The power of forming *collegia* was restrained, and societies pretending to act as corporations were often suppressed. Dig. 47. 22. 1-3.

Corporation in English law.

In all these respects the *collegium* of the Roman law closely resembles the corporation of the English law. A corporation has rights and duties of its own which are not the rights and duties of its members. Thus the corporation may own land, but the individual members of the corporation have no rights therein. A corporation may own money, but the corporators or individuals are under no obligation to pay this debt. The rights and duties descend to the successive members of the corporation. This capacity of perpetual succession is regarded as the distinguishing feature of corporations as compared with other societies. A corporation is sometimes described as a society with perpetual succession and a common seal. But the seal is not conclusive of the corporate character. The Inns of Court, *e.g.*, have common seals, but they are only voluntary societies, not corporations.

Fundamental idea.

The sharp line of demarcation between the collective person and the separate members expresses the fundamental idea underlying the Roman Law. "Roman Law," says Sohm (§ 37), "contrived to execute a veritable masterpiece of juristic ingenuity in discovering the notion of a Juristic Person; in clearly grasping and distinguishing from its members the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a Juristic Person, namely) and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other persons."

A Juristic Person is, however, wanting in much that belongs to a Natural Person. Its course of existence is marked out from its birth, it has been called into being for certain special purposes, it has all the powers and capacities, and only those, which are expressly given to it or are absolutely requisite for the due carrying out of those purposes, and all the obligations it affects to assume, which do not arise from or out of the pursuit of such purposes, are null and void.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Corporation, according to Coke.

"The corporation," says Coke (10 Rep. 32b), "is only *in abstracto* and rests only in intendment and consideration of the law, for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law, and therefore.....a dean and chapter can't have predecessor nor successor. They can't commit treason nor be outlawed, nor excommunicate, for they have no souls,* neither can they appear in person but by attorney... ..A corporation aggregate of many can't do fealty, for an invisible body can neither be in person nor swear, and it is not subject to imbecilities or death of the natural body and divers other cases."

Corporation, definition of, by Grant.

"The ideal being, called a Corporation," says Grant, "we may define to be a continuous identity endowed at its creation with capacity for endless duration, residing in the grantees of it and their successors, its acts being determined by the will of a majority of the existing body of its grantees or their successors at any given time, acting within the limits imposed by the constitution of their body politic, such will being signified to strangers by writing under the common seal; having a name and under such name a capacity for taking, holding and enjoying all kinds of property, a qualified right of disposing of its possessions and also a capacity for taking, holding and enjoying, but inalienably, liberties, franchises, exemptions and privileges, together with the right and obligation of suing and being sued only under such name."

Corporation aggregate and sole of English law.

The Corporation of English law is either a "corporation aggregate" (consisting of many individuals), or a "corporation sole" consisting of only one, *e.g.* the king or the parson *(persona)* of a parish. Of these Corporations or Juristic Persons Coke says that they are "Persons incorporate and politic created by the policy of man," as contrasted with "Persons natural, created of God as J. S., J. N., &c.," and "are of two sorts, *viz.*, aggregate or sole" (Coke on Littleton, 2a). Corporations sole are either at Common Law, as the king, or a bishop, vicar or parson, or are statutory corporations sole, as the Post Master General (3 & 4 Vict. c. 96 §16), the Solicitor to the Treasury (39 & 40 Vict. c. 18 § 1), the Secretary of State for War (18 & 19 Vict. c. 117 §2). When such a public officer is said to be a corporation sole, the meaning is that the rights acquired by him in that capacity descend

* See page 57 *infra*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to his successor in office and not (as is the case where a public officer is not a corporation) to his ordinary legal representative. The conception of the king as a corporation is the key to many of his paradoxical attributes in constitutional theory, his invisibility, his immortality, his incapacity for the doing of a wrong, &c.

Prof. Maitland on Corporation sole.

I have so far stated the orthodox view of English lawyers as to Corporations, the view of Coke and Blackstone still current in the books. But its fallacy has been exposed by Professor F. W. Maitland. He maintained that the "corporation sole" was a strange conceit originated in the 16th century within the domain of what might be called church property law, in order to explain the parson's altered relation to his glebe. By the slow expropriation of the patron the parson had an estate in church and glebe, which refused to fit into any of the ordinary categories of English real property law and needed a permanent "subject" in which the fee simple of the parochial glebe could be reposed. This attempt to bring the parson into line with corporations aggregate proved abortive, for the freehold of the glebe still falls into abeyance whenever a parson dies. Coke or some other lawyer of his day thought of bringing the King of England into one class with the parson, and thus the corporation sole acquired greater importance and vitality. But this attempt too has proved abortive. The fiction of personifying the king's office never harmonized with its history or with the actual facts nor solved the difficulties which the fiction was intended to meet. For example, until the Parliament came to the rescue with a statute, the delegation of the king's powers to the judges and others ceased on his death, all litigation had to stop and to be begun over again, military commissions under the royal sign manual had to be renewed by the new king, etc., etc. For the wealth of Maitland's facts and arguments read his translation of Gierke's Genossenschaftrechts (Political Theories of the Middle Age) and introduction, and also his articles in the Law Quarterly Review of October, 1900 and April, 1901 on "The Corporation Sole" and "The Crown as Corporation."

The parson.

The King.

It is difficult to resist his conclusion that the only persons known to English law are men and certain organized groups known as corporations aggregate, and that this organized group has a will of its own, a real and not a fictitious will of its own, distinct from the several wills of its members; that "the corporation

Corporation sole "a juristic abortion."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The King the head of a corporation aggregate.

sole has shown itself to be no juristic person but is either a natural man or a juristic abortion;" and that the king is merely the head of a complex and highly organized corporation aggregate which may be called the State or Commonwealth. "The king and his subjects together compose the corporation, as Southcote said, and he is incorporated with them and they with him, and he is the head and they are the members" (Plowden, 234). It has been well said of Maitland that "if he did not start the hunt of that monstrous beast, the fiction theory of the corporation, he was the first English scholar to join in the adventure, and lived to be well in at the death" (Law Quarterly Rev., April, 1908, p. 220).

No distinction in Ceylon between corporation aggregate and sole.

In countries like Ceylon, where the ideas of the Roman law have influence, the distinction between a corporation sole and a corporation aggregate can have no meaning, as the Roman law looks upon a corporation as an entity independent of the individuals who contribute or manage its funds or appropriate its income and profits. The corporation is always one person, never an aggregation of persons.

The Fisc.

The Corporation sole of the English law—though strange and unmeaning to the Roman law—is an expansion and development of its principles. It is true that the Roman law, while it held that the corporation subsisted in full force notwithstanding that only one member survived, did not impute to the successive holders of a public office the character of a corporation. But the Fisc or the State was an exception. The Fisc (from the Latin *Fiscus*, a basket; then a basket used by the Romans for keeping and conveying money) originally meant the Emperor's exchequer as distinct from the *Ærarium* or the State exchequer. The distinction disappeared with the increase of the power of the Emperor and the decline of the power of the Roman Senate, and the *Ærarium* was absorbed in the *Fiscus*, which came to mean the State Treasury and then the State itself, and in that capacity was regarded as a Juristic Person and (unlike other corporations) was never denied heritable capacity (Savigny. Syst. des h. r. Rechts II. 88. 101; Voet ad Pandect 49. 14). The Fisc or the State would thus be the nearest approach to what the English law calls a "corporation sole." The English lawyers brought into the same class the king and ecclesiastical officers, such as a bishop, archdeacon, vicar, parson of a parish. But this has not been recognised

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

by our Courts and is not the law here. *Ratanapala Unanse* v. *Kevitiagala Unanse*, 1879, 2 S. C. C. 27; *Van Reeth* v. *de Silva*, 1906, 8 N. L. R. 97; *Copleston* v. *Dingiappu*, 1908, 1 Leader Law Reports, 85. As the result of the decision in 8 N. L. R. 97 that a Roman Catholic Archbishop was not a corporation sole, application was made by the Catholic hierarchy to Government, and the Ordinance No. 19 of 1906 was passed making the Catholic Archbishop and Bishops each a corporation.

No corporation sole in Ceylon.

"The incumbent of a *vihara* or *pansala* in this Island," said *Phear* C. J. in *Ratanapala Unanse* v. *Kevitiagala Unanse*, *uti sup.*, "is not a body corporate with perpetual succession as is the case with a parson *(persona)* of an English parish, where though the individual changes and is designated from time to time, as need may be, by some outside nominating authority, yet, so far as concerns the property of the corporation, the parson never ceases to be and continues for ever without any break. Neither does the *vihara* or *pansala* cover any legal entity resembling the deity of a Hindu family or temple, in which case the dedicated property belongs by law to the deity, who is recognized in the Civil Courts as a perpetual corporation and of whom the human *sebaiat* is only the steward or agent with very limited powers of dealing with the property. In this Island, on the other hand, the property dedicated to the *vihara* or *pansala* appears to be the property of the individual priest, who is the incumbent of the foundation, for the purposes of his office, including his own support and the maintenance of the temple and its services, and on his death it passes by inheritance to an heir who is ascertained by a peculiar rule of succession or special law of inheritance, and is not generally the person who would be by general law the deceased priest's heir in respect to secular property. And it is noteworthy that the law of property which obtains with regard to the Hindu *Math*, an institution which has many features in common with the Sinhalese *vihara* and is characteristic of the *Bihar* (or *vihara*) district from which Buddhism sprung, is precisely that which has just been stated, and is founded on a text of the *Mitakshara* prescribing that the property of a *Sannyasi* priest must descend to the selected pupil." This is known as the *Sisyanu Sisya paramparawa* succession, which (it was held in this case) is presumed to apply in every case in the absence of any other definite rule of succession. When the priest who is the proprietor, passing over his

Incumbent of Buddhist *Vihara* not a corporation.

His legal status.

Sisyanu Sisya, and Siwuru, Paramparawa.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

pupils, bestows the property on one of his lay relations after ordaining him to the priesthood, the succession is called *Siwuru paramparawa.*

Buddhist Temporalities Ordinance, effect of.

Under the Buddhist Temporalities Ordinance No. 8 of 1905 (formerly No. 3 of 1889) § 20, in those districts in which the Ordinance is in force, all property, movable and immovable, belonging to a temple and all offerings made for the use of the temple other than the *pudgalika* offerings which are offered for the exclusive personal use of any individual priest, vest in the trustees of the temple appointed under § 17.

Legal status of deity of a Hindu temple or of manager.

The law quoted above from *Phear*, C. J., as to the status of the deity of a Hindu temple, was held by Pereira, A. J., in *Sivapragasam* v. *Swaminatha Aiyar*, 1906, 2 Balasingam, not to apply to Ceylon. But the question deserves further consideration. In that case he held that a person cannot claim to be declared the proprietor of a Hindu temple and to be put in possession of the temple on that footing, unless he can show title to the fabric of the temple and its grounds by virtue of a conveyance executed in terms of Ordinance 7 of 1840 or show title acquired in any other way known to our law; that no portion of the laws and usages prevalent in India governing the ownership, devolution and management of Hindu temples and their temporalities has been imported into this country, and hence where transactions are entered into in relation to such temples and property in imitation of cognate transactions in India, it may often happen that our law is powerless to grant relief in the case of breach of faith by a party to such transactions; that although in India gifts and bequests to idols and superstitious uses are operative by the Hindu law, our laws do not permit the Courts of this Island to tolerate such grants; that there is no law in this country which recognizes the status of the manager of a Hindu temple, and therefore a claim to be declared the legally constituted manager of a Hindu temple and to be entitled to manage the affairs of such temple cannot be maintained; that a *de facto* manager, however, of a Hindu temple who has control of the fabric of the temple and of the property belonging to it may, if dispossessed otherwise than by process of law, maintain an action to be restored to possession and to the enjoyment of such rights as have been interfered with, provided that the other requirements of the law as regards possessory suits are fulfilled.

Right of *de facto* manager of temple to bring possessory suit.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Corporations classified.

Corporations may be classified as

I. Corporations of public law, *viz.*: Municipalities, Local Boards, &c., and, most important of all (in Ceylon), the Fisc or the State.

II. Corporations for educational, scientific, artistic, religious and other public purposes, *e.g.* the University of Oxford, the Royal Society or the Royal Academy of England: in Ceylon, the Council of Legal Education incorporated by Ordinance 2 of 1900, the Trustees of the Church of England incorporated by Ordinance 6 of 1885, the Roman Catholic Archbishops and Bishops incorporated by Ordinance 19 of 1906, the Jaffna Hindu College incorporated by Ordinance 6 of 1902, the Victoria Home for Incurables incorporated by Ordinance 7 of 1903, &c.

III. Corporate Foundations, *e.g.* the Colleges in Oxford and Cambridge, St. Thomas' Hospital, London.

IV. Trading and Semi-trading Companies, which are of two classes:

(A) Public Companies constituted

(1) by charter to govern uncivilized or semi-civilized countries, *e.g.*, the Chartered Company of British South Africa or British North Borneo, or

(2) by special legislative enactment to construct and carry out works of public utility (as a railway, gas or waterworks, canals), which, as they need special powers as for the compulsory purchase of land, and involve interference with the right of individuals, require the direct authority of the legislature and are regulated in England each by its own special Act and by the Companies Clauses Consolidation Acts 1845, 1888 and 1889, and the Companies Clauses Acts, 1863 and 1869;

(B) Private Companies, such as

(1) Joint Stock Companies regulated in England by the Acts of Parliament known as the Companies Acts 1862-1907, and in Ceylon by those Ordinances subject to the provisions of Ordinances 4 of 1861, 9 of 1867, 4 and 6 of 1888, 3 of 1893, 2 of 1897, 13 of 1905 § 5, and 17 of 1907.

(2) Friendly Societies and other Mutual Assurance Societies (regulated in England by the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Friendly Societies Act 1896, and in Ceylon by Ordinance 16 of 1891) by which members seek to aid one another in the emergencies arising from sickness, death and other causes of distress.

Co-operative Societies, which are associations of persons for mutual profit in the purchase and distribution of commodities for consumption or in the production of commodities, or in the hiring and lending of capital among workmen, are not corporations unless they are incorporated under the Companies Acts, and then they would come under class IV. B. (1).

The legal status of a corporation of the class I., II., or III., is comparatively simple. The corporation exists generally for some public purpose and the members have no defined personal interest in the property belonging to it. But class IV., and especially Joint Stock Companies, which exist for the procurement of gain to their members, have introduced great complications into the law of corporations. See Chapter V. "Registered Companies."

Number of persons required to form trading corporations.

There is now nothing to prevent any number of persons associating themselves for a common lawful object, except that not more than six persons (in England, ten) may associate themselves for the business of banking, and not more than twenty for any other business having gain for its object (English Companies Act 1862 § 4; Ceylon Ordinance 9 of 1867 § 2, Ordinance 2 of 1897 § 3) except as an association under royal or statutory authority.

Legal status of unincorporate associations.

But an unincorporated association is, for legal purposes, very little more than a number of isolated individuals employing common agents. The personality of such an association is not as a rule recognized by the law. But under the Larceny Acts 1861 § 68, 1868 § 1, and Trade Union Act 1871 § 12, the property of certain associations is protected by the provisions of the Criminal Law of England. Under certain Acts (Building Societies Act 1874 § 7, 1894 § 25, Friendly Societies Act 1896 §§ 47-50, Trustee Appointment Acts 1850 & 1890 in reference to religious and educational societies, Trade Union Acts 1871 & 1876, etc.) these associations, if registered or certified as provided by law, can enforce against their trustees and officials the due administration of the property held on behalf of such associations.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Trade Unions and their liability for the torts of their servants.

By the decision of the House of Lords in *Taff Vale Railway Co.*, v. *The Amalgamated Society of Railway Servants*, 1901, A. C. 426, a registered trade union, and therefore other unincorporated associations if registered, were held liable to the extent of its associate property to indemnify persons who have suffered by the wrongful acts of the officers and servants of the association done in pursuance of the objects of the association. But the Trade Disputes Act, 1906, (6 Edw. 7, c. 47 § 4 (1)) has expressly exempted trade unions and their officials from the operation of this rule.

Article 26.

Birth of a Juristic Person.

An Association or Foundation acquires the capacity for the enjoyment of rights by the authority, express or implied, of the State.

Comment.

Neque societas neque collegium neque hujusmodi corpus passim omnibus habere conceditur, nam et legibus et senatusconsultis et principalibus constitutionibus ea res coerzetur; paucis admodum in causis concessa sunt hujusmodi corpora. Dig. 3. 4. 1.; 47. 22. 1-3.

"No corporation exists without the King's consent (Year Book, 49 Edw. III. 1376). "None but the King alone can create or make a corporation." Coke 10 Rep. 33 b. (*The Case of Sutton's Hospital*).

It is a salutary principle that private societies can only acquire juristic personality by grant from the State. By forming societies, private individuals are able to exercise a very considerable influence on public affairs, and by vesting property in societies duly qualified to own it, they are able to endow such private property with something of that permanence and that power of indefinite accumulation which are the distinguishing features of public property. "This corporate personality is an element full of grave possibilities. Like the wonder-working cloak of the ancient legend it renders its bearer invisible and at the same time endows him with a strength far exceeding that of any single human being" (Sohm § 38). Hence the necessity for strict State control.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 27.

Authority of State, how granted and when implied.

Such authority is granted

(*a*) in the case of an Association or Foundation formed for the purpose of promoting art, science, religion, education, charity or other object of public utility,—by royal charter or letters patent or by legislative enactment,

(*b*) in the case of an Association having for its object the acquisition of gain,—by registration under the law in force regarding such Associations.

The authority is implied in the case of an Association or Foundation which from time immemorial has had the capacity for the enjoyment of rights ("corporation by prescription").

Comment.

"Lawful authority of incorporation, and that may be by four means, *scilicet*, by the common law as the King himself &c., by authority of Parliament, by the King's charter, and by prescription." (Coke 10 Rep. 29 b). See also the introduction to this Title, p. 30.

Article 28.

Corporation, definition of.

An Association or Foundation having the capacity for the enjoyment of rights is in this Digest called a Corporation. The term Corporation does not include the Fisc, unless otherwise expressly stated.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 29.

Constitution of corporation.

The constitution of a corporation is determined by its charter or other instrument of incorporation and by the statutes (if any) of the founder, and in default thereof, by its own bye-laws or regulations, not being contrary to the law; in the case of corporations by prescription, by immemorial custom.

Grant on Corporations, 13; Broom and Hadley, I. 579.

Article 30.

Its function.

The function of a corporation is to act up to the end or design, whatever it be, for which it was created.

Comment.

No corporation can pursue any other objects than those specified in its charters. There alone can the peculiar purposes of its establishment be discovered. An act of a corporation in excess of its powers, with reference to third persons, is *ultra vires* and is void even if unanimously agreed to by all the members; and the Court may be put in motion at the instance of a single shareholder if he can show that the corporation is employing its statutory powers, funds &c. for the accomplishment of purposes not within the scope of their institution, and an injunction will issue accordingly.

Ultra vires.

Here we recognise the principle that the majority, or the whole, of the corporators existing at a given moment are not the corporation, which is eternal; and therefore neither they, nor any succeeding body of corporators, can, as a corporation, act inconsistently with the purposes of the corporation, or be allowed to do that which would place their successors in a different position from that in which the institution of the corporation intended them to stand (Grant, 291).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

In Riche v. *Ashbury Railway Carriage Co.* (1875) 7 H. L. 653 there was under consideration a contract made under an article of association of the company providing that "an extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special regulation." Such a provision in the article was held to be wholly nugatory and void and the contract *ultra vires* and incapable of ratification. The article, said *Cairns*, L. C., is an attempt to do the very thing which the Act prohibits,—to arrogate to the company a power under the guise of internal regulation to go beyond the objects expressed or implied in the memorandum, which is the charter of the association. The concurrence or assent of every individual member will not make valid against the corporation a contract which is *ultra vires* the corporation. Such a contract is sometimes said to be void on the ground of illegality. But Lord Cairns in this case pointed out that contracts of this nature are invalidated not so much by the *illegality* of their object as by the *incapacity* of the corporation to bind itself by agreement for purposes beyond its statutory powers.

Principles of *ultra vires*: per Cairns, L.C.

The doctrine that any act *ultra vires* is incompetent to the corporation and void, is to be applied reasonably, and anything which is fairly incidental to the objects of the corporation is not (unless expressly prohibited) to be held as *ultra vires*. *Attorney-General* v. *G. E. Railway Co.* (1880) L. R. 5 App. Cas. 473. Earl Selborne laid down in *Small* v. *Smith*, 10 A. C. 119,129 the principles to be considered in applying the doctrine. When you have a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it and which may reasonably and properly be done, and against which no express prohibition is found, may and ought *prima facie* to follow from the authority for effectuating the main purpose by proper and general means. You must ascertain first what the main purpose is, then what are the general powers, then what are the special powers, and then, supposing the act is not within the natural meaning either of the general or the special powers, whether it can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it. In the *Attorney-General* v. *London County Council* (1902) A.C. 165, a County Council, being

per Selborne L.C.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

a purely statutory body, had statutory powers to own and work tramways only. It started a line of omnibuses as well. Held that the Council was acting *ultra vires* in becoming omnibus proprietors and running omnibuses as feeders to the tramways, this business not being by necessary implication incidental or auxiliary to the tramway business.

The leading principles of *ultra vires*, as above declared by Lord Selborne, may be supplemented by the following rules from Brice.

Other rules.

Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. Special proceedings in themselves *ultra vires* will sometimes be upheld as having been rendered necessary by unexpected circumstances. Formalities are generally not imperative but merely directory, and therefore the absence of them can be set up against those persons only who were cognizant of the defect. Franchises and special privileges or powers in the nature of franchises cannot be delegated. Special powers of whatever description can be used only *bona fide* for the purposes for which the corporations were created. The capacities and powers of the governing body, and *a fortiori* those of the subordinate agents of a corporation, cannot be greater and will generally be much more restricted than those of the corporation. Any party to an *ultra vires* transaction may set up the defence thereof, and any one corporator may call upon the Courts to restrain the corporation from engaging therein (Brice, *Ultra Vires* 67).

Cy-pres.

The rule that the founder's intention shall govern the administration of a corporate foundation becomes much modified by the *cy-pres* doctrine now fully established, under which the Courts will, on failure of the express object of the founder, direct a reference to inquire what objects are *cy-pres* or nearest to such express objects, and will change the objects of the corporation accordingly. (Broom and Hadley, I. 580) See under Chapter VI. "Foundations."

Article 31.

Name of Corporation.

A corporation must have a name.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Without a name or, as the Romans called it, a head (*caput*), recognised by the law, there cannot be a personality in law. In the register of names—*i.e.* of persons—recognised by private law, Juristic Persons or corporations are entered in precisely the same way as Natural Persons, the latter being there by virtue of the personality with which they were born, the former by virtue of the personality conferred on them by law (Sohm § 37).

The name is the very knot of its combination, without which it could not perform its corporate functions: the name is the very being of its constitution. When a corporation is erected, a name must be given to it—"the name of incorporation is as a proper name or name of baptism" (Coke 10 Rep. 28 b)—and by that name it must sue and be sued and do all legal acts, though a minute variation therein is not material. Under such name it may take, hold and enjoy all kinds of property, as well as liberties, franchises, exemptions and privileges, and may dispose of its possessions. The name cannot be changed except by act of Parliament or fresh charter from the Crown (Grant, 4, 50; Broom and Hadley, I. 575).

Article 32.

Perpetual succession.

The rights and duties of a corporation descend to its successive members.

Comment.

"A corporation is an institution calculated for and capable of duration as long as the world lasts, though it may be brought to a termination by certain accidents or by certain defaults of duty on the part of its members at any period. But however long its duration, the corporation always continues the same, and the same rights, privileges, duties and liabilities attach to it as it had at the first moment of its creation, precisely as though it were an individual. *Personæ vice fungitur.* This unbroken personality, this beautiful combination of the legal characters of the finite being with the essentials of infinity, appears to have been the primary object of the invention of corporations" (Grant, 4).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

To have perpetual succession is the distinguishing feature of a corporation and the very end of its incorporation, for there cannot be a succession for ever without an incorporation (Coke 10 Rep. 26 b); and implies the power of electing members in the room of such as die. This power the aggregate of the members of every corporation may and must exercise as occasions occur, except where the succession is otherwise provided for by the constitution of the body politic (Grant, 203).

Article 33.

Power to make bye-laws

A corporation may make such regulations (bye-laws) as are necessary for carrying out its purposes, provided that the bye-laws are not contrary to law or reason or the objects of the corporation and are not retrospective in their operation.

The power of making bye-laws belongs, subject to the constitution of the corporation, to the entire body of corporators.

The bye-laws, until repealed, bind the corporation and the members of the corporation as such, and (if authorized by law or ancient custom) other persons resident within its local jurisdiction if any.

Comment.

This power is included by law in the very act of incorporation, and is legally incident to every corporation (Coke 10 Rep. 31 a, *The Case of Sutton's Hospital*; Grant, 76) and is as old as the law of the Twelve Tables, Tab. VIII. frag. 27, which was itself borrowed from the law of Solon (Dig. 47. 22. 4; Gneist, *Institutionum et Regularum Juris Romani Syntagma*, p. xxiv.).

When the Crown grants a corporation, it grants to it by implication all powers necessary for carrying into

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

effect the objects for which it was created and securing a perpetuity of succession, according to the maxim *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest.* (Broom's Legal Maxims, 469).

The power of making bye-laws belongs (unless otherwise provided by the constitution) to the whole body of corporators. *R.* v. *Westwood* (1830) 7 Bing. 1, where it was held that an express power in a select body to make bye-laws did not deprive the whole body of its inherent rights. A bye-law may be supported if founded on immemorial usage (Grant, 82), and the existence of a bye-law may be presumed after long usage (*ibid.* 91).

The bye-laws are binding not only on the corporation and its members but also on others who are resident within its local jurisdiction if any, as in the case of municipal and other corporations entrusted with local, popular or territorial government or with jurisdiction over a trade (*ibid.* 77).

Article 34.

Common Seal.

A corporation must have a common seal.

Article 35.

When corporate acts should be under seal.

The due affixing of the seal in accordance with the instruments of incorporation is necessary to the validity of all corporate acts affecting strangers.

Exceptions. The affixing of the seal is not necessary for the validity of acts of the corporation which are

(*a*) of trifling importance or daily necessary occurrence, or

(*b*) of urgent necessity admitting of no delay, or

(*c*) acts of a trading corporation made in pursuance of the objects of its incorporation, or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*d*) contracts executed by one of the parties thereto and of which the other has taken the benefit, or

(*e*) contracts made by a Joint Stock Company, a Municipal Council, a Board of Health or other statutory corporation in terms of the instruments of its incorporation.

Comment on Articles 34 & 35.

Why seal necessary.

A corporation, being an invisible body, cannot manifest its intention by any personal act or verbal order, it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community and makes one joint assent of the whole.

When rule relaxed and why.

But the strictness of this rule is relaxed in cases of "convenience amounting to necessity," *i.e.* when the application of the rule would cause extreme inconvenience and loss of time and tend to defeat the very object for which the corporation was created. A corporation may, therefore, without using the seal do necessary acts of frequent occurrence and within the scope of its ordinary duty or incidental to its business. Among such acts are the hiring or discharging of a servant, giving notice to quit, distraining for rent; in the case of a trading corporation, accepting bills of exchange or making promissory notes (Grant, 55 *et seq*; Br. and H. I. 575-6; Anson on Contracts, 11th edition, 69-71, 135-6; Smith on Contracts, 249 *et seq*).

In *The East London Waterworks Co.* v. *Bailey* (4 Bing. 283) Best C. J., in delivering the judgment of the Court, said:—

per *Best* C. J.

"It is clear as a general rule, that a corporation cannot express its will, except by writing under the common seal of the body corporate, but this rule is subject to some exceptions: these are to be found in Brooke's Abridgment. The first is, where the contract is

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Exceptions.

executed; in that case the law implies a promise, and a deed under seal is not necessary, as was decided in the *Mayor and Corporation of Stafford* v. *Till* (4 Bing. 75) where it was holden that a corporation might maintain *assumpsit* for the use and occupation of their land. The next exception is, where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal: all these are enumerated in Bro. Abr. 'Corporations' 56, and in *Horn* v. *Ivy* (1 Vent. 47). Another exception is, where a corporation has a head, as a mayor, or a dean, who may give commands which a party may obey without the sanction of a common seal; *Randal* v. *Deane* (2 Lut. 1497); or may bind the corporation by record. A fourth exception is, where the acts to be done must be done immediately, and it would be impossible to wait for the formality of the corporation seal; as where cattle are to be distrained damage feasant, which might escape before the seal could be affixed; *Manby* v. *Long* (3 Lev. 107). But it is only in cases of necessity, occasioned by the hurry of the proceedings, that such a course can be pursued; for in *Horn* v. *Ivy* (1 Vent. 47) it is laid down that the appointment of the bailiff, who is to make distresses for the corporation, must be under seal. The principle of *necessity* applies to corporations created for purposes of trade, such as the Bank of England. The very object of that institution requires that it should have the power of issuing bills of exchange and promissory notes. But this indulgence is not extended beyond cases of necessity: for in *Slark* v. *The Highgate Archway Co.* (5 Taunt. 792), the Court said 'that *assumpsit* on notes would not lie against a corporation, unless the act which authorised the making of the promissory note, *eo nomine*, by the corporation, *ex vi termini* impliedly empowered the corporation to make a promise.' And in *Broughton* v. *The Manchester Waterworks Co.* (3 B. and Al. 12) which I should not cite, but that my judgment in the case has been confirmed by a decision in this Court, I am reported, and correctly, to have said:—'When a company, like the Bank of England or the East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated that they should have power to accept bills or issue promissory notes.'"

For the exceptions the following authorities may also be consulted:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Exceptions.

(*a*) Matters of trifling importance or daily necessary occurrence, as the hire of an inferior servant or the supply of coals to a workhouse. *Nicholson* v. *Bradfield Union*, 1866, L. R. 1 Q.B. 620, action to recover price of coals supplied to a workhouse: held agreement need not be under seal, as being a matter of daily necessary occurrence in the workhouse.

(*b*) Matters of urgent necessity, admitting of no delay, as where a municipal corporation possessed a dock and made agreements from time to time for the admission of ships: held that such agreements need not be under seal, as the admission of a ship into a dock is a matter of urgent necessity. *Wells* v. *The Mayor of Kingston upon Hull*, 1875, L. R. 10 C. P. 402.

(*c*) Acts of a trading corporation made in pursuance of the objects of its incorporation. *South of Ireland Colliery Co.* v. *Waddle*, 1868, L. R. 3 C. P. 463 & 4 C. P. 617, where a company incorporated for the working of collieries contracted by parole with an engineer for the erection of a pumping-engine and machinery and paid him part of the price: held that action by the company lay for breach of contract in refusing to deliver engine and machinery, the contract being one made by a trading corporation in pursuance of the objects of its incorporation.

(*d*) Contracts executed by one of the parties thereto and of which the other has taken the benefit. *Lawford* v. *Billericay Rural District Council*, 1903, 1 K.B. 772. Defendants had employed plaintiff by contract under seal as engineer in connection with a scheme of sewerage. Afterwards other orders of a like character were given to him by parole and executed at considerable expense by plaintiff. Held that the law implied a contract by the corporation to pay for benefits actually accepted in pursuance of the objects for which it exists. So where a corporation has done all that it was bound to do under a contract not under

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

seal, it may sue the other party for a non-performance of his part. *Fishmongers' Co.* v. *Roertson*, 1843, 5 M. & Gr. 192. There must be total performance. Part performance by either side in no case dispenses with the need of a seal. *Kidderminster* v. *Hardwick*, L. R. 9 Ex. 24.

(*a*), (*b*), (*c*), (*d*) are the exceptions at Common Law. But the Legislature has in some cases freed corporations from the necessity of contracting under seal and provided special forms in which they may express their common assent. This is referred to in exception (*e*) to the Article. Examples of these special provisions are the Companies Act (England) 1867, § 37; Companies Act (England) 1862, §§ 47, 55; Public Health Act (England) 1875, § 174; Ceylon Joint Stock Companies Ordinance 4 of 1861, §§ 53-5; Municipal Councils Ordinance 7 of 1887, §§ 63-8, 72, 160 A & B.

Acts *ultra vires.*

Whether authorised by the use of the seal or not, no act is valid if it is *ultra vires.* See Article 30, p. 43.

Acts of internal administration.

The necessity for the use of the seal is almost wholly confined to acts done by the corporation affecting strangers. Acts of internal administration affecting the members solely need not be under seal (Grant 65).

How seal to be affixed.

Where the seal is necessary, it must be duly affixed, *i.e.* by persons duly authorized to do so, and with intent to render the instrument effectual and operative, although no formal delivery thereof is necessary. (*D'Arcy* v. *Tamar, Kithill* and *Callington Railway Co.*, 1866, L. R. 2 Ex. 158).

"The affixing of the seal is not enough; there must be delivery of the deed also: *Derby Canal Co.* v. *Wilmot*, 9 East, 360. *Prima facie*, putting the seal imports delivery; yet if it be intended otherwise, it is not so; and then if delivery be made upon a different occasion and not at a corporate meeting, it must be done by some person acting under a power of attorney from the corporation" (per Wills J. in *Staple of England*, v. *Bank of England*, 1889, 21 Q. B. D. 165).

Contracts affecting land.

A contract affecting land must under the Ordinance of Frauds and Perjuries 7 of 1840 §2 be executed before and attested by a Notary (or under Ordinance 17 of 1852 a District Judge, Commissioner of Requests or Justice of the Peace) and two witnesses.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 36.

A juristic act may be entered into between a corporation and one or more of its members.

Juristic acts between corporation and its members.

Comment.

This results from the sharp demarcation (which is the fundamental idea of a corporation, see p. 33) between the collective person and the separate members. *John Foster & Sons, Limited*, v. *Com. of Inland Rev.* (1894) 1, Q. B. 516. "A beautiful example," says Professor F. W. Maitland (Law Quarterly Rev. Oct. 1900, p. 353, Article "The Corporation Sole") of the main phenomenon of a true corporation, a corporation aggregate, *viz.*, that legal transactions, or acts in the law, can take place and do often take place between the corporation of the one part and some or all of the corporators of the other part." In this case eight persons named Foster conveyed a colliery to a company (John Foster & Sons, Limited) of which they were the only members, and the Court of Appeal construed it as a sale by eight persons to a ninth person, though the price consisted not in cash but in the whole share capital of the newly formed corporation. "Although the persons of the first eight parts may be and were members, and the only members, of John Foster & Sons, Limited," said Lord *Lindley*, "John Foster & Sons, Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals and the other party consisting of a corporation. Whether they are or are not the members, or the only members, of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one."

Corporation a totally distinct person from its members

A Juristic Act or Act-in-the-law is defined as a manifestation of the human will intended to create, transfer or extinguish a right, *e.g.*, a gift, a sale, a promise, a disclaimer, a release. See Part III. "Juristic Acts."

Article 37.

Subject to the provisions of any special law, a corporation may not without a license from the Crown take or hold landed property.

Mortmain.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

The very existence of a corporation implies that it is capable of rights. But as corporations are creatures of the law, it follows that the capacity for rights may be restricted either generally or by the statute or charter by which, or under which, any particular corporation is formed. The most important general restriction is generally embodied in laws summed up under the title of laws against the 'dead hand' or Mortmain Acts: so called because they deal with land held *in mortua manu*, *i.e.*, 'in a dead hand' *viz.*, a hand that cannot shift away or alienate the property. They originally dealt with land conveyed to ecclesiastical bodies, the members of which were reckoned dead persons in law. The object of all such statutes is to prevent the accumulation of land by owners not being natural persons, and this is generally done by prohibiting, regulating or restricting the acquisition of land by corporations. In England this policy was carried out by a number of statutes beginning with the statute *de viris religiosis* of Edward I, which have all been now consolidated by the Mortmain and Charitable Uses Act, 1888. The alienation of lands to corporations was looked upon as detrimental to the Crown and to the lord, if any, of whom such land was held, as by the alienation the lord was deprived of the valuable incidents of tenure (*e.g.* escheat, wardship, &c.) to which he would have been entitled, had the land been held by a private individual. A license from the Crown and (till 7 & 8 Will. III c. 37) also from the lord, was made necessary to an alienation in mortmain. Alienation in mortmain without license is not void, but voidable only, and was good if the right of the Crown or lord to re-enter remained unexercised. (Pothier, Œuvres, IX. 79-85; Grant 98-153; Broom and Hadley II. 439-448; *A. G.* v. *Lewin*, 1837, C. P. Cooper, 54; Coke on Littelton, 46 b; *Power* v. *Banks*, 1901, 2 Ch. 487).

Mortmain Acts in England.

The statutes of Mortmain do not extend to the Colonies of Great Britain (2 Burge 458; *Attorney-General* v. *Stewart*, 2 Meriv, 143). In *Godinho* v. *Konig* (Ramanathan, 1843-5, 132) the Supreme Court pointed out that the Dutch laws restricting donations in mortmain (Voet. 18, 1 & 11; Burge, 455; 2 Van Leuwen, 266) do not appear to have been acted on or enforced by the English Government in this Island. Regulation 4 of

Restrictions in Ceylon.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1806 expressly removed all restraints imposed on the Roman Catholics by the Dutch Government and admitted them to all civil privileges and capacities. By the proclamation of 18th September, 1819, all donations and bequests of land to the use of any temple were prohibited in the Kandyan provinces unless authorized by license from the Governor, and if any land was granted or bequeathed by any person to a temple without such license, the land accrued to his heir at law. The Ordinance 2 of 1840 was passed to extend the provisions of the proclamation throughout the Island, but was disallowed by Her Majesty. The Buddhist Temporalities Ordinance No. 3 of 1889 § 48 required, in those districts where the Ordinance was in force, a license from the Governor for the acquisition by Buddhist Temples of lands of the value of fifty rupees or more. This requirement has been re-enacted by the Buddhist Temporalities Ordinance, No. 8 of 1905, § 41.

As the English law of corporations is by the Ordinance 22 of 1866 the law in Ceylon unless there be any statutory enactment to the contrary, the restrictions in force in England on the acquisition and holding of land by a corporation would appear to be in force in Ceylon so far as circumstances permit. Exemptions from these restrictions have from time to time been introduced by statute, and corporations of certain kinds have been thereby enabled to hold lands without license from the Crown: *e.g.* Incorporated Charities, by virtue of 18 & 19 Vict. c. 124 §§ 35, 33 & 34 Vict. c. 34; Joint Stock Companies, by virtue of the Companies Acts (England) 1862 §§ 18 & 21, and the Joint Stock Companies Ordinance (Ceylon) 1861 § 16; Municipal Corporations Acts 1 Vict. c. 78 § 40, 18 & 19 Vict. c. 70 § 18, 23 & 24 Vict. c. 16 § 8 and Municipal Councils Ordinance (Ceylon) 7 of 1887 §§ 7, 72, 155-8, 161-5; Buddhist Temporalities Ordinance 8 of 1905, § 41.

Article 38.

A corporation may not so deal with its property as to incapacitate itself from performing any trust incidental to such property

Restriction on dealing with property.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

or (if the corporation is of a public nature) any public duties of the corporation.

Brice, *Ultra Vires*, 91, 104, 129.

Article 39.

Powers and liabilities of corporations

A corporation has, subject to the instruments of its incorporation and to the provisions of Articles 35, 37 & 38, all the powers and liabilities of a Natural Person so far as they are capable of being attributed to a Juristic Person, and is bound by the acts of its servants and agents according to the ordinary rules of agency.

Comment.

Under Roman law.

In the Roman law a corporation was likened to a minor or madman in that it had wide jural capacity with absolute incapacity of action; and its quasi-guardian was the director or other duly constituted representative through whom alone it could act. It had so much of the rights of a natural person as its artificial character permitted it to enjoy and as the public interests justified its being vested with. Family relations, as of husband and wife, father and child, could of course not be attributed to it. But the rights of ownership, servitude, possession, of making contracts, of suing, belonged to a corporation, also (under the later Roman law) of inheritance, legacy, fideicommissum, &c. A corporation enjoyed many rights accorded to minors, according to the rule *re ipsa minorum jura habent;* among others, the right of restitution by rescission of agreements which have caused serious loss; nor could prescription for a less period than forty years avail against a corporation. As to crimes and delicts, the general principle was, *universitatem delinquere non posse.* A corporation was, like a minor or madman, incapable of *dolus* or *culpa* and therefore of intention and accountability, and the corporation was no more punishable for the crime of its representative than a ward for that of his guardian, while for the delicts of its representative the corporation was only liable so far

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

as it had been enriched thereby. Savigny, II. 94-5; Thibaut, Introd. 116; Pothier, Œuvres IX. 86.

One reason why a corporation was deemed incapable of committing an offence was that a corporation does not exist for the purpose of wrong-doing. Acts of wrong-doing, therefore, lie outside the scope of its functions, *i e.* are *ultra vires*, and must be imputed to the individuals actually concerned in the acts.

Under English law.

Under the English law, as in the Roman, a corporation, having only an ideal existence apart from its members, cannot personally enter into a contract, but only through an agent. The corporation must give formal evidence of the assent of its members to any legal act which, as a corporation, it may perform. Hence the requirement stated in Article 35 that a corporation must contract under seal subject to the exceptions stated in the Article. "The true rule of law" as to the contractual powers of corporations was stated by Blackburn J. in *The Ashbury Carriage Co.* v. *Riche*, 1875, L. R. 9 Ex. 249 to be "that a corporation at Common law has, as an incident given by law, the same power to contract and subject to the same restrictions that a natural person has." As regards statutory corporations, the House of Lords held in that case (L. R. 7 H. L. 653) that such a corporation could only make those contracts which it is permitted to make, that a company incorporated under the Companies Act of 1862 is so far bound by the terms of its memorandum of association that it may make no contracts which are either inconsistent with, or foreign to, the objects expressed in that memorandum. The contract would be *ultra vires* and therefore void.

Contractual Powers.

As to crimes and delicts, the old view was that as a corporation had no soul or body, it could not be excommunicated or outlawed, or commit treason or felony (Coke, 10 Rep. 32 b) or beat or be beaten or be guilty of a wilful and intentional wrong. But this view has now been greatly modified.

Liability for torts.

In *Green* v. *the London General Omnibus Co.* (1859) 29 L. J. C. P. 13, which was an action against the defendants for interfering through their servants with the right of the plaintiff by driving their omnibuses in such a manner as to molest him in the use of the highway, Erle J. delivering the considered judgment of the Court, said: "I take the whole tenor of authorities from *Yarborough* v. *The Bank of England* (16 East, 6) down to the case of *Whitfield* v. *The South Eastern*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Counties Railway Co. (1 E. B. & E. 115) to show that an action for a wrong does lie against a corporation, where the thing is done within the purpose of the incorporation and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. The doctrine that was relied on by Mr. Giffard is rather more of a quaint than substantial form,—that because a corporation has no soul, therefore it is incapable of a malicious intention. We do not in the smallest degree interfere with prior decisions, but on the contrary there are numerous authorities of which *Yarborough* v. *The Bank of England* (where there was a well considered and elaborate judgment going over all the previous cases) is by no means the first in support of the principle upon which we rely; and I may add as an additional reason for our decision the inconvenience to the public that would arise if we are to hold that these companies, incorporated for the purpose of trade, had a restricted limitation put upon their liability by reason of such incorporation, and were exempt from responsibility because they intentionally wronged the public. We think it extremely important, where the companies admit that they have intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed and who may be entirely incapable of giving the recompense which the law may award."

per Lord Bramwell, *Abrath* v. *N. E. R. Co.*

There has since been some conflict of opinion, but it has now ceased. In an elaborate judgment in the House of Lords in *Abrath* v. *North Eastern Railway Co.*, 1886, 11 A. C. 250, Lord Bramwell said in emphatic language: "I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I can; and I think the reasoning is demonstrative. To maintain an action for a malicious prosecution it must be shewn that there was an absence of reasonable and probable cause, and that there was some malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or motive. If the whole body of shareholders were to meet and in so many words to say, 'prosecute so and so, not because we believe him guilty, but because it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

If the directors even, by resolution at their board or by order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires:* they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a prosecution. I say therefore that no action lies, even if you assume the strongest case, namely that of the very shareholders directing it or the very directors ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive."

Lord Fitzgerald and the Earl of Selborne, L. C., expressly declined to commit themselves to this proposition. The question was directly raised before Darling J. in *Cornford* v. *Carlton Bank* 1899, 1 Q. B. 392, and it was held in substance by him that, although in a sense a corporation is as incapable of malice as it is of wit, yet in view of the fact that corporations are for civil purposes regarded as persons, the ordinary doctrines of agency may fairly be applied to them. He held therefore that the action for malicious prosecution lay. In the Court of Appeal (1900, 1 Q. B. 22) it was conceded at the bar that the ruling of Darling J. on this point was right. The law has been finally laid down in similar terms by the Privy Council in the case of *Citizens' Life Assurance Co.* v. *Brown*, 1904, A. C. 423.

per Lord Lindley, *Citizens' Life Assurance Co.* v. *Brown.*

It is in truth neither more nor less easy, as Sir Fred. Pollock observes (Law of Torts, 8th ed. p. 94), to think of a corporation as deceiving or being deceived than as having a consenting mind. In no case can a corporation be invested with rights or duties except through natural persons who are its agents. "If it is once granted," said Lord Lindley in *Citizens' Life Assurance Co.*, v. *Brown (uti supra)*, "that corporations are to be regarded as persons, *i.e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Doctrines of agency and of master and servant apply equally to corporations and individuals.

to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contracts, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the acting C. J. in the case that if Fitzpatrick published the libel complained of in the course of his employment, the Company was liable for it on the ordinary principles of agency .....Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant. This doctrine has been approved and acted upon by this Board (in *Mackay* v. *Commercial Bank of New Brunswick* (1874, L. R. 5 P.C. 394), *Swire* v. *Francis* (1877, 3 App. Cas. 106), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on the question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (1867, L. R. 2Ex. 259), which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (1880, 5 App. Cas. 326) and has been followed in numerous other cases."

Rule of Agency. *Barwick* v. *English Joint Stock Bank.*

The rule of agency was thus stated in *Barwick* v. *English Joint Stock Bank*, the leading case referred to. "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved..... With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

Liability of corporation for tort of servant.

It may now be taken as settled law that a corporation is liable for torts committed by its servants and agents (1) if done in the course of its business and for its benefit and (2) if done in such a manner that it

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

would have constituted an actionable wrong if it had been the act of a private individual.

When liable and when not.

On the first point the following cases illustrate when the corporation is liable and when not. In *Poulton* v. *L. and S. W. Railway Co.*, 1867, L. R. 2 Q. B., a station master having demanded payment for the carriage of a horse conveyed by defendant company, arrested and detained plaintiff for non-payment thereof until it was ascertained by telegraph that all was right. Held by Blackburn J. that the company were not liable, as they had no power to arrest for non-payment of carriage and could not give the station master any power, and his act was completely out of the scope of his authority, and the plaintiff's remedy lay against him and not against the company. So in *Edwards* v. *L. & N. W. Railway Co.*, 1870, L.R. 5 C.P. 445, where defendant company's servant in charge of station arrested plaintiff on suspicion of stealing company's goods, company held not liable, servant's act being plainly beyond his authority, not part of the company's general business nor for their apparent benefit. On the other hand in *Bayley* v. *Manchester, Sheffield* and *Lincolnshire Railway Co.*, 1872, 1873. L. R. 7 C. P. 415, where porter pulled plaintiff out of carriage thinking he was in the wrong carriage, company held liable on the ground that porter was acting within his general authority. The master company is liable for its servant's wrongs committed in the course of his employment, even if the wrongs resulted from the servant's disobedience to positive commands. In *Limpus* v. *London General Omnibus Co.*, 1862, 32 L.J. Ex. 34, where the driver of an omnibus wilfully and contrary to express orders from his master, pulled across the road in order to obstruct the progress of the plaintiff's omnibus, the company was held to be liable. Willes J. said: "Of course one may say that it is no part of the duty of a servant to obstruct another omnibus, and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say that in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servants in the course of his employment; and the law is not so futile as to allow the master, by giving secret instructions to his servant, to set aside his own liability.....The proper question for the jury to determine is, whether what was done was in the course of the employment and for the benefit

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of the master.' Blackburn J. quoting and approving this charge, said: "If the jury came to the conclusion that he did it not to further his master's interest, not in the course of his employment as an omnibus-driver, but from private spite, with an object to injure his enemy, who may be supposed to be the rival omnibus, that would be out of the course of his employment. That saves all possible objections."

Indictment of corporation.

A corporation may be indicted for breach of duty as for non-repair of a bridge or highway, for a nuisance, for misfeasance consisting of an offence not being treasonable or felonious or attended with violence (Grant 275, 284; Brice 482, 483; *Broom* and *Hadley* I. 578; *Reg.* v. *Tyler*, 1891, 2 Q. B. 588; *Lawler* v. *Egan*, 1901, 2 Ir. Rep. 589). The corporation can only appear by attorney and may be compelled by distress infinite, though there will be a difficulty in enforcing the penalty if there is no property. (Grant 275; Br. & Had. *ibid*). According to Voet (3. 4. 5 & 8; 48. 4. 4) and Pothier (Œuvres, X. 496), corporations may be prosecuted for crimes including treason. The corporation must appear by a *syndicus* or *actor*, *i.e.*, an attorney. The punishment imposed on the corporation would be fine, suspension of privileges, or dissolution; and the individual members responsible for the crime were also liable to prosecution and punishment.

When no remedy.

While corporations as regards most varieties of torts are on a very similar footing to individuals, and acts which are wrongful in the case of the latter are equally so if done by the former, yet where a corporation has been endued with compulsory powers, as for entering upon land and the like, it has an implied authority to do all such acts as may be necessary for the full and complete utilization of such powers. Proceedings carried on by a corporation in pursuance of such powers are legal and persons thereby aggrieved will be ousted of their common law remedy and, if the statutes conferring the powers have not indicated a method of redress, will be without remedy at all. (Brice 134.)

Can a corporation sue for libel?

A corporation cannot of course be subjected to personal injuries in the sense of bodily harm or offence, nor (it seems) be injured in respect of merely personal reputation. It can sue for a libel affecting property, but not for a libel purporting to charge the corporation as a whole with, *e. g.*, corruption: in such a case the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

individual corporators reflected on should be the plaintiffs (*Mayor of Manchester* v. *Williams*, 1891, 1 Q.B. 94; Pollock on Torts 60). But under the R. D. Law the action would lie, according to de Villiers (Roman and Roman Dutch Law of Injuries p. 59). Though there do not appear to be Roman Dutch authorities in support of this specific proposition, it seems consistent with principle and would probably be now accepted by the English Courts. The *ratio decidendi* of *The Mayor of Manchester* v. *Williams* was that the corporation as such was incapable of committing the acts imputed to it. But now that it has been held in *Citizens' Life Assurance Co.* v. *Brown*, 1904, A.C. 423, cited *supra*, that a corporation is capable of malice, why cannot it also be capable of corrupt practices? If it can, then an imputation of such acts would injure its good name and give it a cause of action.

Liability of corporation for delict—is it governed by English or Roman Dutch Law?

In *Kandasamy* v. *The Municipal Council of Colombo*, (1907, 1 App. Court Rep. 91) which was an action of "injury" *(injuria)* to plaintiff's good name, reputation and feelings caused by the wrongful act of the defendant council, the Court below held that a corporation could not be sued for "injury" in our Courts, as the law which governed the question was the Roman Dutch Law and under that law a corporation was deemed incapable of *dolus* and could therefore commit no "injury" or other offence of which an intentional act was an ingredient. In appeal the Supreme Court held that a corporation was capable of *dolus* under the Roman Dutch Law and the action lay. So far as this particular case went, it mattered little whether the Supreme Court applied the English or the Roman Dutch Law, for the view they took of the Roman Dutch Law coincided with the English Law. But the decision that the question at issue was governed by the Roman Dutch and not the English Law, involves far-reaching consequences and deserves re-consideration.

It is submitted with all deference that the law applicable to such cases is the English Law. The question was not, what constitutes an *injuria?* That is no doubt governed by the Roman Dutch Law so far as it is in force in this Island, and not by the English Law which differs in important respects, *e.g.*, in that *dolus malus* or malicious intent is an essential ingredient of an "injury" under our law and must be proved by the plaintiff. But the question was, assuming that the act if committed by a private individual was an

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"injury" and actionable, was it actionable against a corporation? The Ordinance 22 of 1866 has expressly introduced into this Island the English law of corporations and the English law of principals and agents. "In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of .....joint stock companies, *corporations*, banks and banking, *principals and agents*, ...the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England," in the absence of other provision by local enactment. The question of the capacity of a corporation for *dolus malus* and its liability for the acts of its agents is a question purely of the law of corporations and the law of principals and agents, as was explained in the judgment, cited p. 59 *supra*, of the Privy Council in *The Citizens' Life Assurance Co.*, v. *Brown*. The question, therefore, in *Kandasami* v. *The Municipal Council* of Colombo, is, it is submitted, governed by the English, and not the Roman Dutch, Law.

Article 40.

Directorate and its powers.

A corporation must have a Directorate which may consist of one or more persons.

The Directorate represents the corporation in judicial proceedings and in all other matters and is vested with all powers necessary for carrying on the ordinary business of the corporation.

The extent of the powers of the Directorate may be limited by the instruments of incorporation of the corporation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Directors.

A corporation being a legal abstraction, "invisible and existing only in intendment and consideration of the law" (Coke 10 Rep. 32), can do nothing in its own person. It must act through an agent—*actorem sive syndicum per quem quod communiter agi fierique oporteat, agitur, fiat* (Dig. 3. 4. 1. 1.). The agents are commonly called Directors. Directors are described sometimes as agents, sometimes as trustees, sometimes as managing partners. Each of these expressions is used not as exhaustive of their powers or responsibilities, but as indicating useful points of view from which they may for the moment and for the particular purpose be considered. It is not meant that they belong to the class, but that it is useful for the purpose of the moment to observe that they fall *pro tanto* within the principles which govern that class (per *Bowen* L. J., *Imp. Hydropathic Co.*, v. *Hampson*, 23 Ch. D. 12).

Their Powers.

The authority and powers of directors are *prima facie* those necessary for carrying on the ordinary business of the corporation, but are usually defined, in the case of a joint stock company, more particularly by its regulations or articles of association. The powers confided to directors are in the nature of a trust and must be exercised with a single eye to the benefit of the corporation. A large discretion is allowed to them so long as they keep within the limits set them by the charter, memorandum and articles of association, etc. Within the limits so fixed they are the agents of the corporation, but beyond those limits there is no agency and the directors must personally take the consequences of their own acts. They are not liable for mere errors of judgment, still less for being defrauded. All that the law requires of them is that they should be faithful to their duties as agents—"honest and diligent" (Thibaut, Introd. § 116-7 and Lindley's note thereon; Encyc. Brittanica, Art. "Company," XXVII. 174).

Directors are special agents of the corporation in respect of the powers expressly vested in them, but they may also be regarded as general agents of the corporation in matters not specially provided for and not foreign to the objects of the corporation (*Ernest* v. *Nicholls*, 1856, 6 H. L. 419). In gauging the powers of directors to bind the corporation a distinction must be drawn between actual authority and apparent authority. Actual authority is that which is given to

Actual and apparent authority.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

them expressly or is incidental to the doing of that which is ordinarily and reasonably done in such a business as the directors carry on (*Hutton* v. *West Cork Railway Co.*, 1883, 23 Ch. D. 665). Apparent authority is where directors transcend their actual authority and do acts which are outside their proper authority as agents of the corporation but which, for all a person dealing with the corporation knows, may be within their authority. In such a case the stranger has the right to presume *omnia rite acta* and the corporation would be estopped from disowning the agency (*In re Land Credit Co. of Ireland*, 1868, L. R. 4 Ch. 469) unless he was, or might by the application of proper care have been, cognizant of the defect of authority (*Royal British Bank* v. *Turquand*, 1857, 6El. & Bl. 332; *Howard* v. *Patent Ivory Co.*, 1888, 38 Ch. D. 156.).

Liability of Directors.

As to the liability of directors for negligence, Lindley M. R. said in *Lagunas Nitrate Co.*, v. *Lagunas Syndicate*, 1899, 2 Ch. 392, 435: "If directors act within their powers, if they act with such care as is reasonably to be expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. The amount of care to be taken is difficult to define, but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them. Their negligence must be not the omission to take all possible care: it must be much more blamable than that; it must be in a business sense culpable or gross. I do not know how better to describe it."

See also under Article 39 *supra*.

Article 41.

Appointment of Directors.

Unless otherwise provided in the instruments of incorporation, the appointment of the Directors is made by a resolution of a general meeting of the members of the corporation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The appointment is revocable at all times without prejudice to claims for the stipulated compensation.

Article 42.

Appointment of special agents.

The instruments of incorporation may provide for the appointment of special agents for the performance of special matters of business.

The powers of such special agent are deemed, in case of doubt, to extend to all juristic acts which ordinarily fall within the scope of the particular kind of business assigned to him.

Article 43.

Decision of directors, how taken.

When the Directorate is composed of many persons, their decision is governed, unless otherwise provided in the instruments of incorporation, by the provisions of Articles 45 & 47 relating to the resolutions of a general meeting.

Article 44.

The government of a corporation.

Unless otherwise provided in the instruments of incorporation, the affairs of the corporation, so far as they are not entrusted to the Directors or other agents, are governed by the resolutions carried at a general meeting of the members.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 45.

The will of the majority at corporate meeting is the will of the corporation.

Unless otherwise provided in the instruments of incorporation or unless there be a special custom of the corporation, the decision of the majority of the members of the corporation present at a corporate meeting duly summoned and duly constituted is the decision of the corporation and is binding in all matters consonant to, and within the scope of, the objects of the corporation.

Comment on Articles 44 and 45.

Will of the majority under the Roman Law.

Under the Roman Law in order to create a corporate body there must be at least three members—*tres faciunt collegium* (Dig. 50. 16. 85); the body must act on the resolution of the majority, and a majority presupposes at least three members; though the corporate body once constituted could continue to exist, even if reduced to one (Dig. 3. 4. 7. 2; Savigny II. 89; Sohm 38).

That the will of the majority is the will of the corporation and binds the minority, is one of the first principles of corporation law. *Refertur ad universos quod publice fit per majorem partem.* Dig. 50. 17. 16. *Ubi major pars ibi totum,* the absent members being supposed to side with, and be included in, the greater part.

It is sometimes said that under the Civil Law a resolution in order to be binding required to be made by a majority at a meeting which consisted of at least two-thirds of the members of the corporation (Dig 3. 4. 3; Voet 3. 4. 7; Thibaut, Introd. § 114; Broom & Hadley, I. 579). But Savigny (II. 97), has shown this view to be erroneous and that the alleged rule applied only to the executive authority or senate (*ordo*) of a Municipality.

Under the English Law.

The binding force under English law of the will of the majority can (it is said) only be avoided by statute. But the decision of the majority must be consonant to, and not in contravention of, the objects of the corporation; beyond such limits neither the will of the majority

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

nor unanimity can make an act valid. What is an act of the corporation binding the corporation and what constitutes a meeting of the corporation, are exhaustively discussed in Grant pp. 68-75, 154-221. Some authorities will be found collected in *Staple of England* v. *Bank of England*, 1888, 21 Q.B.D. 165, by Wills J. "The acts of a corporation are those of the major part of the corporators corporately assembled: Com. Dig. tit. Franchise. . . . . In the absence of special custom the major part must be present at the meeting, and of that major part there must be a majority in favour of the act or resolution. It was so decided in Easter Term, 1693, *Hascard* v. *Somany*, Freem. 504, quoted in Viner's Abridgment, tit. Corporations; and it was said by Lord Mansfield in *Rex* v. *Monday*, Cowp. 530, to be undoubted law. By "corporately assembled" it is meant that the meeting shall be held upon notice which gives every corporator the opportunity of being present. *Smyth* v. *Darley*, 2 H.L.C. 789. The notice need not necessarily be special, but there must be such knowledge, or such means of knowledge, as to give each corporator the opportunity of attending."

Corporate meeting.

Notice.

The meeting must be one duly summoned and duly constituted. Except in the case of meetings for which set days and the subjects for discussion are appointed by the constitution of the corporation, notice of the meeting must be given to the members and should specify the business to be transacted, and the meeting must be at the appointed place. *R.* v. *Harris*, 1831, 1 B. and Ad. 936; *R.* v. *Langhorn*, 1836, 4 A. and E. 538; *Re Bridport Old Brewery Co.*, 1867, L.R. 2 Ch. Ap. 191. If all the corporators attended and waived the question of notice, the objection could not (perhaps) be afterwards raised. *R.* v. *Chetwynd*, 1828, 7 B. and C. 703-4.

Constitution.

When a meeting at which a specified thing is to be done is to consist of the different integral parts of a corporation, and each of these integral parts consists of a definite number of corporators, then the meeting will not be properly constituted, unless it be attended by a majority of the members of each integral part. Where the presiding officer at an electoral meeting, who by the constitution of the corporation is an integral part of such assembly, secedes after the meeting has been duly constituted and the election entered upon but before it is completed, an election made after the departure is void,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and it makes no difference that he improperly or even criminally absented himself.

Adjournment. There is at Common Law a right of adjournment of a public meeting, and *semble* it lies in the chairman. But this must be for the proper conduct of the business, not for its frustration. A chairman has no power to stop a meeting at his own will and pleasure: the meeting by itself can resolve to go on with the business for which it has been convened and appoint another chairman. *National Dwellings* v. *Sykes*, 1894, 3 Ch. 159.

Closure. A majority cannot refuse the minority a hearing: but after the minority has had a fair hearing the chairman may, with the sanction of a vote of the meeting, close the discussion and put the question to the vote. *Wall* v. *London* and *Northern Corp.*, 1898, 2 Ch. 469; Buckley on the Companies Acts, 8th edn., 545.

Quorum. Often the instruments of incorporation, usually the articles of association, fix the minimum number of members that must be present. This minimum is called a *quorum*. The term is borrowed from the expression "Justices of the *quorum*" and originated in a clause which occurs in the warrant of appointment of Justices of the Peace in England: *quorum aliquem vestrum A, B, C, D, ... etc., unum esse volumus.* The Ceylon Joint Stock Companies Ordinance 1861, Table A § 32 (corresponding to the Companies Act 1862, Table A § 37) fixes the *quorum* according to a scale there set forth.

Having met for one purpose, the meeting cannot proceed to any other matter without the unanimous consent of the whole body of corporators who have a right to be present there.

Legal majority. Those who do not choose to vote on the question before the meeting or who vote on any other question, are considered to vote with the majority of the voters on the real question, in the same way as those who are absent. The majority in all cases means legal majority whether it be numerical or not. For if the numerical majority direct their votes where it can have no legal effect, they by so doing voluntarily leave unopposed, *i.e.* they assent to, the voice of the voters (Grant 69, 155).

Mode of voting. According to the Common Law, the voting is by a show of hands. But special enactments (as *e.g.* the Companies Acts) or bye-laws of corporations provide for a poll of names, and then this mode must be followed. *Re Horbury Bridge Co.*, 1879, 11 Ch. D. 109. The Common Law recognizes neither a proxy nor a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

casting vote, but these are provided for in statutes and bye-laws.

Quo Warranto.

The validity of an election to an office is usually tested by proceedings known as *quo warranto.* In ancient times this was a writ of right available only to the Crown and issued by the King's Bench against persons who claimed or usurped any office, franchise or privilege belonging to the Sovereign, to inquire by what warrant or authority they maintained their claim. The writ fell into disuse from the delay with which it was attended, and it has now been replaced by an information (which may be filed by any person) in the nature of a *quo warranto*, in which the person usurping is considered as an offender and on conviction is punishable by ouster and fine. A mandate in the nature of *quo warranto* was issued by the Supreme Court (per *Wood Renton* J., *In re the election of a councillor for the Galapiadda ward of Galle Municipality*, 1905, 8 N.L.R. 300). In the same matter when it again came up before the Supreme Court, 1906, 9 N.L.R. 142, *Wendt* J. held that the mandate was rightly issued. But in *Abaywardene* v. *Chairman of the Municipal Council, Galle, et al.*, 9 N.L.R. 304, *Lascelles* A.C.J. and *Middleton* J. doubted whether the Supreme Court had the power to issue the mandate.

Article 46.

Unanimity when required.

Unless otherwise provided in the instruments of incorporation, the consent of all the members of the corporation is required for a change of

(*a*) the objects of the corporation,

(*b*) the regulations of the corporation,

(*c*) the substance of the corporate property.

If the corporation is one created by royal charter, letters patent or legislative enactment, the authority of the State is also required for the change.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Unanimity when required.

Savigny II. 99. This provision serves as a check on the abuse of its power by a majority to the irretrievable injury of other members. In the case of a corporation, not of a trading character, but having a capital or common stock in which each corporator was interested individually and which might become productive of benefit to each, where a large majority had concurred by a regular vote in a resolution to surrender the existing charter for the purpose of getting a new one altering the constitution of the body, it was held that the surrender could not be carried into effect without infringing the pecuniary rights of each member of the corporation and therefore required the express consent of every corporator (Grant 158-9).

Exceptions.

The provision is modified by some statutes. For example under the Companies (Memorandum of Association) Act 1890 § 1, corresponding to Joint Stock Companies Ordinance (Ceylon) 3 of 1893 § 14, a company may by "special resolution" in a general meeting (*i.e.* a resolution passed by a three-quarter majority of those present at a meeting of which due notice has been given, and confirmed at another meeting, two weeks to one month later, by a simple majority of those present) restrict or abandon any of its objects, enlarge or change the local area of its operations, &c., if such resolution be confirmed by the Court. So under the Companies Act 1862 § 50, corresponding to Joint Stock Companies Ordinance (Ceylon) 4 of 1861 §§ 46-7, the regulations of a company may be altered by a special resolution, without confirmation by Court. Such alteration may be made even to the detriment of individual members' interests, provided it is done *bona fide* for the benefit of the company as a whole. *Andrews* v. *Gas Meter Co.*, 1897, 1 Ch. 361; *Allen* v. *Gold Reefs*, 1900, 1 Ch. 656. The resolution in both cases must be registered before it can be valid against third persons. Under the Ceylon Municipal Councils Ordinance 7 of 1887 § 124, all bye-laws require to be confirmed by the Governor in Executive Council and published in the Government Gazette. Under the Municipal Corporations Act 1882 (England), two-thirds at least of the members must be present at the making of a bye-law, and the bye-law when made must, unless it is one for the prevention and suppression of a nuisance, be passed by His Majesty in Council.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 47.

Vote of interested person.

Unless otherwise provided in the instruments of incorporation, a member may vote upon a resolution relating to a subject matter in which he is personally interested, but a director may not vote upon such resolution as director.

Comment.

The law on this point was doubtful, but has now been definitely settled by the Privy Council in *North-west Transportation Co.* v. *Beatty* 1887, 12 A. C. 589. In this case a company had purchased a steamer from one of its directors upon a bye-law enacted at a directors' meeting (at which he voted) and adopted subsequently at a general meeting at which also he voted. It was held that a shareholder is entitled to vote as he pleases, and to consult his own interests, and in the absence of anything in the articles of the company, is not debarred from voting upon a question in which he is personally interested; his vote, if not impeachable for fraud, may in fact determine the matter in his own favour by turning the scale, as it did in the case in question. A director, however, is not entitled to vote as director in respect of any contract in which he is interested, but he may vote as a shareholder at a general meeting.

Interest of members.

The principles were thus laid down in the case. 'Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company; and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

Of director.

"On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself and from entering into engagements

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it."

Article 48.

Reservation of members' special rights.

Unless otherwise provided in the instruments of incorporation, the special rights of a member may not without his consent be infringed by a resolution of the general meeting.

Comment.

"The consent of each individual corporator must be obtained in order that the rights vested in him as such may be affected," Thibaut, Introd. § 114. (See also under Art. 46 *supra*). This is on the principle, *In re communi neminem dominorum jure facere quicquam invito altero posse. . . . . in re enim pari potiorem causam esse prohibentis constat*, Dig. 10. 3. 28; Codex 5. 5. 59. *Invito autem uno socio, nihil novi per alterum potest fieri in re communi, meliorque prohibentis conditio est*, Voet ad Pand. 10. 3. 7. This principle specially applies to prevent a corporation doing anything which substantially amounts to a fraud upon the minority or on particular members, or where there is a wrongful dealing with the property, assets or rights of a corporation, whose constitution is such as to confer on each member definite rights to or interests in such property (Brice 874, 875).

When, however, the members' rights have arisen under articles of association which under the statute it is competent for a company to alter (Companies Act 1862 § 50; Joint Stock Companies Ordinance 4 of 1861 §§ 46-7), then in the absence of a special agreement

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

between him and the company or of a special obligation incurred towards him, it is competent for the company to alter its articles to his detriment and without his consent, provided the power is exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities, that is to say, it must be exercised for the benefit of the company as a whole. *Andrews* v. *Gas Meter Co.*, 1897, 1 Ch. 361; *Allen* v. *Gold Reefs*, 1900, 1 Ch. 656; Buckley p. 216.

Article 49.

When general meeting to be called by directors.

A general meeting shall be called by the directors

(*a*) in the cases prescribed by the regulations,

(*b*) whenever the interests of the corporation require it, or

(*c*) when the number of members fixed by the regulations demands a general meeting, stating the object thereof.

Comment.

In case (*c*) the directors cannot question the validity of the reasons for calling the meeting, they have simply to carry out the resolution of the members.

Article 50.

When Court may authorise calling of general meeting.

If the demand made under Article 49 (*c*) is not complied with, the District Court may authorise the persons making the demand to call the general meeting. The notice convening the meeting shall set forth such authority.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 51.

Rights of membership, transfer of.

Unless otherwise provided in the instruments of incorporation, membership is not transferable and does not pass by inheritance, and the right of membership cannot be delegated to another person.

Comment.

This is the rule at Common Law, but it is modified greatly by statute and by bye-laws of corporations. Thus membership of a Joint Stock Co. passes by purchase or inheritance of the member's share; and a member may, if authorized by the instruments of incorporation, vote by proxy, which the Common Law does not recognize. In the case of a Municipal corporation, a vote may be exercised by proxy, if the instruments of incorporation permit it, but cannot be transferred.

Article 52.

Amotion from membership or office.

A corporation has, subject to the instruments of incorporation, the right to amove a member or officer of the corporation for reasonable cause and after giving him due opportunity of defence.

Comment.

This is an inherent right of every corporation and is as necessary for its due administration as the power of making bye-laws: *per* Lord *Mansfield* in *R.* v. Richardson, 1758, 1 Burrow 517. It is a reasonable cause for amotion that the person amoved does acts which "work to the destruction of the body corporate or to the determination of the liberties and franchises thereof" (*Earle's Case*, Carthew's Rep. 176); or is guilty of "offences of an infamous character indictable at Common Law" (*R.* v. *Mayor of Liverpool*, 2 Bur. 732), or of conduct inconsistent with the dignity of the office, as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

habitual drunkenness (*R.* v. *Taylor*, 3 Salkeld, 231). He should be allowed, before amotion, due opportunity of making his defence (*R.* v. *Saddlers' Co.*, 1863, 10 H. L. C. 404).

Article 53.

Member's right of withdrawal.

Members have, subject to the instruments of incorporation, the right to withdraw from a corporation. The regulations may provide that the right can be exercised only at the end of a business year or after due notice.

Article 54.

Domicile of corporation.

The domicile of a corporation is, in the case of a trading corporation, the place where its administrative business is principally carried on; in the case of any other corporation, the place where its functions are discharged.

Comment.

"Without a place no corporation can be made." Coke, 10 Rep. 20 b. *Case of Sutton's Hospital.* A place is as essential as a name to a corporation. The domicile of a corporation is entirely distinct from the domicile of the persons who compose the corporation and is determined by the situation of its principal business, *i.e.* the place where the administrative business of the corporation is conducted or its functions carried on. This place, in the case of a registered company, is usually the place where its registered office is. Dicey p. 154; Savigny VIII. § 354; *Jones* v. *Scottish Accident Insurance Co.* (1886) 17 Q.B.D. 421.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 55.

Inspectors.

Inspectors may be appointed to a corporation by the instruments of its incorporation, by a general meeting of the corporation or by the Crown.

Article 56.

Their duties.

The duties of an Inspector are to examine into the condition of the property and business of the corporation and into the conduct of its affairs and to report thereon as directed by the terms of his appointment.

Comment.

Under the Companies Act (England) 1862 §§ 56-61 and the Joint Stock Companies Ordinance (Ceylon) 1861 §§ 58-62 Inspectors may be appointed by the Board of Trade in England or the Governor in Ceylon or by a general meeting of the Company.

Dissolution of Corporation.

Effect of dissolution.

The dissolution of a corporation, like its creation, requires the sanction of the State (Savigny, II. 89). The dissolution is the civil death of the corporation. It ceases then to be a juristic person, and all its rights and obligations are extinguished. The debts of the corporation due to or from it cannot be recovered by or from the members, according to the maxim *si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent* (Dig. 3. 4. 7.). The lands and other real property of the corporation will revert to the person (or his heirs) who granted them to the corporation, for the law annexes a condition to every such grant that, if the corporation be dissolved, the grantor shall have his lands back again, because the cause of the grant has failed (Coke, Litt. 13 b ; Grant 303 ; Blackstone II. 256-7). Personal property of the corporation vests in the Crown as *bona vacantia* (*In re Higginson and Dean*, 1899, 1 Q. B. 325) ; and the franchises, if any, become revested in the Crown (Grant 303). See further under Article 60.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

A corporation can be dissolved by the State against the will of the members if such a course becomes necessary for the security or welfare of the State, or in the case of an endowment having the character of a State institution, if the common aim may be more successfully attained in the form of a new institution; or if a corporation violates its conditions or abuses its powers, or carries on undertakings not within the scope of its object (Savigny, II. § 89; Grant 295, 301; *Eastern Archipelago Co.* v. *the Queen* 1853, 2 C.L.R. 145.) The corporation may be dissolved by the members themselves, if there is a unanimous resolution in favour of the dissolution and the State consents (Savigny § 99).

Reasons for dissolution.

A dissolution against the will of the members may be effected by statute, which is boundless in its operation: witness the statutes of Henry VIII. for dissolving the monastic corporations and chauntries, and the Knights of St. John of Jerusalem. In the case of a corporation created by charter or letters patent, such dissolution may be effected by revocation of the charter or letters patent, which is done in England by judgment upon writ of *scire facias* (Grant 42 *et seq.*). The Crown has not the power by any direct means, or *ex mero motu*, to dissolve a corporation. Though to call a corporation into existence by charter is in the discretion of the Sovereign, a forced extinction can only be effected by statute or by a judgment of revocation by Court (Grant 302). The charter may also be surrendered into the hands of the Crown; and upon the acceptance and enrolment of such surrender, the corporators are stripped altogether of the corporate character. The surrender requires the consent of every corporator (*ibid.* 46, 306; see Articles 46 and 48 *supra*).

Dissolution (1) compulsory.

(2) Voluntary.

If a corporation is reduced to one member, it still continues in law to exist. *Si universitas ad unum redit, magis admittitur posse eum et convenire et conveniri: cum jus omnium in unum reciderit et stet nomen universitatis* (Dig. 3. 4. 7. 2.). If that sole surviving member dies, the corporation ceases to exist (Grant, 303; Br. and H. I. 586). But Savigny and Colquhoun dispute this. According to them, a corporation, not being a natural person, is not affected by natural death. If, for example, says Savigny, during an epidemic in a town, all the members of a Handicraft-guild should die one after another, it will be incorrect to maintain that the guild itself had become extinct and its property heirless and belonged to the State. The death

(3) By death of all members.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of all the members, at all events in the case of a corporate foundation having for its basis permanent objects of public interest, only suspends its executive power, does not extinguish its rights: its founder or his heirs might nominate a sufficient number of persons for corporate action (Savigny II. § 89; Colquhoun I. 66). In the case of a corporation sole the English law admits that natural death has no effect. It is not clear why it should be otherwise in the case of a corporation aggregate.

(4) by loss of ntegral part.

The total loss of a necessary integral part, without the corporation having by its constitution the power of renewal, also operates as a dissolution, but the Crown may revive the corporation by means of a new charter (*R.* v. *Pasmore*, 1789, 3 T. R. 199, 1 Revised Reports, 688; Grant 304).

(5) Dissolution of registered companies.

Registered Companies may be dissolved by order of Court or voluntarily under the Companies Act (England), 1862, §§ 111, 143; Joint Stock Companies Ordinance (Ceylon) 1861 § 102, 107 (11); See also under "Registered Companies," Ch. V. *infra*.

Article 57.

Dissolution of corporation, and its effect.

A corporation is dissolved by the authority, express or implied, of the Crown. Upon such dissolution, the corporation ceases to be a juristic person and all its rights and obligations are extinguished.

Article 58.

Mode of dissolution.

A corporation may be dissolved

(*a*) by legislative enactment;

(*b*) in the case of a corporation created by charter or letters patent,—by revocation of the charter or letters patent;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*c*) by the unanimous resolution of a corporation, ratified by the State;

(*d*) in the case of a chartered corporation, by the surrender duly enrolled of the charter;

(*e*) by the natural death of all the members of the corporation;

(*f*) by the loss of any integral part of it without power of renewal; or

(*g*) in the case of a registered company, by an order of Court or other statutory formality.

Article 59.

Compulsory dissolution.

A corporation may without the consent of its members be dissolved by legislative enactment or revocation of charter or of letters patent,

(*a*) when the corporation violates the conditions under which permission was granted for its creation;

(*b*) when it abuses the powers vested in it;

(*c*) when it carries on undertakings not within the scope of its object; or

(*d*) when it does acts which imperil the public weal.

For comment on Articles 57 to 59 see under "Dissolution of Corporation," pages 78 to 80.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 60.

Devolution of property on dissolution of corporation.

Upon the dissolution of a corporation its property devolves on the persons designated by the instruments of its incorporation.

Failing such designation, the lands and other real property devolve on the person, if any, who granted them to the corporation or on his heirs, and the personal property on the Crown.

Failing such grantor or heirs,

(*a*) the real property of a corporation, which has not for its object the acquisition of gain may be assigned by the unanimous resolution of a general meeting and with the permission of the Crown to a public purpose as near as possible to the object of the corporation;

(*b*) the real property of a corporation, which has for its object the acquisition of gain, passes in equal shares to those corporators who are alive at the time of the dissolution.

Comment.

Escheat.

The reversion of the lands of a dissolved corporation to the donor or his heirs instead of to the Crown is an exception to the law of Escheat. This is a species of reversion, the Crown or lord of the fee, from whom or from whose ancestor the estate was originally derived, taking it as *ultimus hæres* upon the failure, natural or legal, of the intestate tenant's family.

"Escheat," says Coke, "is derived from the French word *eschoir* which signifies to happen, because it falls to the lord from an event and from an unforeseen circumstance" (Co. Litt. 93). "Those things are commonly called escheats which revert to the Exchequer from a failure of issue in those who hold of the King, when there does not exist any heir by consanguinity" (ibid. 13).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Exception in the case of a corporation, acc. to Blackstone.

"Before I conclude this head of escheat," says Blackstone (II. 256) "I must mention one singular instance in which lands held in fee simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee simple absolute. But the law, we are told, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations or alienations of lands by a vassal to be holden as of himself; till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1, to which this very singular instance in some degree remains an exception."

Blackstone's opinion is founded upon that of Coke (Litt. 13 b).

Acc. to Coke

"And it is to be well observed that our author saith if he hath no heire, etc., the lands shall escheate. In which words is implyed a diversity (as to escheate) betweene fee simple absolute, which a natural body hath, and fee simple absolute, which a body politique or incorporate hath. For if land holden of J. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheate. And so if land be given in fee simple to a deane and chapter, or to a maior and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have againe the land, and not the lord by escheate. And the reason and cause of this diversity is, for that in the case of a body politique or incorporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheate."

Personal property of dissolved corporation vests in Crown as *bona vacantia*.

As to the personal property of a corporation, on its dissolution the property passes to the Crown as *bona vacantia*. Whether choses in action are included in the term "personal property" is doubtful. In the case of *In re Higginson and Dean*, 1899, 1 Q. B. 325, a trading firm (Higginson and Dean) became bankrupt and a corporation created by statute (the Royal Bank of Liverpool) proved a bankruptcy with other creditors and was afterwards dissolved by order of Court under the Companies Acts. It was then discovered that the bankrupts had been entitled to certain railway shares, and the official receiver recovered their value and held the proceeds as trustee in bankruptcy. Another creditor moved to expunge the proof of the dissolved corporation, claiming that those proceeds were divisible among himself and the other still existing creditors. The County Court Judge made an order expunging the proof. On appeal by the Attorney-General on behalf of the Treasury, it was held that on the dissolution of the corporation the proceeds of the shares in the hands of the official receiver as trustee in bankruptcy had passed to the Crown as *bona vacantia* and the Crown was entitled to the amount.

In re Higginson and Dean.

"From the time of Lord Thurlow's decision in *Middleton* v. *Spicer*, in 1873, 1 Bro. C.C. 201," said Wright J., "it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of *bona vacantia;* and during all the period which has elapsed since that decision no exception from the rule seems to have been established. . . . . Nor, I think, is there any authority for holding that the Crown is in any worse position in relation to chattels held in trust for a corporation which has become dissolved than in relation to chattels held in trust for a natural person deceased. The same principle seems applicable in both cases. The Courts will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession, or otherwise. The text-books, such as those of Kyd, Grant and Lewin, agree, though in some cases with an "it seems"

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

that the Crown is entitled to the personal estate of a dissolved corporation aggregate. Nor is there any authority for holding that the creditors, other than the dissolved Bank, have any *jus accrescendi*, or of survivorship, entitling them to the share of the creditor who has become extinct without successor or representative. . . . . The difficulty is, that, as it is argued, on the dissolution of the Bank, not only did its artificial personality come to an end, but the debt due to it from the bankrupts lapsed or was extinguished. The existence of a debt, it is said, imports the existence of two parties to the obligation, and the obligation of the debtors to the Bank is not, upon the dissolution of the Bank, converted into an obligation of the debtors to the Crown. The Bank, therefore, has ceased to be a creditor, and the Crown has not become a creditor; the ground of the proof has gone as completely as if it had never existed, and the proof ought to be expunged, with the consequence that the official receiver is now a trustee of the fund for the remaining creditors, as if there never had been any others. . . . . Even if it be the law that a debt due to a corporation aggregate is extinguished by the dissolution of the corporation, I do not think that it follows that the Crown's claim fails in this case. The original assignees in the bankruptcy, and their successors in office, have from the time of bankruptcy been entitled to the old railway shares in trust for such creditors as had been or might be admitted to proof. The Bank immediately before its dissolution was not a mere creditor. It was a creditor whose claim was in proof. Its claim was no longer a mere right of action for a debt. It could no longer have maintained an action as for a debt. The debt had been, at any rate provisionally, merged in an equitable execution and the right to sue had been replaced, not, indeed, by any particular interest in any specific chattels, but by a right to have all the assets, as and when realized, applied *pro ratâ* for the bank's benefit with the other creditors. This right, as it seems to me, existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property, which devolved upon the Crown as *bona vacantia* as completely as any other equitable interest. Alternatively, the case may be stated in a different way, but with the same result. From the time of the bankruptcy a title

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to the shares has been vested in the bankrupts' assignees and their successors, in trust down to 1887 for the Bank and the other creditors. In 1887 the Bank disappeared. The assignees thereupon did not cease to hold the title to the shares, nor did they cease to hold it as trustees. Their title did not depend upon the continued existence of any particular debt or of any particular creditors, nor did it become extinct upon the extinction of particular creditors. It continued to be a title upon trust, and the Crown takes the place of the extinct *cestui que* trust. Suppose all the creditors had been corporations aggregate, and all had become dissolved, it seems clear that the assignees could not have taken the property as their own as against the Crown."

Article 61.

Escheat to the Crown.

If the landed and other real property of the corporation is not disposed of under the last Article, it passes to the Crown.

Article 62.

Cy-pres.

The Crown shall as far as possible employ the property in a manner conformable to the object of the corporation.

Comment.

This is the doctrine of *Cy-pres* according to which, in cases where the charitable purpose of the founder cannot be carried into effect, the Court of Chancery in England (and in Ceylon the District Court), as representing the Sovereign in his character of *parens patriæ*, and guardian of public charities, lunatics and others incompetent to act for themselves, will on the application of the Attorney General or an interested person execute the purpose as nearly as it can *(cy-pres)*, applying the funds to some other purpose as near the original as possible (Story's Eq. Jur. §§ 1154, 1190; Br. and H. I. 580 n).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The doctrine was borrowed from the Roman law by which donations for public purposes were sustained and were applied, when illegal, *cy-pres* for other purposes (Dig. 33. 2. 16. 17 *De Usu et Usufructu Legatorum;* Voet 33. 2. 4; Story's Eq. Jur. 1169-70).

As to the principles which govern the Courts in the application of this doctrine, see *Cherry* v. *Mott*, 1 My and Cr. 123; *Att. Genl.* v. *Ironmongers' Co.*, 2 Beav. 313, Cr. and Ph. 208. See further under Ch. VI. "Foundations," *infra*.

Article 63.

Liquidation.

When the property of the corporation does not pass to the Crown, a liquidation must take place.

Article 64.

Appointment of Liquidators.

Liquidators may be appointed by the regulations of the corporation or by a general meeting or by the District Court.

Article 65.

Duties of Liquidators.

The duties of liquidators are to wind up the business of the corporation, to recover debts, to convert into money the other property, to pay off creditors and to distribute the surplus among those who are entitled thereto.

Article 66.

Existence of corporation pending liquidation.

The corporation is deemed to continue in existence for the purposes of the liquidation, and for no other, until the liquidation is completed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Transactions of company in liquidation.

In the case of a registered company, the business of the company comes to an end except so far as may be necessary for the beneficial winding-up of the same, but the corporate state and all the corporate powers of the company continue until its affairs are wound up. The company exists for the purpose of being beneficially wound up and for no other. All transfers made after the commencement of the winding-up are void unless (in the case of a voluntary winding-up) they are made to or with the sanction of the liquidators, or unless (in the case of a winding-up by, or under the supervision of, the Court) the Court orders otherwise. Companies Act (England), 1862, §§ 95, 131, 153; Joint Stock Companies Ordinance (Ceylon), 1861, §§ 99, 105. Transactions in the ordinary course of the trade of a Company *bona fide* entered into *and completed* before the winding-up order will always, in the discretion given to the Court, be maintained; but where the transactions are incomplete at the time of the winding-up order and vest only in contract, the Court has no discretionary power to order the contract to be fulfilled, and the person with whom it was entered into, though he has paid his money, has only a general claim (*pari passu* with other creditors of the Company) for damages in respect of the breach of contract. *In re Wiltshire Iron Co. ex parte* Pearson, L. R. 3 Ch. App. 443.

Article 67.

Unincorporate association, legal status of.

The provisions regarding partnership are applicable to an association which is not a corporation.

For a juristic act done to a third person in the name of such an association the doer is himself responsible: if the doers are more than one, they are jointly and severally responsible.

See pp. 40-41 *supra* and p. 89, and Book II., "Law of Obligations," Title, "Partnership."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CHAPTER V.—REGISTERED COMPANIES.

Origin of Joint Stock Companies.

The vast proportions and wide ramifications of Joint Stock Companies are among the most striking features of modern industrial life. A trading association was at best only a partnership, and between large partnerships and small partnerships there was no legal difference whatever. Each of the members was responsible for all the debts of the association, and all the members had to unite in instituting or defending any process of law. The inconvenience of such disabilities increased with the growth of trade. On the other hand, if the society applied to the Crown for a charter and succeeded, it became a corporation and the members were rendered irresponsible for its debts. What was wanted for trade was a society which might sue and be sued like a corporation, while its members remained personally liable for its debts. These conditions were fulfilled by Joint Stock Companies.

Co-operative principle.

Joint Stock enterprise derives its vitality from the co-operative principle, by which a multitude of small investors create a fund to be used in furtherance of some commercial undertaking for the common benefit of all. The natural growth and expansion of the principle was checked by the great risks attaching to unlimited liability. The shareholders delegate the management to a board of directors and may easily find themselves committed by the fraud or folly of the directors to engagements which meant ruin. Failures like those of Overend and Gurney and of the Glasgow Bank caused wide-spread misery and alarm.

Limited liability.

It was not until limited liability had been grafted on the stock of the co-operative system that the potency of this principle of industrial co-operation became apparent. We owe the adoption of the limited liability principle to the clear-sightedness of Lord Sherbrooke, then Robert Lowe, and to the vigorous advocacy of Lord Bramwell. It was Lord Bramwell that made the principle a feasible one. The practical difficulty was how to bring home to persons dealing with the company that the liability of the shareholders was limited. It was solved by Lord Bramwell's happy suggestion that the company should add the word "Limited" to its name,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

painting it up on its premises and using it on all its documents. "Write it on my tombstone," Lord Bramwell said humorously to a friend.

Company Law in England.

Joint Stock Companies are governed in England by the Acts of Parliament now known as the Companies Acts, 1862-1907. The chief of these are

1. The Companies Act, 1862 (25 & 26 Vict. cap. 89).
2. Do 1867 (30 & 31 Vict. cap. 131).
3. The Joint Stock Companies Arrangement Act, 1870 (33 and 34 Vict. cap. 104).
4. The Companies Act, 1877 (40 & 41 Vict. cap. 26).
5. Do 1879 (42 & 43 Vict. cap. 76).
6. Do 1880 (43 Vict. cap. 19).
7. Do 1883 (46 & 47 Vict. cap. 28).
8. The Companies (Colonial Registers) Act, 1883 (46 and 47 Vict. cap. 30).
9. The Companies Act, 1886 (49 Vict. cap. 23), applicable to Scotland only.
10. The Companies (Memorandum of Association) Act, 1890 (53 and 54 Vict. cap. 62).
11. The Companies (Winding-up) Act, 1890 (53 & 54 Vict. cap. 63).
12. The Companies (Winding-up) Act, 1893 (56 & 57 Vict. cap. 58).
13. The Directors' Liability Act, 1890 (53 and 54 Vict. cap. 64).
14. The Companies Act, 1898 (61 & 62 Vict. cap. 26).
15. Do 1900 (63 & 64 Vict. cap. 48).
16. Do 1907 (7 Edw. 7, cap. 50).

There are other statutes which affect the provisions of the above Acts.—*viz:*

Companies Seals Acts, 1864 (27 Vict. cap. 19).

Joint Stock Banking Companies Shares Purchase Act (30 Vict. cap. 29).

Life Assurance Companies Act, 1870 (33 & 34 Vict. cap. 61).

Life Assurance Companies Act, 1871 (34 & 35 Vict. cap. 58).

Life Assurance Companies Act, 1872 (35 & 36 Vict. cap. 41).

The above is not a complete list and it would be almost impossible to enumerate the Acts of Parliament which bear on the subject, for there are provisions which relate to Companies in Acts on quite different subjects, *e.g.* the Larceny Act, the Stamp Act, the Judicature Act.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

In Ceylon, how far English law applicable.

By the Ordinance No. 22 of 1866, the English law of corporations and joint stock companies was introduced into Ceylon: "The law to be administered in this Island on all questions or issues which may have to be decided in this Colony in respect of the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, shall be the same as would be administered in England at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted." Accordingly in Ceylon the English Acts apply so far as they are not inconsistent with local legislation, so far also (I presume it must be added) as local circumstances render the application of the English law possible. How far individual cases satisfy this condition, will have to be decided by the Courts in each case as the question arises.

Local Ordinances.

The principal Ceylon Act is the Joint Stock Companies Ordinance 4 of 1861, which has been amended by Ordinances 9 of 1867, 4 of 1888, 6 of 1888, 3 of 1893, 2 of 1897, 13 of 1905 § 5, and 17 of 1907. The principal Ordinance is based on the repealed English Act of 1856 (19 and 20 Vict. cap. 47), and excluded from its operation (§3) banking and insurance companies which are not excluded by the English Acts. By Ordinance 2 of 1897 the incorporation of banking companies was provided for, and by Ordinance 16 of 1891 that of Mutual Provident Societies, but insurance companies remain exempt.

Registrar of Companies.

The Registrar of Joint Stock Companies was from 1861 to 1906 the Registrar of the Supreme Court, but from 1st January, 1907, the office is vested in the Registrar-General.

The Articles in this Chapter do not profess to set forth fully the voluminous law of Companies. A mere skeleton of the Company law, an abstract of its principles and important features, is here given. To have done more was impossible without exceeding the just proportion and disturbing the natural connexion of subjects in this Digest. In order to determine any legal question relating to companies, it is indispensable to attend closely to the statutes by which they are governed. Reference should in every case be made to the local and English Acts and to such treatises as Lindley on Company Law and Buckley on the Com-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

panies Acts. I have inserted in an Appendix the local Ordinances for the benefit of those who desire detailed information as to the special provisions in force here.

Article 68.

Prohibition of partnership exceeding certain number.

An association, company or partnership, having for its object the acquisition of gain, and not incorporated by Royal charter or letters patent or by an Act of Parliament, must be registered, if it consists of more than 20 persons or, in the case of a banking company, if it consists of more than six persons.

Comment.

Ordinance 4 of 1861 § 6, as amended by Ordinance 9 of 1867 § 2; Ordinance 2 of 1897 § 3. The corresponding section of the English Act is § 4 of the Companies Act, 1862. The maximum number of persons who may without registration carry on business for gain is the same here as in England (20), but is different in the case of a banking company, six here to ten in England.

Reason for prohibition.

The object of the law forbidding persons in excess of the prescribed number to carry on business for gain without registration is "to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed" (*per* James, L. J., *Smith* v. *Anderson*, 15 Ch. Div. 273).

Consequences of non-registration.

Such an association is illegal for want of registration and cannot recover debts due to it, and each member is liable for the payment of the whole debts of the association and may be sued without the joinder in suit of any other member (Ordinance 4 of 1861 § 6, as amended by Ordinance 9 of 1867 § 2).

Article 69.

Mode of forming registered company.

Seven or more persons associated for any lawful purpose may, upon subscribing

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

their names to a memorandum of association and otherwise complying with the requirements of the law in respect of registration, be incorporated and registered as a company with or without limited liability.

Comment.

The last Article prescribed that an association of more than 20 persons or (in the case of a banking company) more than 6 persons must be registered. This Article prescribes that an association in order to be registered must have at least seven members. Ordinance 4 of 1861 § 5 and 2 of 1897 § 3, corresponding to the Companies Act, 1862 § 6.

Seven persons required to form a company.

This requirement is so strict that, if after registration the number of members should fall below that number and the company carries on business with the reduced number for six months after the number has been reduced, every person who is a member of the company during the time it so carries on business after such period of six months, is severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same without the joinder in the suit of any other member (Ordinance 4 of 1861 § 51; Companies Act, 1862 § 48). The reduction of the number to below seven is also a ground for the winding-up of the company by the Court, *ibid*, § 79 (3); Ordinance 4 of 1861 § 75 (3).

Carrying on business with less than seven persons.

There must be a minimum of seven members and each must have at least one share (*ibid*, § 10). But all the shares except six may be owned by a single individual and these six shares may be of little nominal value and may in fact be held in trust for the seventh member (though the trust cannot be entered in the register). See the decision of the House of Lords in *Salomon* v. *Salomon & Co.* 1897, A. C. 22, 45, reversing *Broderip* v. *Salomon*, 1895, 2 Ch. 323, and disposing of the supposed illegality of the so-called "one-man company." It was there held that the fact that six of the subscribers are mere dummies, clerks or nominees of the seventh did not affect the validity of the company.

"One man Company."

The word "person" in this Article includes a body corporate. A limited company may become a share-

Person.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

holder in another limited company if authorized by its own memorandum and articles of association to do so. *Barned's Banking Co., E. p. Contract Corporation*, 3 Ch. 105; *Royal Bank of India's Case*, 7 Eq. 91, 4 Ch. 252.

For Memorandum of Association see Art. 71, p. 95.

Insurance Companies.

Insurance companies are excluded from the operation of the Ceylon Registration Law (§ 3 of Ordinance 4 of 1861). Banking companies were also excluded, but are now provided for by Ordinance 2 of 1897.

Article 70.

Company with limited and unlimited liability.

A company may be formed on the principle

(*a*) of having no limit placed on the liability of its members, or

(*b*) of having their liability limited to the amount unpaid on their shares, or

(*c*) of having their liability limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of its being wound up.

In case (*a*) the company is called an unlimited company; in case (*b*) a company limited by shares; and in case (*c*) a company limited by guarantee.

Comment.

Ordinance 4 of 1861 § 7; Companies Act, 1862 §§ 7 to 10. The unlimited company is practically an extinct species: the company limited by shares has become the normal type and is incomparably the most important. The number of companies limited by shares registered in England from 1862 to 1905 was 85,447 against 1,787 companies limited by guarantee and 276 unlimited companies. In Ceylon there are hardly any companies of the two latter classes, and the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Legislature has not thought it worth while to take over the special provisions of the English Acts in regard to them.

Article 71.

Memorandum of Association.

The Memorandum of Association must contain the following particulars:—

(1) the name of the proposed company, with the addition of the word "Limited" in the case of a company limited by shares or by guarantee;

(2) the place in which the registered office of the company is to be established;

(3) the objects for which the company is to be established;

(4) the liability of the shareholders, whether limited or unlimited;

(5) the amount of the nominal capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

The Memorandum must be subscribed by not less than seven persons, and each subscriber must take not less than one share and must write opposite his name the number of shares which he takes.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Companies Act 1862 §§ 8 to 10; Ordinance 4 of 1861 § 7.

Memorandum of Association the Company's charter.

The five matters specified in this Article the Legislature has deemed of such intrinsic importance that it has required them to be set out in the company's Memorandum of Association. They are the essential conditions of incorporation, and as such they must not only be stated, but the policy of the Legislature has made them unalterable, with certain exceptions. The Memorandum of Association is the company's charter and defines the limitation of its powers and the destination of its capital (*per* Cairns, L.C., *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 668); it is the fundamental and (except in specified particulars) the unalterable law of the company (*per* Lord Selborne, L. R. 7 H. L. 693).

Name.

I. The Name is an essential feature of the company's existence. See Art. 31, pp. 45-6. By its registered name the company must sue and be sued and do all legal acts. The company cannot be registered under a name identical with that by which a subsisting company is already registered or so nearly resembling that name as to be calculated to deceive (Ordinance 4 of 1861 § 8 as amended by Ordinance 3 of 1893 § 4); in England, not unless the subsisting company is in course of dissolution and testifies its consent (Companies' Act 1862 § 20). The name cannot be changed except with the sanction of a special resolution and with the approval of the Governor or, in England, of the Board of Trade (Ordinance 4 of 1861 § 8 A; Companies' Act 1862 § 13).

"Limited."

The word "Limited" must be the last word in the name of the company, if its liability is limited. For the history of this requirement see p. 89 *supra*. The name with the word "Limited" should be painted up on the company's premises and used on all documents, under penalty of £5 a day on the defaulting company in the first case, and in the second case a penalty of £50 on the defaulting officer in addition to his personal liability to the holder of any bill of exchange, promissory note, cheque or order for goods or money, on which the name is not properly mentioned. Ordinance 4 of 1861 §§ 37, 38; Companies' Act, 1862 §§ 41, 42.

Place.

II. A Place is as essential as a name to the company (See Art. 54, p. 77 *supra*). The place where its registered office is, is its domicile, where notices are to be served

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

on it, where the various books required by the law are to be kept; in fact where it is to be found for every legal purpose. The memorandum of association should, in Ceylon, state the town in which the office is to be established (Ordinance 4 of 1861 § 7 (2)); in the United Kingdom, it should state whether the office is to be established in England, Scotland or Ireland (Companies' Act 1862, §§ 8 to 10; Companies Consolidation Act, 1908, §§ 3 to 5). The town may in Ceylon be changed by special resolution (Ordinance 17 of 1907 § 4); in the United Kingdom the place may be changed so long as it is not outside the area mentioned in the memorandum,—England, Scotland or Ireland, as the case may be.

Objects of the company.

III. The most important of the five conditions in the memorandum of association is the third, and its importance consists in this, that the Objects defined in the memorandum circumscribe the sphere of the company's activity. This principle, which is one of public policy and convenience, and is known as the "*ultra vires* doctrine", carries with it important consequences, because every act done or contract made by a company *ultra vires*, *i. e.* in excess of its powers, is absolutely null and void. (See Art. 30 and comment thereon, pp. 43-5.) The policy is a sound one. Shareholders contribute their money on the faith that it is to be employed in prosecuting certain objects, and it would be a violation of good faith if the company, *i. e.* the majority of shareholders, were to be allowed to divert it to something quite different. So strict is the rule that not even the consent of every individual shareholder can give validity to an *ultra vires* act.

Ultra Vires.

Statement of objects.

The memorandum should state the objects of the company with reasonable particularity and clearness. Where general words are used, the courts will consider in each case what the main object of the company really was and will construe the general words as limited by such main object. Where the main object is not clearly defined in the memorandum, the courts will look at the surrounding circumstances existing at the incorporation of the company, *e. g.* the original name and prospectus. In the case of the *German Date Coffee Co.* (20 Ch. D. 169, at p. 188), Lindley, L.J., said: "In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

unwary people. General words construed literally may mean anything, but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are."

Alteration of objects.

The consent of all the shareholders was till recently incompetent to alter the objects defined in the memorandum, as being part of the charter. The inconveniences attending this unalterability of the objects were, however, so sensibly felt that in 1890 the Companies' (Memorandum of Association) Alteration Act—the provisions of which are embodied in §§ 14 and 15 of the Ceylon Ordinance 3 of 1893, and are now replaced in the United Kingdom by § 9 of the Companies (Consolidation) Act, 1908—was passed, qualifying the prohibition against alteration. The Act enables a company to obtain the sanction of the court to an alteration of the objects in its memorandum, when it appears that the alteration is required for certain specified purposes, such as the carrying on of the company's business more economically or more efficiently. See Article 78 *infra*, p. 108.

Liability.

IV. Liability. See pp. 89, 96 *supra* under "Limited," and comment on Article 74 *infra*, p. 103.

Capital.

V. The Capital, which is required to be stated in the memorandum of association, is what is known as the nominal capital. This must be distinguished from the subscribed capital, which is the aggregate amount agreed to be paid by those who have taken shares in the company. For the nature of Shares see Article 82 *infra*, p. 116.

A company may increase its capital, consolidate it, subdivide it into shares of smaller amount, or convert paid-up shares into stock and for this purpose modify its memorandum of association. But a limited company cannot reduce its capital either by direct or indirect means without the sanction of the court. See Articles 94 to 99 *infra*, pp. 131 *et seq.*

Inviolability of Capital.

The Inviolability of the Capital is a condition of incorporation—the price of the privilege of trading with limited liability, and by no subterfuge will a company be allowed to evade this cardinal rule of policy, either by paying dividend out of the capital, or buying its own shares, or returning money to shareholders. But the prohibition against reduction means that the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

capital must not be reduced by the voluntary act of the company, not that a company's capital must be kept intact. It is embarked in the company's business and it must run the risks of such business. If part of it is lost, there is no obligation on the company to replace it and to cease paying dividends until such lost capital is repaid. The company may in such a case—and no course can be more beneficial to it—write off the lost capital and go on trading with the reduced amount. But for this purpose the sanction of the court must be obtained by petition. Article 99 *infra*.

Article 72.

Articles of Association.

(1) The Memorandum of Association may be accompanied by Articles of Association or regulations providing for the internal management of the company.

(2) The regulations may provide for the issue, transfer and forfeiture of shares, calls upon shares, the appointment and qualification of directors, their powers and proceedings, the general meeting of shareholders, votes, dividends, the keeping and audit of accounts, and other like matters.

(3) The regulations contained in the Table C of the Ordinance No. 4 of 1861, shall be deemed to be the regulations of the company, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations in the Table C.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Ordinance 4 of 1861, § 41 and Table C; Companies Act, 1856, § 9 and Table B; 1862, §§ 14 and 15 and Table A (revised 1906); Companies (Consolidation) Act, 1908, §§ 10, 11 and Table A. The provisions cited here and elsewhere of the English Acts do not always agree with the provisions of the local Ordinances. As to how far the English law is applicable, see p. 91 *supra*.

Internal management

In addition to the memorandum of association, the Legislature has provided for articles of association, which are the regulations for the internal management of the company, the terms of the partnership agreed upon by the shareholders among themselves. They regulate such matters as mentioned in para. 2 of the Article. In regard to these internal regulations the Legislature has left the company free to adopt whatever terms of association it chooses. It has furnished in the schedule to the Ordinance 4 of 1861, Table C—corresponding to the Companies Act, 1862, Table A (revised 1906), Companies (Consolidation) Act, 1908, Table A—a model or specimen set of regulations, but their adoption, wholly or in part, is optional; only if a company does not register articles of its own, these statutory regulations are to apply.

The articles may be changed, but they cannot (except as specially provided by law) modify or alter any condition in the memorandum nor go beyond the objects expressed or implied in the memorandum (see page 44 *supra*). For purposes of construction upon points which the statute does not require to be contained in the memorandum as the dominant instrument, the memorandum and articles as contemporaneous documents are to be read together, and the articles may serve to explain that which is ambiguous in the memorandum, or to supplement it as to that upon which it is silent (Buckley on the Companies Acts, 8th edition, p. 18).

Article 73.

Registration of memorandum and articles of association.

The memorandum of association and the articles of association, if any, shall be delivered to the Registrar of Joint Stock

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Companies with the prescribed stamps and fees. The Registrar shall, upon being satisfied that all the requirements of the law in respect of registration have been complied with, declare by endorsement on the memorandum of association the company to be incorporated, and register the memorandum so endorsed and the articles of association, and shall upon payment of the prescribed fee, issue a certificate of incorporation.

Comment.

Ordinance 4 of 1861, section 14, as amended by Ordinance 13 of 1905, § 5; Companies Act, 1856, § 12; 1862, § 17; Companies (Consolidation) Act, 1908, § 15.

Registrar.

The Registrar of the Supreme Court was, under the Ordinance 4 of 1861 § 4 (7), the Registrar of Joint Stock Companies until 1st January, 1907, from which date the Governor appointed the Registrar-General to be Registrar of Joint Stock Companies.

Procedure of registration.

The Ordinance 4 of 1861, § 14, as amended, prescribes the course to be followed by the Registrar. He should transmit the memorandum and articles to the Attorney-General and also publish them in the *Government Gazette* in three consecutive issues. After such publication, and if the Attorney-General certifies that there is no legal impediment to the incorporation, the Registrar is to declare the company to be incorporated by endorsement (in the form prescribed by Ordinance 4 of 1861 § 14, as amended by Ordinance 13 of 1905 § 5, see Appendix I) on the memorandum of association, and is to register it and the articles and, upon payment of the prescribed fee, issue a certificate of registration.

The English Acts do not provide for a declaration of incorporation by the Registrar, but require him to register the memorandum and articles and issue a certificate of incorporation. To this certificate the English law attributes the legal effects which the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Ceylon law attributes to the declaration of incorporation. See Article 74, para. 2 *infra;* Ordinance 4 of 1861, § 16; Companies Act, 1900, § 1; Companies (Consolidation) Act, 1908, §§ 16, 17.

Stamp duties and fees.

The stamp duty payable on the memorandum of association is Rs. 50, and on the articles Rs. 10 (Ordinance 4 of 61, § 13); in the United Kingdom, the same stamp as on a deed (Companies Act, 1862, §§ 11, 16; Companies Consolidation Act, 1908, §§ 6, 12). The fees payable for registration are specified in Table A of Ordinance 4 of 1861; and for the United Kingdom, in Tables B and C of the Companies Act, 1862, and Table B of the Companies (Consolidation) Act, 1908.

Article 74.

Effect of registration.

(1) Upon such registration, the subscribers to the memorandum of association, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum of association and declaration of incorporation, but with such pecuniary liability on the part of the members as is hereinafter mentioned.

(2) The declaration of incorporation shall be conclusive evidence that the requirements of the law in respect of incorporation have been complied with, and the date of such declaration shall be the date of the incorporation of the company.

Comment.

Ordinance 4 of 1861, § 16; Companies Act, 1856, § 13; 1862, § 18; 1900, § 1; Companies (Consolidation) Act, 1908, §§ 16, 17.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

When the company comes into existence.

Until the declaration of incorporation is registered or, in the United Kingdom, until the certificate of incorporation is made, the company has no existence. It has been likened to a babe unborn. No one can contract on its behalf or in its name. Hence binding contracts can only be entered into after its incorporation.

Contracts before incorporation.

Contracts previously entered into on its behalf are provisional and unless ratified by the company after incorporation do not bind the company.

Commencement of business.

As soon as the certificate of incorporation is issued, the company may issue certificates of shares (Ordinance 4 of 1861 § 18). In the United Kingdom, under the Companies Act, 1900, § 6, as amended by the Companies Act, 1907, §§ 1 and 51, now replaced by the Companies (Consolidation) Act, 1908, §§ 82, 87, a company is forbidden to commence business or exercise any borrowing power until certain conditions (as to allotment of shares, directors' qualifications, statutory declarations, &c.) are fulfilled, its contracts being in the meantime provisional.

When company dies.

The company, having come into existence as a corporate body, does not cease to exist until it is wound up under the provisions of §§ 67 *et seq.* of the Ordinance 4 of 1861, corresponding to §§ 74 *et seq.* of the Companies Act, 1862 and the Companies (Consolidation) Act, 1908, §§ 122 *et seq.* See Articles *infra*, 'Winding up' In the United Kingdom, it may also be dissolved by the Registrar as a defunct company under § 7, Companies Act, 1880, and § 26 Companies Act, 1900; Companies (Consolidation) Act, 1908, § 242.

Liability of members.

When a company is wound up, every present and past member is liable to contribute to the assets of the company up to the amount unpaid on his shares, with the following (among other) qualifications:—No past member shall be liable if he has ceased to be a member for a year before the winding up, nor shall he be liable for any debt contracted by the company after he has ceased to be a member, nor unless present members are unable to satisfy the contributions required. (Ordinance 4 of 1861 §§ 69-71; Companies Act, 1862, § 38; Companies Consolidation Act, 1908, § 123.)

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 75.

Memorandum and articles of association, how far binding on members and others.

(1) Upon registration

(*a*) the memorandum and articles of association shall bind the company and its members as if every member, his heirs, executors, and administrators, had expressly covenanted to observe all the provisions of the memorandum and articles subject to the law of registered companies; and

(*b*) every person dealing with the company is presumed to have read its memorandum and articles and to be acquainted with its constitution, and may assume against the company that all matters of internal management have been duly complied with.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

Comment.

Ordinance 4 of 1861, §§ 9, 12, 25; Companies Act, 1856, §§ 7, 10, 22; 1862, §§ 11, 16; Companies Consolidation Act, 1908, § 14.

In considering this section, the position of a member *qua* member of the company must be distinguished from the position of an outsider dealing with the company. A member dealing with the company otherwise than in his capacity of member, is for this purpose deemed an outsider.

How far binding on members.

The contract contained in the memorandum and articles of association is a contract between the members themselves, not between the members and the company. *Automatic Self-Cleansing*, &c., *Co.*, v. *Cunningham* (1906), 2 Ch. 34, at p. 44; *Eley* v. *Positive Government*, &c., *Co.*, L.R., 1 Ex. D. 20, 88. The contract defines the liabilities of holders of shares;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

it is one of the original incidents of each share, the share being not a sum of money, but an interest in the assets of the company measured by a sum of money and made up of the various rights contained in the memorandum and articles. *Borland's Trustee* v. *Steel Bros.* (1901) 1 Ch. 279, 288. The contract under which a person acquires the bundle of rights, as it has been called, which go to make up his share, is his contract of membership. The articles of association may be altered by special resolution. Consequently a member's rights, so far as they are only contained in the articles of association, are alterable. See Art. 79, p. 110 *infra*.

On non-members.

Non-members of the company are in a different position; persons who are members but are not dealing with the company with reference to their rights as shareholders, being deemed for this purpose non-members. In no sense can the articles ever constitute a contract with them. The memorandum and articles being public documents after registration, any person may inspect them on payment of the prescribed fee. Ord. 4 of 1861, § 4 (5); Comp. Act, 1862, § 174 (5); Comp. (Consol.) Act, 1908, § 243 (6). They must look at the memorandum and articles to see whether the company is entitled to deal with them in the way it proposes to do. *County of Gloucester Bank* v. *Rudry Merthyr, &c., Co.*, (1895) 1 Ch. 629, 633. Further, if the articles say that a certain class of work shall receive a certain remuneration, a court may, in the absence of express agreement, infer a contract of service on the terms set out in the articles of association. *Salton* v. *New Beeston* (1899) 1 Ch. 775, 778. Take, for example, the case of a director where he sues for fees. The articles usually provide that each director shall receive a certain sum, and, in the absence of agreement to the contrary, the court will usually infer that a director agreed to serve for such sum. As has been said: "The articles do not themselves form a contract, but from them you get the terms upon which the directors are serving." *Swabey* v. *Port Darwin*, 1 Meg. 385, cited by Stirling, J., in *Isaacs' Case*, (1892) 2 Ch. 158.

Presumption *omnia rite esse facta.*

Although persons dealing with a company are bound to look at the memorandum and articles to see whether the company has power to do the thing in question, yet if the company has power to do a thing in a particular way, such persons can assume that it was done in that way, unless of course they know it

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

was not so done. *Royal British Bank* v. *Turquand*, 6 E. and B. 327; *County of Gloucester Bank* v. *Rudry Merthyr, &c., Co.*, (1895) 1 Ch. 629. And similarly where a person deals with persons who have been allowed by the company to act as directors, he need not pause to inquire whether they have been duly elected. *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869; *Duck* v. *Tower Galvanizing Co.*, (1901) 2 K. B. 314. See also Companies Act, 1862, § 67; Companies (Consolidation) Act, 1908, § 71.

Article 76.

Restriction on alteration of memorandum of association.

A company may not alter the conditions contained in its memorandum of association except in the cases and in the mode and to the extent for which express provision is made in the law of registered companies.

Comment.

The memorandum of association is the company's charter, it is the fundamental and (except in specified particulars) the unalterable law of the company: *per* Lord Selborne, *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 693. See further at p. 96 *supra*.

Article 77.

Name of company, and change of name.

Change when compulsory;

(1) A company may not be registered under a name identical with that by which a company in existence is already registered or so nearly resembling that name as to be calculated to deceive; and the first mentioned company shall, if registered by such a name, change it with the sanction of the Governor.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(2) A company may change its name by a special resolution with the sanction of the Governor. When optional.

(3) When a company changes its name, the new name shall be registered in place of the former name, and a certificate of incorporation altered accordingly shall be issued by the registrar. Registration of change.

(4) No such change of name shall affect the rights or obligations of the company, or render defective any legal proceedings instituted by or against the company; and any legal proceedings that might have been instituted or commenced against it by the former name may be continued or commenced against it by the new name. Effect of change.

Comment.

See pages 45, 46, 96 *supra*, 'Name.' Ordinance 4 of 1861, §§ 8 and 8 A; Companies Act, 1856, § 6; Companies Act, 1862, §§ 13 and 20; Companies (Consolidation) Act, 1908, § 8.

In the United Kingdom, since the Act of 1862, the name of a subsisting company may be assumed by a new company with the sanction of the Board of Trade, if the subsisting company is in course of dissolution and gives its consent. The change of a registered name calculated to deceive is compulsory in Ceylon: '*Shall*' against '*may*' in the English Act.

For 'special resolution' see Ordinance 4 of 1861 § 47 and Article *infra*, 'special resolution'.

The change of name is not complete until it is registered and the certificate of incorporation altered to meet the circumstances of the case is issued. Till then the corporation does not exist by its new name. When change of name complete.

Where a company is registered under a name which is calculated to deceive, the court will restrain it When injunction granted.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Name calculated to deceive.

from using such name. *North Cheshire* and *Manchester Brewery Co.* v. *Manchester Brewery Co.*, 1899, A. C. 83. An injunction will also be granted against the signatories to the memorandum where it can be shown that the company has been formed with the fraudulent intention of annexing the benefit of some other company's name. *Société Panhard et Levassor* v. *Panhard Levassor Co.*, 1901, 2 Ch. 513. The jurisdiction rests either upon fraud or upon property: not that there is property in the name, but that the use of a name in which another carries on business will deceive and will affect property by diverting customers to the person taking the name. Where this is not the case, there is no jurisdiction. *Street* v. *Union Bank of Spain*, 30 Ch. D. 156; *Day* v. *Brownrigg*, 10 Ch. Div. 294.

True name.

If the name be not a fancy name but the correct statement of a fact, the putting forth of such a statement does not become actionable by the fact that some persons may misapprehend it. *Turton* v. *Turton*, 42 Ch. Div. 128, 148. It must be shown not that some persons may be, but that persons will be or have been, deceived. If this be shown, then there lies a fallacy in saying that the use of the name conveys a simple truth. The very value to the defendant of the name then lies in its duplicity. The name or statement of fact may in its primary sense be strictly true, but may in its secondary sense convey an untruth, as where 'camel-hair belting' has come to mean A's manufacture of that article. Then the use of the words by B conveys not only the primary meaning, which, if the article is made of camel's hair, is true, but the secondary meaning which, if the article is not made by A, is untrue. *Reddaway* v. *Banham*, 1896, A. C. 199.

Article 78.

Change of objects.

(1) The object of a company stated in its memorandum of association may be altered by a special resolution confirmed by the District Court.

Order of court.

(2) The confirmation of the resolution may be in whole or in part; and before the confirmation is made the court must be satisfied—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(i) that due notice has been given to all persons interested (unless notice be dispensed with by the court in the case of any special person or persons for special reasons) and that the consent has been obtained or the interests safeguarded of those who object to the alteration; Notice to interested parties.

(ii) that the alteration of the objects is required in order to enable the company Reasons or order.

(*a*) to carry on its business more economically or more efficiently, or

(*b*) to attain its main purpose by new or improved means, or

(*c*) to enlarge or change the local area of its operations, or

(*d*) to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company, or

(*e*) to restrict or abandon any of the objects specified in the memorandum of association.

(3) A copy of the order of court and of the memorandum of association altered in terms of the order shall, within fifteen days from the date of the order, be delivered by the company to the registrar to be registered Registration of order.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

by him; in default of such delivery, the company shall be liable to a penalty of one hundred rupees for every day during which it is in default.

Comment.

Ordinance 3 of 1893 §§ 14, 15; Companies (Memorandum of Association) Act, 1890, §§ 1, 2; Comp. (Consolidation) Act, 1908, § 9.

See pages 97-8 *supra* for the policy of the law and the reason for this provision. The Ordinance does not confer on either the company or the court a general power of alteration. The proposed alteration must be brought within one or more of the subsections (*a*) to (*e*); the authority is confined to the definite matters therein mentioned. *Government Stock Investment Co.* (No. 2), 1892, 1 Ch. 597, 603; *ibid.* (No. 1) 1891, 1 Ch. 649.

Article 79.

Alteration of articles of association.

(1) The articles of association may be altered or added to by a special resolution of the company, subject to the provisions of the law of registered companies and the conditions of the memorandum of association.

(2) Any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

Effect on members' rights.

(3) The power of altering articles under this section extends to altering them with retrospective effect or to the detriment of the rights of particular members and without their consent, provided that the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

alteration is made in the manner required by law and *bona fide* for the benefit of the company as a whole.

Comment.

Ordinance 4 of 1861 § 46; Comp. Act, 1856, § 33; Comp. Act, 1862, § 50; Comp. (Consol.) Act, 1908, § 13.

Must not be *ultra vires*.

The permanence of the general constitution and frame of the company is secured by the provisions relating to the memorandum of association. The power of altering the articles by a special resolution cannot be extended so as to authorize an alteration in the memorandum by the introduction into the article of a clause so providing. Such a clause is contrary to the statute and is wholly nugatory and void. See p. 44 *supra*. So, on the other hand, the power cannot be rejected by the company. A company cannot contract itself out of the section and deprive itself of the power of altering its articles. *Walker* v. *London Tramways Co.* 12 C. D. 705; *Punt* v. *Symons*, 1903, 2 Ch. 506.

Power to alter cannot be renounced

Members' rights.

The exercise of the power in the manner stated in para. 3 of the Article is an exception to the general principle which requires the consent of every member whose rights may be effected by the resolution. See Article 48, p. 74 *supra*.

Andrews v. *Gas Meter Co.*

In *Andrews* v. *Gas Meter Co.*, 1897, 1 Ch. 361, the question was whether a company with no authority either in the memorandum or articles to create any preference between different classes of shares might, by special resolution, alter its articles so as to authorize the directors to issue preference shares by way of increase of capital. The resolution was held to be valid and effectual. It was laid down that, although by § 8 of the Companies Act, 1862, the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles rather than by the memorandum and can therefore, at all events unless provided for by the memorandum, be determined by the company from time to time by special resolution.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Allen v. Gold Reefs.

In *Allen* v. *Gold Reefs*, 1900, 1 Ch. 656, the question was whether, as against the executors of a holder of fully paid shares who was at his death indebted to the company, the company could by special resolution confer upon itself a lien over fully paid shares for the debts and liabilities of holders of such shares. The argument for the deceased shareholder's executors was that a special resolution, though it may alter the articles, cannot retrospectively affect existing rights and that it cannot validly operate upon the general body of shareholders unequally. But the majority of the court held that the resolution was passed *bona fide* in the interests of the company and bound all the shareholders without exception and was effective to impose a lien on the deceased's fully paid shares.

Limitation on power of alteration.

From these cases may be deduced that there is a limitation on the power of alteration conferred by the statute, and that this limitation is to be found in the principle that the power must be exercised *bona fide* for the benefit of the whole company and in the manner required by the statute.

Effect of alteration on contract previously made by a stranger.

The alteration will not invalidate any contract entered into or act done by a stranger before such alteration, even though the power to do that particular thing is taken away by the alteration. *Punt* v. *Symons* (1903) 1 Ch. 506, where Byrne, J., refused to restrain a company from so altering its articles as to take away a power conferred by the articles on a certain person. In this case his lordship said it was not necessary to decide what effect such alteration would have on such person's power.

In *Baily* v. *British Equitable Assurance Co.*, 1904, 1 Ch. 374, where an article had been altered in such a way that certain profits were to be distributed in a way which the plaintiff alleged infringed his rights under a contract, the Court of Appeal made a declaration that the company ought to continue to distribute the profits in the way they had done before the alteration.

Article 80.

Promoters.

The promoters of a company stand in a fiduciary relationship to it and may not make, either directly or indirectly, any profit at the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

expense of the company without the knowledge and consent of the company.

Comment.

What is a promoter?

The term "promoters" is applied to the persons who originate the company. To define the term or to determine the moment when a man becomes or ceases to be a promoter, is not easy. Cockburn, C. J., defined a promoter as one who "undertakes to form a company with reference to a given project and to set it going, and takes the necessary steps to accomplish that purpose." (*Twycross* v. *Grant*, 2 C. P. D. 541.) According to Bowen, L. J., the term "is a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence" (*Whaley Bridge Co.*, v. *Green*, 5 Q.B.D. 111).

His duties and liabilities.

Whether what a person has done towards this end constitutes him a "promoter" or not, is a question of fact, but once he is held to be a promoter, he is clothed by equity with a fiduciary relation towards the company which he has been instrumental in creating. As to the duties and liabilities of promoters, see *New Sombrero Co.* v. *Erlanger*, 3 App. Cas. 1218; *Gluckstein* v. *Barnes*, 1900, A. C. 240. Promoters, as Lord Cairns said in the former case, "have in their hands the creation and moulding of the company; they have the power of defining how and when and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation." Such a control over the destinies of the company involves correlative obligations towards it, and one of these obligations is that the promoter must not take advantage of the company's helplessness. A promoter may sell his property to the company, but he must make full and fair disclosure of his interest in order that the company may determine whether it will or will not authorize its trustee or agent to make a profit out of the sale. It is not a sufficient disclosure in such a case for the promoter merely to refer in the prospectus to a contract which, if read by the shareholders, would inform them of his interest. They are under no obligation to inquire. It is for the promoter to bring home notice, not constructive but actual, to the shareholders.

per Lord Cairns, *New Sombrero* v. *Erlanger*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Disclosure to the directors of the company who are themselves the promoters or the mere nominees of the promoters, is not disclosure at all.

Article 81.

Prospectus.

Every prospectus, notice or other invitation offering to the public for subscription or purchase any shares or debentures of a company shall be strictly accurate in its statements, shall not omit any fact which, if disclosed, would falsify any of the statements and shall duly specify the particulars prescribed by the law.

Comment.

Ordinance 3 of 1893, § 12; Companies Act, 1867, § 38; 1900, §§ 10, 30; 1907, § 2; Companies Consol. Act, 1908, §§ 81, 84.

General requirements.

The promoters usually prepare before registration a prospectus to induce other persons to take shares or otherwise assist the company with money. The prospectus is finally settled and put forward by the directors after registration. The prospectus being an invitation to the public to take shares on the faith of the statements therein contained, and being thus the basis of the agreement to take shares, there rests on those responsible for its issue an obligation to act with the most perfect good faith, *uberrima fides* (*Derry* v. *Peek*, 14 App. Cas. 376, *per* Lord Herschell). Directors must be perfectly candid with the public; they must not only state what they do state with strict and scrupulous accuracy, but they must not omit any fact which, if disclosed, would falsify the statements made.

per Lord Herschell, *Derry* v. *Peek*.

Special requirements in Ceylon;

In addition to this general obligation of directors, the Legislature has engrafted special requirements. By the Ordinance 3 of 1893 § 12, corresponding to the Companies Act, 1867, § 38, the prospectus is required to specify the dates and names of the parties to any contract entered into before the issue of the prospectus;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

In England.

otherwise it was deemed fraudulent. The Companies Act, 1900, made still more stringent provisions. Under § 10 of that Act as amended by § 2 of the Companies Act, 1907, and now replaced by the Companies (Consolidation) Act, 1908, § 81, numerous other particulars must be stated in the prospectus, such as the contents of the memorandum of association, with the names of the signatories, the share qualification (if any) of the directors, the minimum subscription on which the directors may proceed to allotment, the shares and debentures issued otherwise than for cash, the names and addresses of the vendors of property to the company, the amount paid for underwriting the company, the amount of preliminary expenses, of promotion money (if any), and the interest (if any) of every director in the promotion or in property to be acquired by the company. Neglect of this statutory duty of disclosure exposes the directors to personal liability.

Directors' liability for false statements.

For false or fraudulent statements, as distinguished from non-disclosure, in a prospectus, directors are liable in an action of deceit or under the Directors' Liability Act, 1890 (now replaced by § 84 of the Companies Consol. Act, 1908, § 84). This Act of 1890 was passed to meet the decision of the House of Lords in *Peek* v. *Derry* (12 App. Cas. 133), that a director could not be made liable in an action of deceit for an untrue statement in a prospectus, unless the plaintiff could prove that the director had made the untrue statement fraudulently. Under this Act, when once a prospectus is proved to contain a material statement of fact which is untrue, the persons who are responsible for the prospectus are liable to pay compensation to any one who has subscribed on the faith of the prospectus, unless they can prove they had reasonable ground to believe, and did in fact believe, the statement to be true.

Obligation of company where no prospectus issued.

A company which does not issue a prospectus must, before allotting any shares or debentures, file with the registrar a statement in lieu of the prospectus, signed by a director or proposed director or his agent and giving similar information to what is registered in the prospectus. Comp. Act, 1907, § 1; Comp. Consol. Act, 1908, § 82.

Rescission of contract.

A company may obtain a rescission of a contract on the ground that the promoter did not disclose the fact that he was making a profit by selling his own property. But except in the case of fraud, the rescis-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

sion must be claimed in time to place the vendor in the position he was in at the time of the sale. *Lagunas Nitrate Co.*, v. *Lagunas Syndicate*, 1899, 2 Ch. 392, 423. Where rescission is impossible, damages may be obtained, measured by the amount of profit made by the promoters. (*Leeds and Hanley Theatre of Varieties*, 1902, 2 Ch. 809). An executed agreement will not be rescinded in the absence of fraud (*Seddon* v. *N. E. Salt Co.*, 1905, 1 Ch. 326). See *infra.*, pp. 127 *et seq.*

Article 82.

Nature of Shares.

(1) A share in a company represents the fraction in which the shareholder is entitled to the assets, and liable to the burdens, of the company.

(2) A share in a company is movable property, and not of the nature of immovable property.

(3) Each share in a company having a share capital must be distinguished by its appropriate number.

Comment.

Ordinance 4 of 1861 § 18; Companies Act, 1856, § 15; 1862, § 22; Companies Consolidation Act, 1908, § 22.

What is a Share?

A share is an aliquot part of a company's nominal capital. The amount may be anything from one shilling to £ 1,000. The tendency of late years has been to keep the denomination low and so to appeal to a wider public. The usual amount is £ 1. The share, however, in its legal sense, is not the sum of money, but an interest in the company measured by the sum of money and made up of the various rights and liabilities contained in the memorandum and articles of association. *Borland* v. *Steel Brothers*, 1901, 1 Ch. 279.

Kinds of Shares.

Shares are of various kinds—ordinary, preference, founders' and management. Into what classes of shares the original capital of the company shall be divided, what shall be the amount of each class, and their

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

respective rights, privileges and priorities, are matters for the consideration of the promoters of the company, and must depend on its special circumstances and requirements.

Preference and Founders' shares.

A company may issue Preference shares if there is no mention of them in the memorandum of association, but it is as a rule desirable that the memorandum should define the rights of preference shareholders as their rights cannot then be altered or infringed. The preference given may be as to dividends only, or as to dividends and capital. The dividend may again be payable out of the year's profits only, or cumulative. The question for the company is, what must be offered to attract investors? Founders' shares (which originated with private companies) are shares which usually take the whole or half of the profits after payment of a dividend of 7 or 10 per cent. to the ordinary shareholders.

Article 83.

Certificate of shares.

A certificate under the common seal of the company specifying any shares held by any member shall be *prima facie* evidence of the title of the member to the shares.

Comment.

Ordinance 4 of 1861 § 24; Companies Act, 1856, § 20, 1862, § 31; Companies Consolidation Act, 1908, § 23.

A member's right to require a certificate, on payment of one shilling, is provided for by Table C, Art. 8, of Ord. 4 of 1861, Table B, Art. 8, of Companies Act, 1856, Table A, Art. 2, of Companies Act, 1862, and without payment, by Table A, Art. 6, of Companies (Consolidation) Act, 1908.

Payment for shares.

The Legislature has allowed companies to trade with limited liability, but the price of the privilege is that the limited capital to which alone the creditors can look shall at least be a reality. It is therefore *ultra vires* for a limited company to issue shares at a discount. The Companies Act, 1867, § 25, required shares

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to be paid for in cash, but this was found too stringent and has been repealed, and shares may now be paid for in any adequate consideration, provided that the consideration, if other than cash, is stated in a return to be filed by the company with the registrar. Companies Act, 1900, § 7; Companies (Consolidation) Act, 1908, § 88.

Article 84.

Transfer of shares.

The transfer of any share shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in respect thereof in the register of members.

Comment.

Ordinance 4 of 1861, § 23; Companies Act, 1856, § 20; 1862, Table A, Arts. 8 & 9; Companies Consol. Act, 1908, Table A, Arts. 18, 19.

Right to transfer.

The shares are personal property and may be transferred in the manner provided by the regulations of the company. As Lord Blackburn said, it was one of the chief objects with which joint stock companies were established, that the shares should be capable of being easily transferred. But though every shareholder has a *prima facie* right to transfer his shares, this right is subject to the regulations of the company, and the company may and often does by its regulations require that a transfer shall receive the approval of the board of directors before being registered,—the object being to secure the company against having an insolvent or undesirable shareholder (the nominee perhaps of a rival company) substituted for a solvent and acceptable one.

In the absence of restrictions in the articles the shareholders have the right of transferring their shares at will. If it is desired that such unlimited power of transfer shall not exist, a clause must be inserted in the articles whereby the directors shall have the power of rejecting proposed members. In the absence of any

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

such provision the directors have no discretionary power of refusing to register a transfer which has been made *bona fide*. The only obligation, in fact, on the transferor is to find a transferee legally competent to take the shares. *Lumsden's Case*, 4 Ch. 31, 34. When a power of rejecting proposed transferees is reserved to the directors, they must exercise it reasonably (for an arbitrary or capricious exercise of the power would amount to a confiscation of the shares) and in its exercise will be controlled by a Court of Equity. The directors are not bound to disclose their reasons for rejecting a proposed transferee. A power of this kind is given to directors for the benefit of the shareholders, and if the reasoning had to be disclosed, the power would be deprived of half its efficacy. In the absence of evidence to the contrary, the court will assume that the directors have acted reasonably and *bona fide*. See further Buckley under § 22, Companies Act, 1862.

Discretion of directors to reject transferee.

Article 85.

Who are Members?

The following persons are members of a registered company:

(1) every subscriber of its memorandum of association, in respect of the shares subscribed by him;

(2) every person who has accepted a share in the company and whose name is entered in the register of members in respect of such share;

(3) every person who has agreed to take a share from the company under such circumstances that his name ought, in the opinion of the court, to be entered in the register of members in respect of such share.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Ordinance 4 of 1861 §§ 10, 22; Companies Act, 1856, § 19; 1862, § 23; Comp. Consol. Act, 1908, § 24. Under these provisions the subscribers of the memorandum of the company are deemed to have agreed to become its members and on its registration must be entered as members in its register of members; and every other person, who agrees to become a member and whose name is entered in the register, is a member. The meaning of this was explained by Cotton, L. J., in *Arnot's Case*, 1888, 36 Ch. D. 707. "To enable it to be said under the 23rd section that any one has agreed to become a member (and therefore a contributory) it must be shown either (1) that with his own knowledge and assent he is entered as the holder of shares upon the register of shareholders, or (2) that a contract was entered into by the alleged contributory which ought to be specifically performed so that the court would be justified, without the consent of the alleged contributory, in putting him upon the register in respect of shares which it is said he had contracted to take from the company."

per Cotton, L.J., *Arnot's Case.*

A "contributory" means every person liable to contribute to the assets of the company in the event of its being wound up. See p. 103 *supra, ad fin.*

Register of members not conclusive.

A person may thus be a member, though his name is not on the register. The register is not conclusive, for it may be rectified by the court both before and after the winding up of the company (Companies Act, 1862, §§ 35, 98; Comp. Consol. Act, 1908, §§ 32, 163; Ord. 4 of 1861 § 32); and if a person ought to be but is not on the register, he cannot escape liability on that ground, for he may be put on it by rectification. Again the register may, under the provisions quoted, be purged of a number of persons whose names appear on it, if it be shown that their names have been placed there without any authority or agreement on their parts, and the names of other persons may be substituted.

Subscriber of memorandum.

A subscriber of the memorandum of association for any number of shares thereby contracts to become a shareholder in respect of that number of shares, and becomes absolutely bound to take those shares from the company and pay a proper consideration for them; and so long as there are shares that can be allotted to him, he must fulfil that obligation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"Agreed to become a member."

As regards any other person, to fix him as a member it is necessary to show that he has agreed to become one. "A man may become a contributory to a company by his acts, although he has not made himself legally a member of it": *per* Lord St. Leonard's, *Spackmon* v. *Evans*, L. R. 3, H. L. 171, 208. Whether he has effectually agreed to become a member, will turn upon the facts of each particular case. To constitute a binding contract to take shares between a company and a member of the general public, the letter of application must be followed by an allotment, and that allotment must be communicated to the applicant. *Pellatt's Case*, 2 Ch. 527. The application may be withdrawn at any time before the communication of the allotment. *Hebbs' Case*, 4 Eq. 9. An application for shares in the usual form does, having regard to the usage in such matters, impliedly authorize an acceptance by post; and therefore if a person apply for shares and the application is accepted and allotment made to him by letter duly posted, the contract is complete when the letter of allotment is put into the post. *Harris' Case*, 7 Ch. 587, *Hebb's Case*, 4 Eq. 9. Where a person applies for shares in one company, in the belief that he is applying for shares in a totally different company, and this belief is known to and fostered by the persons acting for the company to which application is made, there will be no contract, and the applicant will be entitled to have his name taken off the register even after a winding up. *Baillies' Case*, 1898, 1 Ch. 10.

A person who has agreed cannot escape liability.

If a person has agreed to become a member, then, whatever be the circumstances which induced him to enter into the agreement, he cannot, after the winding up has commenced, say that he will be released from the contract into which he has *de facto* entered. *Challis' Case*, 6 Ch. 266. Even the fact that the transfer to him was bad as a deed, or that the officers of the company have been guilty of dishonest conduct, will not affect his liability. *Langer's Case*, 18 L. T. 67; 37 L. J. (Ch.) 292. *Bishop's Case*, 7 Ch. 296. If he was induced to take shares on the faith of a promise which was not kept, or of representations which turn out to be untrue, he is nevertheless liable as a contributory, his remedy being only against the persons who have deceived him. *Folgate's Case*, 2 D. J. & S. 456; *Wollaston's Case*, 4 De G. & J. 437.

See further Buckley, under § 23, Comp. Act., 1862.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 86.

Register of members.

Every company shall keep a register of its members, showing

(*a*) their names, addresses and occupations; the number of shares held by each member, distinguishing each share by its number; and the amount paid on each share;

(*b*) the date at which each person was entered in the register as member;

(*c*) the date at which any person ceased to be a member.

Comment.

Ordinance 4 of 1861 § 19; Comp. Act, 1856, § 16 1862, § 25; Comp. Consol. Act, 1908, § 25.

Why register required.

The principle of limited liability having been once adopted by the Legislature, justice required not only that such limitation of liability should be brought home by every possible means to persons dealing with the company, but also that such persons should know as far as possible what was the limited capital—the sole fund available to satisfy their claims,—what amount had been called up, what remained uncalled, who were the persons to pay and in what amounts. These data might materially assist a person dealing with the company in determining whether he would give it credit or not; in any case they are matters which the public had a right to know. The Legislature, recognising this, has exacted as a condition of the privilege of trading with limited liability that the company shall keep a register with those particulars in it, which shall be accessible to the public at all reasonable times. In order that this register may be accurate and correspond with the true liability of membership for the time being, the court is empowered to rectify it in a summary way, on application by motion, by ordering the name of a person to be entered or removed. See Art. 92, p. 126 *infra*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 87.

Annual list of members and summary.

(1) Every company shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company.

(2) The list must state their names, addresses and occupations and the number of shares held by each member, and shall contain a summary specifying the following particulars:

(*a*) the amount of the share capital of the company and the number of shares into which it is divided,

(*b*) the number of shares taken from the commencement of the company up to the date of the summary,

(*c*) the amount called up on each share,

(*d*) the total amount of calls received, unpaid and unforfeited.

(3) The list and summary must be contained in a separate part of the register and completed within seven days after the fourteenth day aforesaid, and an authenticated copy thereof must forthwith be forwarded to the registrar.

Comment.

Ord. 4 of 1861 § 20; Comp. Act, 1856, § 17; 1862, § 26; 1900, § 19; Comp. Consol. Act, 1908, § 26. The English Acts of 1900 and 1908 require additional particulars to be specified in the summary.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 88.

Penalty for not keeping proper register or sending list.

If a company makes default in keeping a register of members or in sending a copy of the list and summary as aforesaid to the registrar, the company shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every director or manager of the company who knowingly and wilfully authorizes or permits the default, shall be liable to the like penalty.

Comment.

Ord. 4 of 1861 § 21; 3 of 1893 § 6; Comp. Act, 1856, § 18; 1862, § 27; Comp. Consol. Act, 1908, §§ 25 (2), 26 (5).

Article 89.

Entry of trusts in register.

No notice of any trust, expressed, implied or constructive, shall be entered on the register or be receivable by the company.

Comment.

Ord. 4 of 1861 § 22; Comp. Act, 1856, § 19; 1862, § 30; Consol. 1908, § 27.

The object is to relieve the company from taking notice of equitable interests in shares and to preclude persons claiming under equitable titles from converting the company into a trustee for them. The Ceylon Ordinance, following the English Act of 1856, forbids the receipt of the notice by the company. The English Acts of 1862 and 1908 forbid receipt by the registrar.

Article 90.

Inspection and copy of register and list.

The register and annual list of members, commencing from the incorporation of the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

company, shall be kept at its registered office and shall, for not less than two hours of the business hours of the day, be open to inspection of any member gratis and of any other person on payment of the prescribed fee.

(2) A copy shall be issued to every member or other person on payment of the prescribed fee.

Penalty.

(3) If such inspection or copy is refused, the company shall be liable to a fine of twenty rupees for each refusal and to a further fine of twenty rupees for every day during which the refusal continues, and every director and manager of the company who knowingly authorizes or permits such refusal shall be liable to the like penalty.

Comment.

Ordinance 4 of 1861 § 26; 3 of 1893 § 7; Comp. Act, 1856, § 23; 1862, § 32; Comp. Consol. Act, 1908, § 30.

Article 91.

Power to close register.

A company may, on giving notice by advertisement in the *Government Gazette*, close the register for any period not exceeding twenty-one days in each year.

Comment.

Ord. 4 of 1861 § 27; Comp. Act, 1856, § 24; 1862, § 33; Comp. Consol. Act, 1908, § 31. The limit of time under the English Acts of 1862 and 1908 is thirty days.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 92.

Power of court to rectify register.

(1) If

(*a*) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company, or

(*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company. or the company, may by motion apply to the District Court for rectification of the register, and the court may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(2) The court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register.

Comment.

Ord. 4 of 1861 § 32; Comp. Act, 1856, § 25; 1862, § 35; Comp. Consol. Act, 1908, § 32.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Jurisdiction, when given.

The jurisdiction arises in two cases

(1) when the name of a person is without sufficient cause omitted from the register, and

(2) if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.

Except in these two cases no jurisdiction to rectify the register exists.

"Without sufficient cause."

If a man has been induced by fraudulent misstatements or fraudulent suppression to become a member of a company, and thereupon his name has been entered on the register, that entry is without sufficient cause: *per* Kelly, C. B., in *E. p. Ward*, L. R. 3 Ex. 180.

Remedy.

The remedy is in rescission and *restitutio in integrum*. He cannot retain the shares and have damages for the fraud as, if it had been a purchase of goods, he could retain the goods and have damages. He cannot remain a member of the corporation and have damages against it.

Relief should be applied for in reasonable time.

The application for relief must be made within a reasonable time after discovery of a misrepresentation by which he has been misled. "If it can be shown that a material representation, which is not true, is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholders, and the shareholder comes within a reasonable time and under proper circumstances to be released from the contract, the courts are bound to relieve him from it and to take his name off any list of contributories on which it may have been put": *per* Turner, L. J., in *Reese River Co., Smith's case*, 2 Ch. 604, 609. "If a man claims to rescind his contract to take shares in a company, on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or he forfeits all claim to relief": *per* James, L. J., *Sharpley* v. *Louth Railway Co.*, 2 Ch. Div. 685.

Why.

Contracts of this description, between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals, subject, however, to this rule that, whereas upon the faith of a person becoming a member of the company various persons are induced to deal with the company and to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

become shareholders, it is necessary for him, in order to set aside a contract of this description, to come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member. *Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 125.

Relief, when refused.

But, as Turner, L. J., laid down in *Jennings* v. *Broughton*, 5 D. M. and G. 126, 140, "although it is the duty of the court to relieve persons who have been deceived by false representations, it is equally the duty of the court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined."

Misrepresentation by agent.

Misrepresentations made by the company's agents and lying at the root of the contract will entitle the other party to avoid the contract: *per* Wood V. C. in *Henderson* v. *Lacon* 5 Eq. 249, 261. The principal cannot retain a profit made by the fraud of his agent, whether he authorized the fraud or not. This principle was laid down in the leading case of *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 265: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." In which statement the words "for the master's benefit" are to be read "for the master": *British Mutual Banking Co.* v. *Charnwood Forest Co.*, 18 Q. B. Div. 714. But in an action for deceit brought to render the company liable in damages for the agent's fraud, the principal is not liable for the unauthorized and fraudulent act of the agent committed not for the benefit of the principal but for the agent's own private ends.

What constitutes misrepresentation.

The object of a prospectus is to invite the public generally to join the proposed undertaking. In an advertisement of this description allowance must always be made for the sanguine expectations of promoters, and no prudent man will accept without considerable abatement the prospects held out by the originators of every new scheme. But though some high colouring, and even exaggeration, may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. The public ought to have the same opportunity as the promoters themselves possess of everything having a material

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

bearing on the true character of the adventure. There must be *uberrima fides* on the part of the promoters.

In *Oakes* v. *Turquand*, L. R. 2 H. L. 342, Lord Chelmsford said: "The objection to the prospectus is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood."

False reference to contents of document offered for inspection.

If a man in a prospectus falsely states the terms of a contract made before the formation of the company, he cannot escape from such false statement by reason of having offered inspection of the contract. "The plea that a general reference to contracts is notice of their contents," said Lord Watson in *Aaron Reefs* v. *Twiss*, 1896, A. C. 273, 287, "appears to me one of the most audacious pleas ever put forward in answer to a charge of fraudulent misrepresentation. When analyzed, it means simply that a person who has induced another to act upon a statement made with intent to deceive, must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document the perusal of which would have exposed the fraud." The plea must be rejected still more on this ground. If a promoter, standing as he does in a fiduciary relation, is desirous of taking a profit, he must not merely give his *cestuis que trust* the means of finding out that he is taking a profit, but must actually inform them of it, and obtain their ratification by active assent or acquiescence. (Buckley p. 124.)

Representations not wilfully false.

If the representation in the prospectus be untrue in point of fact, it is perfectly immaterial for the purpose of a rescission of the contract, whether or not the directors when they made the statement believed it to be true. *Smith's case*, 2 Ch. 604.

Action of deceit.

An action of deceit differs essentially from an action for rescission. When rescission is claimed, it is sufficient that there was misrepresentation which induced the contract, it is immaterial that the misrepresentation was innocent. It would be fraudulent to retain an advantage obtained by misrepresentation, however innocent. But in an action for deceit it is essential that there shall have been deceit. *Derry* v. *Peek*, 14 A. C. 337, 359.

In that case Lord Herschell said: "First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false."

Action under the Directors' Liability Act, 1890.

But under the Directors' Liability Act, 1890, passed in consequence of this decision (see p. 115, *supra*), it is not necessary to prove fraud.

Default or unnecessary delay in registering cessation of membership.

In reference to 1 (*b*) of the Article 92 now under consideration, a transfer to which no objection is or can be made on the part of the company, ought to be confirmed by the directors at the first meeting at which in the ordinary course of business it can be confirmed. If not, there is "unnecessary delay" within the meaning of this provision.

Transferor's liability, duration of.

Until the transferee's liability is complete, the transferor remains liable. The latter can only escape liability by showing that at some time or other there was (or but for the default of the company there could have been) upon the register a transferee of his who could be made liable at law in respect of the shares. *Curtis's Case*, Eq. 455.

Article 93.

Register as evidence.

The register of members shall be *prima facie* evidence of any matters by the law of registered companies directed or authorized to be inserted in the register.

Comment.

Ordinance 4 of 1861 § 33; Companies Act, 1856, § 26; 1862, § 37; Companies Consolidation Act, 1908, § 33.

The register is only *prima facie* evidence, though not so expressly stated in the local law or in the English Act of 1856, as it is in the English Act of 1862 or 1908. Therefore even in proceedings in which the register cannot be rectified, *e.g.* proceedings before a magistrate under Article 88 for not keeping a proper register, evidence may be received to prove entries in the register to be untrue. *Briton Medical Association*, 39 Ch. D. 61.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 94.

Power of company to alter its share capital.

A limited company, if so authorized by its articles, may, subject to the provisions of the law as to registered companies,

(*a*) increase its share capital by the issue of new shares of such amount as it thinks expedient; or

(*b*) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares; or

(*c*) convert all or any of its paid up shares into stock; or

(*d*) subdivide its shares or any of them into shares of smaller amount than is fixed by the memorandum; or

(*e*) cancel shares which, at the date of the passing of the resolution on that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

Comment.

See Articles 95 to 98 *infra* for the procedure in regard to each of the subsections, with the references to the corresponding provisions in England. The provisions in force in Ceylon are not always the same as those in force in England.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 95.

Increase of share capital.

(1) The powers conferred by Article 94 with respect to the increase of share capital shall be exercised by the company in the manner directed by its articles.

Notice to registrar.

(2) Notice of the increase shall be given to the registrar within fifteen days from the date of the passing of the resolution authorizing the increase, and shall be forthwith recorded by the registrar.

Penalty.

(3) If notice be not given within the period aforesaid, the company shall be liable to a penalty of fifty rupees for every day during which such default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits such default, shall be liable to a like penalty.

Comment.

Ordinance 4 of 1861, § 50 and Table C. 21-22; Comp. Act, 1856, § 37; 1862, §§ 12, 34; Comp. Consol. Act, 1908, §§ 41, 44.

For the increase of capital it is immaterial whether the memorandum of association gives power to do this or is silent. All that is required is a power in the articles. A special resolution is unnecessary unless the articles require it.

ARTICLE 96.

Consolidation and subdivision of share capital.

(1) The power conferred by Article 94 with respect to the consolidation, division and subdivision of share capital shall be

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

exercised by the company by a special resolution altering the conditions of its memorandum of association.

Proportion to be maintained.

(2) In such consolidation or subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced or increased share shall be the same as it was in the case of the share from which the reduced or increased share is derived.

Copy of memorandum.

(3) Every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

Penalty.

(4) If a company makes default in complying with the provision of the last subsection, the company shall be liable to a fine of ten rupees for each copy in respect of which default is made, and every director and manager of the company who knowingly or wilfully authorizes or permits the default, shall be liable to a like penalty.

Ordinance 17 of 1907, § 5; Comp. Act, 1862, § 12; 1867, §§ 21, 22; Comp. Consol. Act, 1908, § 41.

Article 97.

Conversion of shares into stock.

(1) The power conferred by Article 94 with respect to the conversion of a company's shares into stock shall be exercised by special resolution.

Effect thereof.

(2) Upon such conversion, all the provisions of the law of registered companies

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

applicable to shares only shall cease as to so much of the capital as is converted into stock.

Notice to registrar.

(3) Notice of the conversion, specifying the shares converted, shall, within fifteen days from the confirmation of the special resolution authorizing the conversion, be given to the registrar, and shall be forthwith recorded by him.

Penalty.

(4) If notice be not given within the period aforesaid, the company shall be liable to a fine of fifty rupees for every day during which such default continues.

Register of stock.

(5) The company shall keep a register of the names and addresses of the persons entitled to such stock, and the register shall be open to inspection in the same manner and subject to the same penalties as the register of members.

Ordinance 4 of 1861, §§ 28, 29; Comp. Act, 1862, §§ 12, 28, 29 and Table A. 23-25; Comp. Consol. Act, 1908, §§ 41 (*c*), 42, 43 and Table A. 31-33.

Article 98.

Cancellation of unissued shares.

(1) The power conferred by Article 94 with respect to the cancellation of shares shall be exercised by the company altering its memorandum of association.

(2) Such cancellation shall not be deemed to be a reduction of share capital within the meaning of Article 99.

Ordinance 6 of 1888, § 18; Comp. Act, 1877, § 5; Comp. Consol. Act, 1908, § 41.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 99.

Reduction of share capital, how effected.

(1) A limited company shall not, by direct or indirect means, reduce its capital, unless the reduction is authorized by its articles of association, is made by a special resolution and confirmed by an order of the District Court, registered by the registrar.

Nature of reduction.

(2) A company may under this article

(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up, or

(*b*) with or without extinguishing or reducing the liability on any of its shares, cancel any paid up share capital which is lost or unrepresented by valuable assets, or

(*c*) with or without extinguishing or reducing the liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital.

Addition of "and reduced" to name of company.

(3) From the date of the passing of the special resolution and until such date as the court may fix, the company shall add to its name the words "and reduced," and those words shall during that period be deemed to be part of the name of the company.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Order of court confirming reduction with creditors' consent.

(4) Before confirming the reduction the court shall be satisfied, in respect of every creditor who is entitled to object to the reduction, that his consent has been obtained or that his debt or claim has been discharged or has been secured by setting apart and appropriating the full amount of the debt or claim if admitted or consented to by the company, or such sum as the court may fix.

When consent dispensed with.

(5) The court may, where the reduction of the capital does not involve either the diminution of the liability in respect of unpaid capital or the payment to any shareholder of any paid up capital, dispense with the consent of creditors and with the addition of the words "and reduced" to the company's name.

Order on terms.

(6) The order confirming the reduction may be made on such terms and conditions as the court deems fit, and the court may, if it thinks fit, require the company to publish the reasons of, or any information in regard to, the reduction, or the causes which led to it.

Registration of order and minute of reduction.

(7) The order of the court, together with a minute approved by the court and showing the amount of the capital as altered by the order, the number of shares into which it is to be divided, the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall be produced to the registrar and registered by him.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Registrar's certificate.

(8) The registrar's certificate of registration of the order and minute shall be conclusive evidence that all the requisitions of the law as to the reduction of capital have been complied with and that the capital of the company is such as is stated in the minute.

Minute to form part of memorandum.

(9) The minute shall form part of the memorandum of association and shall be embodied in every copy of the memorandum issued thereafter, and if not so embodied, the company shall be liable to a penalty of ten rupees for each copy in respect of which such default is made, and a like penalty shall be incurred by every director and manager who knowingly or wilfully authorizes or permits such default.

Penalty.

Comment.

Ordinance 6 of 1888, §§ 4 to 15; Comp. Act, 1867, §§ 9 to 13; 1877, §§ 3 to 5; Comp. Consol. Act, 1908, §§ 46 to 52.

Inviolability of capital.

The inviolability of the capital is a condition of incorporation, the price of the privilege of trading with limited liability; and by no subterfuge will a limited company be allowed to evade this cardinal rule of policy, either by paying dividend out of the capital or buying its own shares, or returning money to shareholders. A company is under no obligation to issue the whole of its nominal capital; but once it has issued a share, it cannot, apart from the provisions in this Article for reducing capital, purchase such share (*Trevor* v. *Whitworth*, 12 A.C. 409). The reason for this is that it cannot become a shareholder in itself. This reason would appear to apply to a surrender of fully paid shares. A surrender of partly paid shares, involving as it does the release of a shareholder from part of his liability is neither more nor less than a

Company cannot purchase its own shares.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Surrender and forfeiture of shares.

purchase of such shares (*Bellerby* v. *Rowland*, 1902, 2 Ch. 14). A surrender of shares is permissible if it is simply a short cut to forfeiture (*Trevor* v. *Whitworth*, 12 A.C. at pp. 417, 418). Forfeiture of shares is recognized by the statute (Comp. Act, 1862, § 26 and Table A, Art. 19; Comp. Consol. Act, 1908, § 26 and Table A, Art. 26; Ceylon Ordinance 4 of 1861, § 20 and Table C, Art. 18).

Reduction of capital.

The first provisions authorizing a company to reduce its capital are contained in the Companies Act, 1867, which empowered the company "to reduce its capital," if authorized by its articles and by a special resolution and confirmed by an order of court. The expression was quite general and was understood to include reduction by reducing paid up capital, including the writing off lost capital. But in 1877, Jessel, M.R. held in the *Ebbw Vale Co.'s Case* (4 Ch. D. 827) that the Act allowed only reduction of liability in respect of the amount unpaid on a share, and not reduction of the amount paid on it. This decision caused great inconvenience. Companies were often anxious to reduce their capital, either because they wished to pay a dividend with complete safety, or because they wanted fresh money in the concern, and the persons invited to take shares were only willing to do so if they were put in a more favourable position than the original shareholders. For example, if when all the shares originally issued are fully paid up, the paid up capital is reduced by half, each shareholder who takes a share issued after the reduction will get twice as large an interest as if he had taken his share before the reduction.

Ebbw Vale Case: *per* Jessel, M. R.

Companies Act, 1877.

In consequence of the decision in the *Ebbw Vale Case* the Companies Act, 1877, was passed, which enacted, *inter alia*, that "capital" in the Act of 1867, should include paid up capital, and enacted other provisions which are summarised in this Article. The provisions of the two Acts are embodied in Ordinance 6 of 1888, and in the Comp. Consol. Act, 1908, §§ 46 to 55.

Confirmation by court of reduction.

Subject to the confirmation of the court, which is the safeguard of the minority, the question is a domestic one for the decision of the majority, and the Act leaves the court to determine the extent, the mode and the incidence of the reduction and the application of any capital moneys which the reduction may set free. There is no limitation on the power of the court to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

confirm the reduction, except that it must first be satisfied that all creditors entitled to object to the reduction have either consented or been paid or secured. The power given to the court is a discretionary power, and the court may confirm the reduction with or without conditions or may decline to confirm it.

A company which has not by its articles power to reduce capital may by special resolution take power to do so, and may at the second meeting pass the special resolution exercising the power (*John Crossley & Sons*, 1892, W. N. 55).

Management and Administration.

Article 100.

Registered office.

(1) Every company shall have a registered office to which all communications and notices may be addressed.

Notice.

(2) Notice of the situation of the office shall be given by the company to the registrar. Until such notice is given, the company shall not be deemed to have a registered office.

Penalty.

(3) A company carrying on business without a registered office shall incur a penalty of fifty rupees for every day during which business is so carried on.

Comment.

Ordinance 4 of 1861, §§ 35, 36, 63; Comp. Act, 1856, §§ 28, 29, 53; 1862, §§ 39, 40, 62; Comp. Consol. Act, 1908, §§ 62, 116.

Domicile.

This is a provision for the protection of the company's creditors. The place where the registered office of the company is, is usually its domicile. See Art. 54, page 77 *supra*. Where a company is incorporated in England and has its head office from which the business

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

is directed and managed in England, it is domiciled in England (*Calcutta Jute Mills Co.* v. *Nicholson*, 1876, 1 Ex. D. 437, *per* Kelly, C.B., at p. 444), and it makes no difference that except for the locality of its office and the management and direction of the business from there, the whole of its property is situated and its business is transacted outside England (*San Paulo Brazilian Railway Co.* v. *Carter*, 1896, A.C. 31). Such a corporation cannot be divided into two parts, English and foreign. But an English corporation, registered also in a foreign country, is thereby made into two corporations, each being a distinct entity (*St. Louis Breweries Ld.* v. *Apthorpe*, 1898, 79 L.T. 551, *per* Wills J. at p. 555).

Service of summons.

A summons or notice requiring to be served on the company may be left at or sent by post to its registered office. If the company has no registered office, a creditor may serve his demand (under § 76 of Ord. 4 of 1861, corresponding to Comp. Act, 1862, § 80 and Comp. Consol. Act, 1908, § 130) at the company's unregistered office. *British and Foreign Gas, etc., Co.*, 13 W. R. 649 ; 11 L. T. 368. So where the registered office of a company had been demolished in the course of alterations, and its business was being carried on at an office which had not been registered, service on directors at such unregistered office was held sufficient. *Fortune Copper Mining Co.*, 10 Eq. 390.

Article 101.

Change of office within a town.

(1) The registered office may be changed from one place to another within the town mentioned in the memorandum of association of the company, upon notice of the change being given to the registrar.

Penalty.

(2) A company carrying on business without giving such notice shall be liable to a penalty of fifty rupees for every day on which business is so carried on.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Change of office from town to town.

(3) The registered office may be changed from the town mentioned in the memorandum of association to another town in the island by a special resolution modifying in this respect the conditions of the memorandum of association.

Statement of change.

(4) The new office shall be stated in every copy of the memorandum of association issued after the change; in default, the company shall be liable to a penalty of ten rupees for each copy in respect of which default is made; and every director and manager with whose knowledge or authority the copy was issued without such statement shall be liable to a like penalty.

Penalty.

Comment.

Ordinance 4 of 1861 § 36; 17 of 1907 § 4; Comp. Act, 1856, § 40; 1862, § 40; Comp. Consol. Act, 1908, § 62.

Change from town to town.

Subsection 3 of this Article has no place in the English Acts. The reason is that the Ord. 4 of 61 § 7, unlike those Acts, requires the town in which the registered office is situated to be stated in the memorandum of association, whereas the English Acts require the memorandum to state the situation as England, Scotland, or Ireland (see p. 97 *supra*), and the town may be changed within those limits by giving notice to the registrar under the provisions cited above corresponding to subsection 1 of this article. In Ceylon the change of town can only be effected by change of the memorandum of association, which requires a special resolution.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 102.

Publication of name by limited company.

A limited company

(*a*) shall keep its name conspicuously and legibly painted or affixed in the English, Sinhalese and Tamil languages, on the outside of every office or place in which the business of the company is carried on,

(*b*) shall have its name in the English language legibly engraved on its seal, and

(*c*) shall have its name in the English language legibly mentioned in all notices, advertisements and other publications of the company and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills, parcels, invoices, receipts and letters of credit of the company.

Comment.

Ordinance 4 of 1861 § 37; Comp. Act, 1856, §30; 1862, § 41; Comp. Consolidation Act, 1908, § 63. The object of this provision (see p. 89 *supra*) is to bring home to persons dealing with the company that the liability of the shareholders is limited. The requirement is safe-guarded by severe penalties for default (See next Article).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 103.

Penalty on company for non-publication.

(1) The company shall be liable to a penalty of fifty rupees for not keeping its name painted or affixed in terms of the last Article, and for every day the name is not so kept painted or affixed.

Penalty on company's officers.

(2) Every officer of the company and every person on its behalf

(*a*) using a seal purporting to be a seal of the company, whereon the name of the company is not engraved in terms of the last Article, or

(*b*) using or authorizing the issue of any such document as is mentioned in the said Article, without the name of the company being exhibited as therein required,

shall be liable to a penalty of five hundred rupees and shall further be personally liable to the holder of any bill of exchange, promissory note, endorsement, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Comment.

Ordinance 4 of 1861 § 38; Comp. Act, 1856, § 31; 1862, § 42; Comp. Consol. Act, 1908, § 63.

Personal liability of company's officers.

The secretary of a limited company, having accepted on its behalf, a bill directed to the company, in which the word "Limited" as part of its name was omitted, was held personally liable on the bill, the same not having been paid by the company. *Penrose* v.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Mortyr, E. B. and E. 499; *Atkins & Co.* v. *Wardle*, 58 L. J. (Q. B.) 377. So directors were held liable on a bill accepted by them on behalf of the company where they described the company by a wrong name. *Nassau Steam Press* v. *Tyler*, 70 L. T. 376.

Article 104.

Annual general meeting.

A general meeting of the company shall be held once at the least in every year.

Comment.

Ordinance 4 of 1861 § 39; Comp. Act, 1856, Table B. Art. 69; 1862, § 49; Comp. Consol. Act, 1908, § 64.

Power of general meeting.

The directors of a company are the persons in whom the management of the company's affairs is vested by the Legislature. But the ultimate controlling power resides in the shareholders, and this power can only assert itself through general meetings. Article 44, p. 67 *supra*.

Meaning of "Year."

A general meeting must be held at least once every year. "Year" here means "calendar year" *i. e.* a year from 1st January to 31st December, *Gibson* v. *Burton* L. R. 10 Q. B. 329, and it may therefore happen that more than 12 months may intervene between two general meetings. This meeting is usually called the "annual" or "ordinary" meeting, as distinguished from a "statutory" meeting (which is not provided for in the local Ordinance but which under the Companies Act, 1900, § 12, must be held between one and three months from the time when the company is entitled to commence business) and from an "extraordinary" meeting, which is a meeting other than the "ordinary" and "statutory" meetings.

Statutory meeting.

Extraordinary meeting.

An extraordinary general meeting of the company is usually provided for in its articles, and may be called whenever the directors deem it necessary, or upon the requisition of a certain proportion of the members. Under Article 26 of Table C of Ordinance 4 of 1861 this proportion must be not less than one-fifth of the shareholders of a company. If the directors fail to comply with the requisition within 21 days, the requisitionists may themselves convene the meeting (*ibid*).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Law of meetings.

For the general provisions as to meetings, notices, votes, quorum, majority, closure, &c., see pp. 68 to 71 *supra*. These matters are in the case of a company usually regulated by its articles of association (Ordinance 4 of 1861 Table C. Arts. 23—43; Comp. Act, 1862, Table A, Arts. 29—51; Comp. Consol. Act, 1908, Table A, Arts. 45—67).

Article 105.

Special resolution.

(1) A special resolution is a resolution

(*a*) passed by three-fourths in number and value of the members present in person or (if proxies are allowed by the regulations) by proxy at a meeting held after due notice, and

(*b*) confirmed by a majority of the members present in person or by proxy at a subsequent meeting held not less than 14 days nor more than two months from the date of the former meeting.

(2) The chairman's declaration that a special resolution has been carried, is conclusive evidence of the fact, unless a poll is demanded by at least five shareholders.

Registry of special resolution.

(3) A copy of the special resolution must within fifteen days of its passing be forwarded to the registrar to be registered by him. In default the company shall be liable to a fine of twenty rupees for every day's delay.

Penalty.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Ordinance 4 of 1861 § 47 (as amended by Ordinance 3 of 1893 § 9) and § 48; Comp. Act, 1856, §§ 34, 35; 1862, §§ 51, 52; Comp. Consol. Act, 1908, §§ 69, 70. The value of the shares held by the voters at the first meeting is not material in the United Kingdom since the Act of 1862.

Chairman's declaration.

The chairman's declaration is conclusive, and the court will not in the absence of fraud go behind it. *Hadleigh Castle Gold Mines* 1900, 2 Ch. 419; *Arnot* v. *United African Lands*, 1901, 1 Ch. 518. If, however, the chairman declares a resolution to be carried, and in the same breath states the numbers voting each way, then if the number so declared show the majority is not sufficient, his declaration will not be final. *Caratal (New) Mines*, 1902, 2 Ch. 498.

Article 106.

Minutes and proceedings of meetings and directors.

(1) Minutes of all proceedings of general meetings and of directors shall be entered in books kept for that purpose and, if signed by the chairman of the meeting, shall be evidence of the proceedings.

(2) Until the contrary is proved, every meeting of which proceedings have been so recorded shall be deemed to have been duly held and convened.

Ordinance 4 of 1861 § 52; Comp. Act, 1856, § 40; 1862, § 67; Comp. Consol. Act, 1908, § 71.

Article 107.

Contracts how made.

Contracts on behalf of a company may be made as follows:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Contracts under seal.

(1) Any contract which, if made between private persons, would be by law required to be in writing, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged.

Written contracts.

(2) Any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

Parol contracts.

(3) Any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, may be made by parol only on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

Comment.

Ordinance 4 of 1861 § 53; Comp. Act, 1856, § 41; 1867, § 37; Comp. Consol. Act, 1908, § 76.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Contracts under seal.

A corporation must have a common seal and use it for its corporate acts. The corporation speaks only through its common seal. See Article 35 and comment thereon as to when the seal must be used and when the rule is relaxed, pages 48-52 *supra*.

Article 108.

Bills of exchange and promissory notes.

A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company, if made, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority.

Comment.

Ordinance 4 of 1861 § 55; Comp. Act, 1856, § 43; 1862, § 47; Comp. Consol. Act, 1908, § 77.

Authority to issue bills.

Without a special authority, express or implied, a corporation has no power to make, endorse or accept bills or notes. (Byles on Bills, 16th ed. p. 81.) A power to issue bills need not be given in express terms. A corporation may issue bills where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issue of bills, or where the business of the corporation is one which cannot in its ordinary course be carried on without bills (*per* Cairns, L.J., 2 Ch. 622). As to the mode in which authority to accept bills on behalf of a company may be given, see the observations of Giffard, L.J., in *Land Credit Co. of Ireland E.p. Overend Gurney & Co.*, 4 Ch. 460.

Form of signature and liability thereon.

Where the signature is that of a company having capacity to incur liability on a bill, two further questions arise, viz. (1) Is the signature in such form as to bind the company? (2) Was it placed there by the proper person or persons to act under the authority of the company? As to (1), it is specially provided in the Bills of Exchange Act, 1882, § 91 (2) that when any instrument or writing is required to be signed by a corporation, it is sufficient, though not obligatory, that it should be sealed with the corporate seal. As to (2), it is evident that, just as in all other questions

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of authority, the point to be decided is one of fact in each case, but the address to the drawee should in every case be most carefully compared with the form of the acceptance. (See *Jones* v. *Jackson*, 1870, 22 L.J. 828.)

Form of signature and liability thereon.

It is not necessary that the signature should purport on the face of the instrument to be on behalf of the company. Thus a bill of exchange addressed to the company and signed "A.B.; C.D.; directors of the company," bound the company and did not bind the directors. *Okell* v. *Charles*, 34 L. T. 822. But where four directors signed their names to a promissory note "We the directors of the A. Company promise to pay," and at one corner the seal was affixed with "witnessed by L.L.," the directors were personally liable, for there was nothing to exclude their personal liability, and the affixing of the seal was not sufficient to show that the signature was on behalf of the company. *Dutton* v. *Marsh*, L.R. 6 Q.B. 361. As to what is a sufficient making on behalf of the company by persons acting under the company's authority, see *Ex parte Agra Bank Re Barber & Co.*, 9 Eq. 725, 734.

Article 109.

Borrowing powers of companies.

A company shall not borrow money or give security, unless expressly authorized by its memorandum or articles of association, or unless such borrowing be properly incident to the course and conduct of its business.

Comment.

The policy of the Legislature in this, as in other matters connected with companies, is to leave the company to determine whether borrowing should or should not be one of the objects express or implied in the memorandum or articles of association. A company cannot borrow unless the borrowing is expressly or by implication authorized in the memorandum or articles. *Blackburn Soc.* v. *Brooks* (*per* Lord Selborne). 22 Ch. D. 61, 70. It is incident to the course and conduct of the business of a trading company to borrow and give security, and therefore it may do so without express authority. *Gen. Auction Co.* v. *Smith*, 1891, 3 Ch. 432; *Re Badger*, 1905, 1 Ch. 568, 574.

Trading company.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Clauses in articles of association giving borrowing powers should be acted on strictly in accordance with the provisions of the articles. The public are deemed to have notice of the limits of the authority conferred upon the agents of a company by its memorandum and articles of association. See Article 75 (1) (*b*), p. 104 *supra*.

Power of directors to bind a company.

For the powers of directors to bind a corporation see pages 65, 66 *supra*. If borrowing powers are exercised by the directors in an unauthorized manner, which would have been patent if those dealing with the directors had referred to the registered articles of association, the company will not be bound by such irregular borrowing. At the same time, however, although the borrowing might, as between the directors and the members be irregular, yet if that irregularity would not be disclosed by the memorandum and articles of association, the liabilities can be enforced against the company by strangers dealing with its agents *bona fide* and without notice of the irregularity.

Presumption against company.

A stranger dealing with a company has a right to assume as against the company that all matters of internal management have been duly complied with. *Royal British Bank* v. *Turquand*, 5 E. and B. 248. In that case the principles acted on were thus stated by Jervis, C.J. "We may now take for granted that the dealings with these companies are not like dealings with other partnerships and that the parties dealing with them are bound to read the statute and the deed of settlement [now termed the articles of association], but they are not bound to do more: and the party here, on reading the deed of settlement, would find not a prohibition from borrowing but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

***Royal British Bank* v. *Turquand*; *per* Jervis C.J.**

Limit of borrowing power.

If the borrowing power of the company itself, as distinguished from that of the directors, is limited, the lender cannot rely upon this principle and say that he was entitled to presume that the limit was not being exceeded. He is bound to ascertain whether the limit has been exceeded or not, and if he advances when the limit has been exceeded, he is lending to a society

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

which cannot borrow, and there is therefore no debt, and the society is not liable. *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. 712, *Wenlock* v. *River Dee Co.*, 36 Ch. D. 675 n., 10 A.C. 354.

Ultra vires use of borrowed money.

The lender's security will not be affected by the fact that, unknown to him, the company intends to use the borrowed money for *ultra vires* purposes, and the knowledge of a person who is director of both the lending and the borrowing company will not be enough to affect the lending company with notice. *David Payne & Co.*, 1904, 2 Ch. 234.

Debentures.

The usual mode of borrowing by a company is either on debentures or debenture stock. These were scarcely known forty years ago and during little more than a generation have grown into an instrument of considerable complexity and received an astonishing development. It is estimated that over a thousand million sterling was invested in these securities before the end of the 19th century in the United Kingdom.

"Debenture" is the Latin *debentur*, the first word in a document in common use by the Crown in early times admitting indebtedness to its servants or soldiers. The admission of indebtedness is the essence of a debenture. A correct definition of the term as now used has never been given. "What the correct meaning of debenture is, I do not know," said Lindley J. in *British India &c. Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 172, and he proceeded to explain the term by giving examples of debentures. It is an instrument importing an obligation or covenant to pay, often accompanied by some charge or security, said Chitty J. in *Edmonds* v. *Blaina Co.*, 1887, 36 Ch. D. 219. "Taking the test of conventional or commercial usage, a debenture may be roughly described as an instrument under the seal of a company providing for the payment of a principal sum at a specified date, and for the payment in the meantime of interest half yearly, and being one of a series of like debentures charged or secured on the company's undertaking," says Palmer (*Company Precedents*, Part III. 9th edition, p. 3). But he points out that, though this definition would be fairly accurate in ninety-nine out of a hundred cases, it is not exhaustive; for there may be a debenture which is not under seal, nor issued by a company, nor one of a series of debentures, nor payable at a fixed date, nor carrying interest, nor accompanied by a charge.

Debenture, definition of.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The debenture usually takes the form of a bond or written promise by the company, under its common seal, to repay a sum of money advanced, with interest, at a time specified and subject to certain conditions endorsed on the document, as *e.g.* that the debenture holders are to rank *pari passu*, that the debenture is to be transferable free from equities between the company and the original holder, &c.

Floating charge.

In the debenture the company frequently charges its undertaking and all its property and assets, including its uncalled capital, with the payment of the amount secured by the debenture; and on the back would be endorsed the events on the happening of which it is enforceable. A "floating charge" of this kind, though often inserted in Ceylon debentures, is not enforceable at law; being a general mortgage, it is invalid under Ordinance 8 of 1871 § 1. A specific mortgage in favour of all the debenture holders is sometimes created by deed, and this is the usual course in Ceylon. See p. 153 under "debenture stock-holders' trust deed."

Registered debentures and debentures to bearer.

Debentures may be (a) registered debentures, which are transferable only in the books, or (b) debentures to bearer, which are negotiable instruments and pass by delivery. Coupons are attached for interest. Sometimes debentures to bearer are made exchangeable for registered debentures and *vice versa*. The negotiability of debentures to bearer was first upheld in 1875 in *Goodwin* v. *Robarts*, L. R. 10 Ex. 337 in a luminous judgment of Cockburn C. J., and though contested since, is now firmly established. *Bechuanaland Exploration Co.* v. *London Trading Bank*, 1898, 2 Q. B. 658; *Edelstein* v. *Schuler & Co.*, 1902, 2 K. B. 144. Debentures may be made, on surrender, exchangeable for shares or redeemable at a premium.

Debenture stock.

Debenture stock bears the same relation to debentures that stock does to shares. "Debenture stock," as Lord Lindley states, (*Companies*, 5th edition 195), "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan." The sum is not (as in the case of debentures) uniform but variable. One debenture stock holder may hold £2 of the stock, and another £20,000, and another £13.10. This divisibility of stock brings it within the reach of the large class of small investors.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Debenture-stock holders' trust deed.

Debenture stock is created by a contract made between the company and trustees for the debenture stock holders. This is known as "debenture-stock holders' trust deed." By it the company acknowledges its indebtedness to the trustees as representing the debenture stock holders to the amount of the sum advanced, covenants to pay it, and conveys the subject matter by way of security to the trustees, with all the requisite powers and provisions for enabling them to enforce the security on default in payment of interest by the company or on the happening of certain specified events evidencing insolvency. In Ceylon, however, the mortgage is effected not by a trust deed, but by a separate instrument by which specific property is mortgaged to trustees for the debenture holders, the rights and liabilities of the trustees being defined in the trust deed between them and the company.

Importance of debentures and debenture stock in modern commercial life.

The important part which debentures and debenture stock play in modern commercial life is due entirely to judicial decisions which have facilitated the framing of debentures and debenture stock securities on lines suitable to the requirements of the times. By suitable words in a debenture, it has become possible for a company in the United Kingdom, though not in Ceylon, to create a floating security on its undertaking—a security, which, while effectually charging all the company's assets, present and future, in priority to its general creditors, and standing before them in a winding-up, yet left the company full liberty to carry on its business and to sell, exchange, lease or otherwise deal with those assets in the ordinary course, until the charge was enforced or a winding-up took place. Debentures and debenture stock could by apt words be made, here as in the United Kingdom, transferable free from equities available against the original subscriber; a whole series might be made to rank *pari passu* in point of charge; debentures to bearer could by proper expressions be endowed with all the characteristics of negotiable instruments; and they are in fact negotiable instruments by the Law Merchant and judicially noticed as such.

See further Palmer, *Company Precedents*, Part III. Debentures, for an exhaustive treatment of the subject. All mortgages and charges must be registered. (See next Article.)

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 110.

Company's register of mortgages.

(1) A limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and the names of the mortgagees or persons entitled thereto.

Penalty for omission of entry in register.

(2) If any director, manager or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made under the last subsection, he shall be liable to a penalty of five hundred rupees.

Inspection of register.

(3) The register shall be open at all reasonable times to the inspection of any creditor or member of the company.

Penalty for refusing inspection.

(4) If inspection is refused, the officer of the company refusing the inspection, and every director and manager authorizing or knowingly and wilfully permitting the refusal, shall be liable to a penalty of fifty rupees and a further penalty of twenty rupees for every day during which the refusal continues; and the District Court may by order compel an immediate inspection of the register.

Comment.

Ordinance 3 of 1893 § 13; Comp. Act, 1862, § 43; Comp. Act, 1900, § 14; Comp. Consol. Act, 1908, §§ 100, 101.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

This provision, borrowed from the Companies Act, 1862, is directory only, and does not render void a mortgage by reason of its not being registered, even though it is issued to a director or other person responsible for such omission; the section imposes only a pecuniary penalty and not the further penalty of forfeiting the security. *Wright* v. *Horton*, 12 A.C. 371.

The provision has in the United Kingdom been supplemented by more stringent provisions under the Comp. Act, 1900, which makes void, as against the liquidator and any creditor of the company, every mortgage or charge created on or after 1st January, 1901, by a company and being either

(*a*) a mortgage or charge for the purpose of securing an issue of debentures, or

(*b*) a mortgage or charge on uncalled capital of the company, or

(*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale, or

(*d*) a floating charge on the undertaking or property of the company,

unless registered within 21 days from its creation, but so far only as it confers any security on the company's property or undertaking, and without prejudice to any contract or obligation for repayment of the money thereby secured. Comp. Consol. Act, 1908, § 93.

Article 111.

Calls on shares.

(1) The company may from time to time, after giving the notice prescribed in the articles of association, make such calls as they think fit on the members in respect of all moneys unpaid on their shares.

(2) The amount of calls for the time being unpaid on a share shall be deemed a debt from the holder of the share to the company, and shall be paid by him to the persons, and at the time and place, appointed by the company.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Ordinance 4 of 1861 § 25 and Table C, Arts. 2 to 5; Comp. Act, 1856, § 22 and Table B, Arts. 2 to 5; Comp. Act, 1862, § 16 *ad fin* and Table A, Arts. 4 to 7; Comp. Consol. Act, 1908, § 14 (2) and Table A, Arts. 12 to 17.

Where part only of the nominal amount of a share has been paid, the company usually gets in the balance by making "calls" upon the shareholders. The statute provides that the amount of call unpaid on a share is a debt to the company, and leaves the authority by which calls in a going company are to be made to be determined by the articles of association. Calls in a winding-up are provided for in the statute. See Articles 126 and 130 (9), pages 175, 178, *infra*.

Amount of call a debt to the company.

How call made.

A call on the members of a going company is effected by the directors passing a resolution fixing the amount of the call and the time and place at which and the person to whom it is to be paid, and then causing the shareholders to be served with a notice of the call in conformity with the provisions in that behalf of the articles of association. Usually 21 days' notice is required to be given of each call, and in Ceylon the notice is published in the *Government Gazette* (Table C, Art. 2).

The power to make calls is in the nature of a trust to be exercised for the general benefit of the company. *Gilbert's Case*, 5 Ch. 559. The onus of proving *mala fides* is on the party alleging it. *Odessa Trans. Co.* v. *Mendel*, 8 C. Div. 246. The court will in general refuse to investigate the propriety or necessity of a call, as being an interference in the internal management of the company. *Bailey* v. *Birkenhead Ry. Co.*, 12 Beav. 433.

From whom due.

The call is due only from "members" within the meaning of Article 85, pp. 119 to 121 *supra*. "Member" includes the legal personal representatives of a deceased member whose name remains on the register. *New Zealand &c. Co.* v. *Peacock*, 1894, 1 Q. B. 622.

Irregularity in calls.

Any irregularity either in making the call or giving notice thereof will entitle the shareholders to resist payment, as *e. g.* if the call was made by persons not duly appointed directors or have ceased to be directors (*Howbeach* v. *Teague*, 5 H. and N. 151; *Iron Ship Co.* v. *Blount*, L. R. 3 C. P. 484), or by less than the prescribed number of directors (*Bottomley's Case*, 1880,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

16 Ch. D. 681), or if the length of the notice was less than that prescribed by the articles. Well-drawn articles, however, usually contain an article validating the acts of directors, notwithstanding that some defect in their appointment is afterwards discovered, and notwithstanding that they were disqualified at the time of doing the act. Such an article will make a call good, in spite of any small irregularity in the appointment of the directors. It will, of course, not cover the case of mere strangers acting as directors.

Irregularity in calls, how cured.

On non-payment of a call, the company is usually empowered by its articles to forfeit the share in respect of which default has been made. The right is wholly regulated by and dependent on the terms of the articles, which will be construed very strictly. *Clarke* v. *Hart*, 6 H. L. C. 633. Irregularity in forfeiture is subject to the same conditions as irregularity in calls. *Bottomley's Case*, 1880, 16 Ch. D. 681.

Forfeiture of share.

Partly paid shares which have been forfeited can be sold by the company, with the benefit of the amount paid up upon them before forfeiture. *Morrison* v. *Trustees Corporation*, 68 L. J. Ch. II. Even where such shares are sold free from all calls prior to the date of sale, the company can make a fresh call on the purchaser for moneys called up prior to such sale but not paid. *New Balkis* v. *Randt Gold*, 1904, A. C. 165.

Sale of forfeited shares.

The forfeiture puts an end wholly to the relation of company and shareholder, and he loses the benefits conferred by the share, which are mainly (1) the voting power carried by the share, (2) the dividend payable to the shareholder, and (3) his right in the distribution of assets on a winding-up. The forfeiture cannot be rescinded without his consent.

Effect of forfeiture.

Article 112.

Accounts

The directors shall cause true accounts to be kept of the sums of money received and expended by the company and the matter in respect of which such receipt and expenditure takes place, and of the assets and liabilities of the company.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Ordinance 4 of 1861 § 40 and Table C, Arts. 70-71; Comp. Act, 1856, § 32; 1862, Table A, Arts. 70-80; Comp. Consol. Act, 1908, Table A, Arts. 103-106.

The company usually provides in its articles that once at least every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year made up to such date and in such form as prescribed in the articles of association.

Article 113.

Balance sheet.

(1) A balance sheet shall be made out in every year and forwarded to the registrar within twelve months after the incorporation of the company, and afterwards every year with the copy of the list and summary required by Article 87.

(2) The balance sheet shall contain a summary of the property and liabilities of the company arranged under the prescribed heads and shall be signed by the directors or any three or more of them, who shall certify at the foot that the same to the best of their belief contains a true account of the capital and liabilities and of the property and assets of the company.

Comment.

Ordinance 4 of 1861, §§ 41-42 and Table C, Arts. 72-73; Comp. Act, 1856, Table B, Arts. 72, 73; Comp. Act, 1862, Table A, Arts. 81-82; Comp. Consol. Act, 1908, Table A, Arts. 107-108. In the United Kingdom the balance sheet is not (as in Ceylon) provided for in the Act, but is left to be provided for in the articles of each company. In the model articles in Table A, the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

balance sheet is required to be made every year and submitted to a general meeting, a copy being previously served on each member. In Ceylon the company's articles usually have such a clause in addition to the statutory requirement as to the filing of the balance sheet with the registrar. The form is the one annexed to Table C.

Under section 41 of the Ordinance 4 of 1861 balance sheets subsequent to the first had to be forwarded to the registrar within twelve months from the filing of the balance sheet immediately preceding, but under the Joint Stock Companies Amendment Ordinance, 1909, must be forwarded as stated in the concluding words of sub-section 1 of Article 113.

Article 114.

Audit.

The accounts of the company shall be examined and the correctness of the balance sheet ascertained by one or more auditors, who shall certify at the foot thereof that the same to the best of their belief contains a true account of the capital and liabilities and of the property and assets of the company, or make special report thereon as may be deemed necessary.

Comment.

Ordinance 4 of 1861 § 44 and Table C, Arts. 74-84; Comp. Act, 1856, Table B, Arts. 74-84; Comp. Act, 1862, Table A, Arts. 83-94; Comp. Consol. Act, 1908, §§ 112, 113.

There is no express provision for an annual audit, but this is implied from the fact that it is the duty of the auditors to report on and certify the balance sheet before every general meeting (in the United Kingdom) and (in Ceylon) before transmission to the registrar. Auditors are appointed by the company in general meeting or, if it be a casual vacancy, by the directors. No director or other officer of the company can be elected auditor.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Rights and duties of auditors.

Auditors have the right of access at all times to the books and vouchers of the company, and are entitled to require from the directors and officers such information and explanation as may be necessary to enable them to perform their duties. Auditors, said Lindley, L.J., in the leading case of *London and General Bank*, 1895, 2 Ch. 673, must not only act honestly, but must exercise reasonable care and skill in the exercise of their duties; it is the duty of the auditors to examine the books and make inquiry and to place before the company the true financial position of the company and not merely to indicate the means of acquiring it. The duty of the auditors is owed to the company itself, and not merely to its directors. If an auditor fails to perform his duty, he will be liable to the company for any loss they may have suffered by such failure. But they must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors (*per* Lopes, L. J., *Kingston Cotton Mills*, No. 2, 1896, 2 Ch. 290, C. A.)

Liability of Auditors.

Inspectors.

Inspectors may be appointed to a company by the Governor (in England, by the Board of Trade) on the application of one-third in number and value of the members, or by the general meeting. Ordinance 4 of 1861 §§ 58-62; Comp. Act, 1856, §§ 49-52, 58; 1862, §§ 56, 58-61; Comp. Consol. Act, 1908, §§ 109-111. For duties of Inspectors see the sections cited and p. 78. *supra*.

Article 115.

Payment of dividends out of capital prohibited.

A company shall not pay dividends out of capital.

Comment.

Ordinance 4 of 1861 § 43 and Table C, Art. 64; Comp. Act, 1856, Table B, Art. 64; Comp. Act, 1862, Table A, Art. 73; Comp. Consol. Act, 1908, Table A, Art. 97.

The word Dividend, according to its derivation, would mean the sum to be divided; but, except in Arithmetic, is used in the sense of the share of a particular person in that sum, a meaning which (as Cranworth, L. C., said in *Henry* v. *Great Northern*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Railway Co., 1 De G. and J. 637) properly attaches to the phrase "aliquot portion of the dividend."

What is a dividend?

In reference to joint stock companies, a dividend is the net profit periodically divisible among the members of the company in proportion to their respective holdings of its capital. Usually the sum to be divided is broken up into as many portions as there are shareholders to claim them, and the fractional part falling to each holder bears the same proportion to the whole dividend as the amount of stock or shares he holds bears to the whole capital from which the dividend is derived. Dividend is not interest, although the word is frequently applied to payments of interest; and a failure to pay dividends to shareholders does not, like failure to pay interest on borrowed money, lay a company open to being declared bankrupt. All dividends are payable in cash.

Its distribution governed by articles.

An intending shareholder must look to the memorandum and articles to ascertain how any dividend that the company may declare will be divided among the various shareholders. The articles generally provide that the dividend is payable according to the amount paid up on each share. But if Table C, Art. 64, of Ord. 4 of 1861 (which corresponds to the old Table A, Art. 72, of the Comp. Act, 1862) be adopted, viz. that dividends are to be paid to the members "in proportion to their shares," then the dividends are payable equally to the member who holds fully paid shares and to the member who has paid nothing on his shares: *Oakbank Oil Co.* v. *Crum*, 8 A. C. 65 in which it was held that "in proportion to their shares" means in proportion to the amount of the subscribed capital of the shares, not of the paid up capital.

Dividend as between fully paid and partly paid shares.

Dividend on different classes of shares.

Most companies divide their capital into at least two classes, called "preference" shares and "ordinary" shares, of which the former are entitled out of the profits of the company to a preferential dividend at a fixed rate, and the latter to whatever remains after the payment of the preferential dividend and any fixed charges. There may also be "deferred" shares, which would be entitled to what remains after payment of a fixed dividend on the ordinary shares. Before, however, a dividend is paid, part of the profits is often carried to a reserve fund. The dividend on preference shares is either "cumulative" or contingent on the profits of each separate year or half year. When cumulative, if the profits of any one year are insufficient

Cumulative dividend.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to pay it in full, the deficiency has to be made good out of subsequent profits. Even without the addition of the word "cumulative," the words "preference dividend" would, in the absence of anything to the contrary, mean the same thing. *Henry* v. *Great Northern Railway Co.*, 1 de G. and J. 606; *Webb* v. *Earle*, 20 Eq. 557; *Foster* v. *Coles*, 1906, 22 T. L. R. 555.

How declared.

Dividends are usually declared yearly or half yearly; and before any dividend can be paid, it is as a rule necessary for the directors to submit to the shareholders, at a general meeting called for the purpose, the accounts of the company with a report by the directors on its position and their recommendation as to the rate of the proposed dividend. The articles of association usually provide that the shareholders may accept the directors' recommendation as to dividend or may declare a lower one, but may not declare a higher one. Directors frequently have power to pay on account of the dividend for the year, without consulting the shareholders, an "interim dividend," which on ordinary shares is generally at a much lower rate than the final or regular dividend. An exceptionally high dividend is often distributed in the shape of a dividend at the usual rate supplemented by an additional dividend or "bonus."

Interim dividend.

Bonus.

Dividend payable out of profits, not capital.

A company can only pay dividends out of profits, which are defined as the "earnings of a concern after deducting the expenses of earning them." To pay dividends out of capital is not only *ultra vires* but illegal, as constituting a return of capital to shareholders and a reduction of capital, which is not allowable unless sanctioned by the court. (Art. 99, p. 135 *supra*.)

Capital account and revenue account. *Lee* v. *Neuchatel Co.*

In the leading case of *Lee* v. *Neuchatel Co.*, 41 Ch. Div. 1, it was decided that capital account and revenue account are, for purposes of ascertaining profit available for dividend, to be treated as separate accounts, and loss on capital account need not be made good before declaring dividend, and that if the objects of the company include the sinking of capital in the acquisition of wasting property, even depreciation by waste is not necessarily a revenue charge but may by the regulations be thrown upon capital.

Duty of directors.

Before paying dividends directors must take reasonable care to secure the preparation of proper balance sheets and estimates, and must exercise their judgment as business men on the balance sheets and estimates submitted to them. If they fail to do this

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and pay dividends out of capital, they will not be held excused. The onus is on them to show that the dividends have been paid out of profits. The court as a rule does not interfere with the discretion of directors in the matter of paying dividends unless they are doing something *ultra vires*.

Their liability.

If the directors declare a dividend when they know the company to be insolvent or likely to be rendered insolvent by the payment of the dividend, they will be jointly and severally liable for the debts of the company to the extent of such dividend. Ordinance 4 of 1861 § 17; Comp. Act, 1856, § 14 and Table B, Art. 64; 1862, Table A, Arts. 72, 73; Comp. Consol. Act, 1908, Table A, Arts. 95-97.

When interest payable out of capital.

Under § 91 of the Comp. Consol. Act, 1908, a company may in certain cases and subject to certain conditions, pay interest out of capital during the period of construction of works, if authorized by the articles or by special resolution and sanctioned by the Board of Trade.

Payment of dividend without replacing lost capital. *Verner* v. *General & Commercial Co.*

In *Verner* v. *General and Commercial Co.*, 1894, 2 Ch. 239. Lindley, L. J., in delivering the judgment of A. L. Smith, L. J., and of himself, said that the broad question raised was whether a limited company which has lost part of its capital can lawfully declare and pay a dividend without first making good the capital which has been lost; that he had no doubt that it could, although it could not lawfully return paid-up capital to the shareholders.

"There is a vast difference between paying dividends out of capital, and paying dividends out of other money belonging to the company, and which is not part of the capital mentioned in the company's memorandum of association. . . . If, therefore, the company has any assets which are not its capital within the meaning of the Companies Acts, there is no law which prohibits the division of such assets amongst the shareholders.

"Further, it was decided in that case (*Lee* v. *Neuchatel Asphalte Company*)—and, in my opinion, rightly decided—that a limited company formed to purchase and work a wasting property, such as a leasehold quarry, might lawfully declare and pay dividends out of the money produced by working such wasting property, without setting aside part of that money to keep the capital up to its original amount.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"There is no law which prevents a company from sinking its capital in the purchase or production of a money-making property or undertaking, and in dividing the money annually yielded by it without preserving the capital sunk so as to be able to reproduce it intact either before or after the winding-up of the company. . . .

"But although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. A dividend presupposes a profit in some shape; and to divide as dividend the receipts, say for a year, without deducting the expenses incurred in that year in producing the receipts, would be as unjustifiable in point of law as it would be reckless and blameworthy in the eyes of business men. The same observation applies to payment of dividends out of borrowed money. Further, if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend, without replacing the capital consumed in producing it, will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain.

"It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up, and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction, which I am endeavouring to explain, is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided; but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." See further Palmer, *Company Precedents*, Part I. 9th edn. pp. 635, 720-766, and Buckley on the Company Acts, 8th edn. pp. 584-592.

Fixed and floating capital.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 116.

Prohibition of carrying on business with less than seven members.

If a company carries on business with less than seven members for a period of six months after the number is so reduced, every person who is a member of the company during the time it carries on business after the six months shall be severally liable for the payment of the whole debts of the company contracted during such time and may be sued for the same without the joinder in the suit of any other member.

Ordinance 4 of 1861 § 51; Comp. Act, 1856 § 39; Comp. Act, 1862 § 48; Comp. Consol. Act, 1908 § 115. See p. 93 *supra*.

Winding-up.

Article 117.

Modes of winding-up.

The winding-up of a company may be either (1) by the court or (2) voluntary.

Comment.

A company once incorporated under the Companies Act cannot be put an end to except through the machinery of a winding-up, though the name of a company which is commercially defunct may in the United Kingdom be struck off the register of joint stock companies by the registrar under the Companies Act, 1880, § 7, and 1900, § 26, now re-enacted in the Comp. Consol. Act, 1908, § 242.

The winding-up of the company is its dissolution or death. For the general principles, modes, and consequences of the dissolution of a corporation, see pages 78 to 88 *supra*.

Winding-up is of two kinds: (1) voluntary winding-up, either purely voluntary or carried on under the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

supervision of the court, and (2) winding-up by the court. Of these by far the more common is a voluntary winding-up. Ninety per cent. of the companies that come to an end are so wound up; and this is in accordance with the policy of the Legislature evinced throughout the Companies Acts, that shareholders should manage their own affairs, winding-up being one of such affairs. A voluntary winding-up subject to the court's supervision takes place (under the Companies Act, 1862 § 147 and the Companies Act, 1900 § 25, now re-enacted in Comp. Consol. Act, 1908 §§ 199 to 203) where a company in the course of voluntary winding-up has proceedings taken against it for its winding-up by or under the supervision of the court, and the court may make order that a voluntary winding-up shall continue, but subject to its supervision, and with such liberty for creditors, contributories or others to apply to the court, and generally upon such terms and conditions, as the court thinks fit.

Article 118.

When winding-up commences.

The winding-up shall be deemed to commence, if the company is wound up voluntarily, at the time of the passing of the resolution authorizing the winding-up; and if the company is wound up by court, at the time of the presentation of the petition for the winding-up.

Ordinance 4 of 1861 § 72; Comp. Act, 1856 § 64; 1862 §§ 84, 130; Comp. Consol. Act, 1908 §§ 139, 183.

Article 119.

Winding-up by court, grounds for.

A company may be wound up by the court

(1) if the company has by special resolution resolved that the company be wound up by the court; or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(2) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; or

(3) if the number of members is reduced below seven; or

(4) if the company is unable to pay its debts; or

(5) when three-fourths of the capital of the company has been lost or become unavailable.

Comment.

Ordinance 4 of 1861 § 75; Comp. Act, 1856 § 67; 1862 § 79; Comp. Consol. Act, 1908 § 129.

The ground stated in subsection (5) was taken over by the Ceylon Ordinance from the Comp. Act of 1856, and continues in force here, though it has been dropped in later English Acts, which have added other grounds such as "if the court is of opinion that it is just and equitable that the company should be wound up," or "if default is made in filing the statutory report or in holding the statutory meeting."

Article 120.

Company, when deemed unable to pay its debts.

A company is deemed unable to pay its debts

(1) if a creditor. to whom the company is indebted in a sum exceeding five hundred rupees, has served on the company, by leaving at its registered office, a demand under his hand for payment, and the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

company has for three weeks thereafter neglected to pay the amount or to secure or compound for the same to his satisfaction; or

(2) if satisfaction of a judgment, decree or order of court in favour of a creditor of the company cannot be obtained within ten days.

Ordinance 4 of 1861 § 76; Comp. Act, 1856 § 68; 1862 § 80; Comp. Consol. Act, 1908 § 130.

Article 121.

Application for winding-up by court.

(1) An application to the court for the winding-up of a company shall be by petition of a creditor or contributory in cases where the company is unable to pay its debts, or of a contributory alone when any other ground is alleged for the winding-up, and shall be supported by affidavit.

(2) Upon the hearing of the application, the court may dismiss the application or make an order for winding-up the company; or, in the case of an application by a creditor, may make an order on the company to pay or secure payment of his debt within a certain date to be fixed in the order, and failing compliance, may make an order for the winding-up of the company, or may make such other order as it deems just.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Ordinance 4 of 1861 §§ 77-80; Comp. Act, 1856, §§ 70-72; 1862, §§ 82, 86; Comp. Consol. Act, 1908, §§ 137, 140, 141.

Article 122.

Effect of the winding-up order.

(1) After the date of the order for winding-up the company, *(a)* all suits and actions against the company shall be stayed, if the court so orders; *(b)* no director or other officer of the company shall dispose of any property of the company without the sanction of the court; and *(c)* no transfer of any shares shall be valid without the sanction of the court.

Registration of the order.

(2) A copy of the order shall forthwith be forwarded by the company to the registrar, who shall make a minute thereof in the books relating to the company.

Comment.

Ordinance 4 of 1861 § 81; Comp. Act, 1856 § 73; 1862 §§ 87, 88; Comp. Consol. Act, 1908 §§ 142, 143.

For the effect of the winding-up order on the company's transactions see Art. 66, pp. 87-88 *supra*.

Article 123.

The court may

Appointment and duties of official liquidators.

(*a*) appoint one or more persons, to be called the Official Liquidators, for the purpose of conducting the proceedings in winding-up the company, of taking charge of its property, collecting its assets, applying them in discharge of its liabilities and distributing its assets, and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*b*) may remove any person so appointed and appoint another in his place or in place of a liquidator who has resigned office or died, and may define the duties of a liquidator.

Comment.

Ordinance 4 of 1861 §§ 97, 98; Comp. Act, 1856, §§ 88, 89; 1862 §§ 92, 94; Comp. Consol. Act, 1908, § 149.

Effect of winding-up order.

The effect of a winding-up order is to constitute the liquidator a trustee of the property of the company for those who were creditors of the company at the time of the winding-up, the trust being imposed on the assets of the company (wherever they may be at the time of the winding-up) to be applied in discharge of the company's liabilities: *per* Lord Cairns, *Delhi Bank's Case*, 15 Sol. J. 923, 924; *Black & Co.'s Case*, 8 Ch. 254, 262. The property of the company ceases to belong beneficially to it and passes into the liquidator's custody to be applied by him as directed by the law.

Duties of liquidator.

A liquidator's duty is to protect, collect, realize and distribute the company's assets, and for this purpose he advertises for creditors, makes calls on contributories, sues debtors, takes misfeasance proceedings, if necessary, against directors or promoters, and carries on the company's business, supposing the good will to be an asset of value, with a view to selling it as a going concern. He is assisted, like a trustee in bankruptcy, by a committee of inspection composed of creditors and contributories.

Article 124.

Powers of official liquidator.

The official liquidator shall have power with the sanction of the court

(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*b*) to carry on the business of the company so far as may be necessary for the beneficial winding-up of the company,

(*c*) to sell its property by public auction or private contract,

(*d*) to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal,

(*e*) to refer disputes to arbitration and compromise debts or claims,

(*f*) to prove, claim, rank and draw a dividend in the bankruptcy, insolvency, or sequestration of any contributory for any balance against his estate,

(*g*) to draw, accept, make and endorse any bill of exchange or promissory note, with the same effect, in respect to the liability of the company, as if such bill or note had been drawn, accepted, made or endorsed by the company in the course of its business,

(*h*) to raise upon the security of the assets of the company any money requisite,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*i*) to do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets.

Comment.

Ordinance 4 of 1861 § 99; Comp. Act, 1856 § 90; 1862 § 95; Comp. Consol. Act, 1908 § 151.

Pending liquidation the company exists only for the purpose of the liquidation. See Art. 66, pp. 87, 88 *supra*.

Article 125.

Liability of present and past members as contributories.

In the event of a company being wound up, every present and past member is liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding-up, with the following qualifications, that is to say:—

(1) A past member shall not be liable if he has ceased to be a member for three years and upwards or, if it be a limited company, for one year and upwards, before the commencement of the winding-up;

(2) a past member shall not be liable in respect of any debt or liability contracted after he ceased to be a member;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(3) a past member shall not be liable unless it appears to the court that the existing members are unable to satisfy the contributions required;

(4) a member of a limited company shall be liable only up to the amount unpaid on his shares or on his guarantee;

(5) a sum due to a member for the company may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves;

(6) the representatives of a deceased contributory shall be liable in due course of administration to the same extent as he would be liable if alive.

Comment.

Ordinance 4 of 1861, §§ 69-71, 73; Comp. Act, 1856, §§ 61-63, 65; 1862, §§ 38, 76; Comp. Consol. Act, 1908, §§ 123, 126.

"Contributory," meaning of.

The term "contributory" means every person liable to contribute to the assets of the company in the event of its being wound up. Contributories are divided into two classes:

Present and past members.

(1) present members, *i.e.* those who are members at the commencement of the winding-up, or who have had shares subsequently transferred to them with the sanction of the liquidators;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(2) past members, *i.e.* those who ceased to be members for a year and upwards before the commencement of the winding-up or, in Ceylon, in the case of companies other than limited companies, three years and upwards.

The distinction as to the period was borrowed by the Ceylon Ordinance from the Companies Act of 1856, but has ceased in England since the Act of 1862.

As to who are "members," see Article 85 and comment thereon, pp. 119-121. In England the court is required to settle a list of contributories, with power to rectify the register of members where such rectification is necessary (Comp. Act, 1862, § 98; Comp. Consol. Act, 1908, § 163). The list consists of what is called the "A list" of present members and the "B list" of past members.

Present members are primarily liable to pay the debts of the company and must be first individually exhausted before any past member can be called upon. In *Webb* v. *Whiffen*, L. R. 5, H. L. 728, Lord Westbury laid down the following rule as to the order and extent of their liability: "The direction (of section 38 of the Companies Act, 1862) is this: You will apply all that you can get from the existing members in payment of the existing debts, no matter of what date. If after you have done that, there remain debts unsatisfied, so that you have to resort to the members who have passed away from the company within a year, then you will be compelled to classify the residuum of the debts so remaining, and ascertain what part of that residuum is to be attributed to past debts,—*i.e.* to debts which pre-existed the transfer made by past members—and what portion is to be attributed to the new debts which have arisen subsequently to the date of the last transfer. When you have ascertained the proportion which is attributable to debts which existed when the transfers were made, then if there have been several transfers within the year, you will be compelled of necessity to subdivide that portion of the residuum into several portions according as you find that transfers have been made within the past year."

Order and extent of their liability; *per* Lord Westbury.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 126.

Power of court to make calls.

The court may make calls on all or any of the contributories to the extent of their liability for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the court, and the costs of the winding-up; and if the calls are not paid within the time fixed by the court, the court shall make an order upon the defaulting contributory for the payment of the amount due on the call, and such order shall have the effect of a judgment of the court.

Ordinance 4 of 1861 §§ 89, 90; Comp. Act, 1856, § 82; 1862 § 102; Comp. Consol. Act, 1908 § 166.

Article 127.

Dissolution of company.

(1) When the affairs of the company have been completely wound up, the court shall make an order declaring the company to be dissolved from the date of such order, and the company shall be dissolved accordingly.

(2) The order shall be reported by the liquidator to the registrar who shall make in his books a minute of the dissolution of the company.

Comment.

Ordinance 4 of 1861 § 102; Comp. Act, 1856, §§ 93, 94; 1862 §§ 111, 112; Comp. Consol. Act, 1908, § 172.

The dissolution is the civil death of the company; it ceases then to be a juristic person and all its rights

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and obligations are extinguished. After dissolution a creditor's action will not lie against the directors in which the plaintiff not alleging fraud seeks to render them liable for dividends improperly paid; this is in substance an action for a further and more complete winding-up. *Coxon* v. *Gorst*, 1891, 2 Ch. 93.

Article 128.

Voluntary winding-up, grounds for.

A company may be wound up voluntarily,

(1) whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved:

(2) whenever the company in general meeting has passed a special resolution requiring the company to be wound up voluntarily, notice of such resolution being given in the *Government Gazette*.

Ordinance 4 of 1861 §§ 105, 106; Comp. Act, 1856 §§ 102, 103; Comp. Act, 1862 §§ 129, 132; Comp. Consol. Act, 1908 §§ 182, 185.

Article 129.

Effect of voluntary winding-up on the company's status.

Whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

may be required for the beneficial winding-up thereof, but its corporate state and all its corporate powers shall, notwithstanding any provision to the contrary in its articles of association, continue until the affairs of the company are wound up.

Ordinance 4 of 1861 § 105, para 2; Comp. Act, 1856 § 102; Comp. Act, 1862 § 131; Comp. Consol. Act, 1908 § 184. See comment on Article 66, p. 88 *supra*.

Article 130.

Consequences of voluntary winding-up.

The following consequences shall ensue upon the voluntary winding-up of a company:

(1) The property of the company shall be applied in satisfaction of its liabilities, and subject thereto, and unless it be otherwise provided by the articles of association, be distributed amongst the shareholders in proportion to their shares.

(2) The company in general meeting may appoint one or more liquidators for the purpose of winding-up the affairs of the company and distributing the property, and may fix the remuneration to be paid to them.

(3) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting or the liquidator sanctions the continuance thereof.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(4) The liquidators shall have all the powers vested in liquidators appointed by the court, and may exercise the same without the intervention of the court.

(5) The liquidators may call on all or any of the contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts of the company and the costs of winding it up; and shall pay the debts of the company and adjust the rights of the contributories among themselves.

(6) When several liquidators are appointed, every power hereby given may be exercised by any two of them.

Ordinance 4 of 1861 § 107 (1) to (9); Comp. Act, 1856, § 104; Comp. Act, 1862, § 133; Comp. Consol. Act, 1908, § 186.

Article 131.

Final meeting and dissolution of company.

(1) As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding-up has been conducted, and the property of the company disposed of; and such account, with the vouchers thereof, shall be laid before such person or persons as may be appointed by the company to inspect the same; and upon such inspection being concluded, the liquidators shall proceed to call a general meeting of the shareholders for the purpose of considering such account.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(2) The meeting shall be called by advertisement in the *Government Gazette* specifying the time, place and object of such meeting, and published at least one month before the meeting.

(3) The meeting shall not enter upon any business except the consideration of the account; but the meeting may proceed to the consideration thereof notwithstanding that the quorum required by any regulation of the company to be present at general meetings is not present thereat, and if on consideration the meeting is of opinion that the affairs of the company have been fairly wound up, they shall pass a resolution to that effect.

(4) The liquidators shall publish a notice of such resolution in the *Government Gazette*, and shall also make a return to the registrar of such resolution.

(5) On the expiration of one month from the date of the registration of such return, the company shall be deemed to be dissolved.

Ordinance 4 of 1861 § 107 (10), (11); Comp. Act, 1862 §§ 142, 143; Comp. Consol. Act, 1908 § 195.

Article 132.

Liquidator's duty, if affairs not wound up in a year.

If, within one year after the passing of the resolution for winding-up the affairs of the company, such affairs are not wound up, the liquidators shall immediately thereafter make

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

up an account showing the state of affairs, and the progress which has been made in winding-up down to that date; and they shall add thereto a report stating the reason why the winding-up has not been completed, and a general meeting shall be called to consider the same, and so on from year to year until the winding-up of the affairs of the company is completed.

Ordinance 4 of 1861 § 107 (12); Comp. Act, 1862, § 139; Comp. Consol. Act, 1908 § 194.

Article 133.

Saving of rights of creditors.

The voluntary winding-up of a company shall not prejudice the right of any creditor of such company to institute proceedings for the purpose of having the same wound up by the court.

Comment.

Ordinance 4 of 1861 § 109; Comp. Act, 1856, § 105; Comp. Act, 1862 § 145; Comp. Consol. Act, 1908 § 197.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CHAPTER VI.—FOUNDATIONS.

Corporate foundations, distinguished from other foundations.

The Foundations which are the subject of this Chapter belong to the class of corporations mentioned in Article 27 (a), p. 42 *supra*, and must be distinguished from foundations in the non-technical sense. If a person were to found a scholarship by giving a sum of money to a university and directing the scholarship to be paid out of the interest, this would be a foundation in the non-technical sense. It would not create a juristic person to whom the money belongs. The money would be the property of the university and the effect of the transaction would merely be to bind the university to apply this particular portion of its own property in the manner prescribed by the donor. On the other hand, if a new juristic person were created and the property dedicated to it as its own separate property, we should have a foundation in the legal sense, a corporate foundation. Savigny, Syst. deshr. Rechts § 88; Sohm § 38.

Charitable foundations under Roman law.

Corporate foundations are what the English law calls Charitable or eleemosynary corporations. The English law as to these corporations and the doctrine of charities grew up from the Roman law. Under the Roman law a public corporation alone could be a juristic person. The charitable foundations established by the early emperors to distribute alms to the poor, were really State institutions and part of the State property. A private individual could not create a foundation with separate property of its own. He could only make over property to a juristic person already in existence and prescribe the object on which it was to be employed.

Pia causa.

From the fifth century onwards foundations created by private individuals came to be recognized as foundations in the true legal sense, but only if they took the form of a *pia causa* (*pium corpus*) and were devoted to pious uses, or in other words were charitable institutions. Whenever a person dedicated property, whether by gift *inter vivos* or by will, in favour of the poor, or the sick, or prisoners, orphans or aged people, he created *ipso facto* a new juristic person —the poor house, hospital, &c.—and the dedicated property became the sole property of the new person

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

whom the founder had called into being. The endowments were regarded as church property and placed under the control of the Church, *i.e.*, of the bishop or ecclesiastical administrator. Savigny, *ibid.*, Sohm, *ibid.*

Charitable foundation under English law.

A charitable foundation was thus *ipso facto* a corporation under the Roman law and did not require a juristic personality to be expressly conferred on it. But under the English law the juristic personality could only be conferred by the State. This was done by an incorporation by the King, by charter or letters patent, or legislative enactment, for "none but the King alone can create or make a corporation." Coke 10 Rep. 33 b. *The Case of Sutton's Hospital.*

Application of English law in Ceylon.

It is the English law which under the Ordinance 22 of 1866 (see pp. 32 and 91 *supra*) applies in Ceylon in the absence of any special provision to the contrary in a local legislative enactment, or (it must, I think, be added) unless local conditions render the application of the English law impracticable. Though there can be no question that the law is in force, I am not aware that it has been utilized for the creation of charitable foundations in Ceylon.

Article 134.

A corporate foundation, requisites of

For the creation of a corporate foundation are required

(*a*) an act of endowment, and

(*b*) the authority of the State.

Article 135.

Mode of endowment and Incorporation.

(1) The endowment is made by a deed or instrument duly executed, and constitutes the foundation.

(2) The authority of the State is granted by royal charter or letters patent or by legislative enactment, and incorporates the foundation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment on Articles 134 & 135.

The leading case on the subject is *The Case of Sutton's Hospital* (1613), Coke 10 Rep. 23-35. Hospitals (in the legal sense) are institutions erected for the relief and maintenance of the poor and impotent and not necessarily connected with medicine or surgery or the treatment of the sick. It was laid down in that case (*ibid* 33 b) that to erect a hospital there is nothing required in law but incorporation and dotation or endowment. "And therefore it was resolved that if the King had incorporated the poor of the said hospital, Sutton need not have made any instrument comprehending any foundation, erection, &c., but his gift of the land being the first gift had made him the founder, and the very first dotation is all the foundation which is requisite in law; and to the erection of an hospital there is not in law anything requisite but Incorporation and Dotation."

Case of Sutton's Hospital.

He who first endows the institution is the founder. But it is the Crown and not the founder who incorporates the body. "For none but the King alone can create or make an incorporation" (*ibid*). If the King joins with an individual in endowing a corporation, the King alone is founder (2 Coke, Inst. 68), but if two or more individuals contribute to the original endowment, they together constitute the founder.

The King alone can incorporate.

No particular form of words need be used for the creation of the corporation, provided the intention to incorporate is clear. (Grant on Corporations, 8; *River Tone Conservators* v. *Ash*, 10 B. & C. 349.)

Incorporating words.

The Crown may in the instrument of incorporation designate the place in or at which the buildings of the institution are to stand, and may appoint the number of corporators, and give the name, so that the incorporation is complete by the charter, and there remains for the founder nothing to do but to grant the lands or property forming the endowment, which he may do by an instrument not containing any words of erection or foundation, such as *fundo*, *erigo*, *stabilio* or the like. Or the Crown by the charter of incorporation may reserve for the founder the nomination of the persons and the giving of the corporate name, when the founder may nominate the parties and impose the corporate name by which they shall sue and be sued, which he may likewise do without any of the above-mentioned description of words. In this case, it

Modes of incorporation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

is not until the founder has stated these particulars in writing that the incorporation is complete; and in either case it is the Crown and not the founder who incorporates the body. Grant, pp. 571-2; Coke 10 Rep. 33 b. Incorporation by charter does not take effect until it is accepted by those to whom it is granted or by a majority of them. Grant, 18; *R.* v. *Hughes*, 7 B. & C. 708, *per* Lord Tenterden, C. J.

In Ceylon.

In Ceylon no instance (it is believed) has occurred of incorporation by royal charter or letters patent. But the power exists and may at any time be exercised by the King. An enactment of the local legislature, however, would probably be the mode of incorporation adopted in Ceylon.

Article 136.

Instrument of endowment.

The endowment may be by a deed *inter-vivos* or *mortis causa* or by last will, and is governed by the law regarding such instruments.

Article 137.

Endowment by deed *inter vivos* revocable until incorporation.

(1) If the endowment is made by deed *inter vivos*, the founder is entitled to revoke it until the authority of the State is granted.

(2) Upon the authority being granted, the property specified in the instrument of endowment becomes the property of the foundation.

Comment.

Donation incomplete until acceptance.

It is a recognized principle that a donation is incomplete until it is accepted by the donee, for benefits or gifts are not acquired by an unwilling person. (Dig. 39.5.19.2); so that without acceptance a donation is ineffectual for lack of the *duorum consensus* which a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

donation needs in common with other contracts. Voet 39.5.11. Until acceptance the donation is a mere intention and can be revoked. Pothier, Œuvres, VIII. 368; Voet 39. 5. 13; Van der L. 1. 15. 1.

Endowment incomplete until incorporation.

In the case of a foundation, until it is incorporated by the authority of the State, there is no person in existence who can accept; before incorporation there is no capacity to take as a corporation. Coke 10 Rep. 26 b; Chitty's Prerogatives of the Crown, 128. When the incorporation is made, the donation is deemed to be accepted, and is complete and irrevocable and the foundation has absolute right in and to the property donated and may bring an action to enforce the right, just as in the case of an accepted donation an action may be brought by the donee to enforce the gift (Van Leuwen, 4. 30. 2). See Article 139 *infra*.

Article 138.

Endowment by last will.

If the endowment is made by will, the property is deemed to vest in the foundation from the time when the will takes effect.

Article 139.

Obligation of founder, on incorporation.

Upon the authority of the State being granted, the founder or, if he is dead, his legal representatives are bound to transfer to the foundation the property specified in the instrument of endowment.

See comment on Article 137, *ad fin.*

Article 140.

Constitution of the foundation.

The constitution of the foundation is determined by the instrument of endowment.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

The maxim is *cujus est dare, ejus est disponere.* A charitable foundation is the "creature of the founder" (*St. John's Coll.* v. *Todington*, 1757, 1 Burr 158, 200), the corporators are in all respects the "creatures of the founder's bounty" (2 Q. B. 96), and he may impose his statutes on them. Grant 578; Lord Halsbury's Laws of England, 'Charities,' 286.

Article 141.

Statutes of the founder.

The founder may in the instrument of endowment state the name of the foundation, its object and its seat, or the place where its affairs are to be administered and its functions discharged, and may provide for its government and administration, the appointment of visitors and the application in perpetuity of its revenues.

Comment.

This follows from the preceding Article. The seat of the foundation is its domicile. See Art. 54, p. 77 *supra*. For duties of visitors, see Art. 145 *infra*.

Article 142.

Defect in endowment, supplied by the Crown or the court.

If the founder dies without making provision in respect of the matters mentioned in the last Article, the necessary provision may be made by the Crown, or (possibly) by the District Court on the application of the Attorney-General or of any person interested.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Benignant construction of charitable bequests.

The Roman law regarded charities with peculiar favour and gave a most liberal construction to legacies, &c., not allowing them to fail for the uncertainty or failure of the persons or objects for which they were destined. 2 Domat, Civil Law, 4.2.6; Story's Eq. Jur. §§ 1137-1140.

The Crown the protector of charitable trusts.

This spirit has descended to the English law. The Crown as *parens patriæ* is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern, and the Attorney-General, who represents the Crown for all forensic purposes, is the proper person to take proceedings on behalf of and to protect public charities. The law so highly favours them as to give them a more liberal construction than it will allow in gifts to individuals. *Ibid* §§ 1165 *et seq.*; *Weir* v. *Crum Broun* (1908) A. C. 162, 167; *Dundee Magistrates* v. *Morris* (1858) 3. Macq. 134, H. L. *per* Lord Cranworth. Subject to certain statutory restrictions on gifts to charity, where a clear charitable intention is expressed it is never allowed to fail on account of the uncertainty of the object, but the particular mode of application will be directed *cy-pres* by the King in some cases and by the court in others. See the leading case of *Moggridge* v. *Thackwell* (1802), 7 Vesey, 36, where Lord Eldon considers the earlier cases.

Charitable objects according to the statute of Elizabeth.

But before the State or its courts could intervene for the protection of a foundation, they had to be satisfied that it was (in the language of the Roman law) a *pia causa* or (in the language of the English law) had a charitable object. To decide whether a purpose is charitable or not in law, it is the practice of the English courts to refer to the preamble to the statute of Elizabeth (43 Eliz. cap. 4), which contains a detailed list of the uses deemed charitable. They are gifts, devises, &c., for the relief of aged, impotent and poor people; for the maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars of universities; for repairs of bridges, ports, havens, causeways, churches, sea banks and highways; for education and preferment of orphans; for or towards the relief, stock or maintenance of houses of correction; for marriages of poor maids; for supportation, aid and help of young tradesmen,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

handicraftsmen and persons decayed; for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes.

Objects "within its spirit and intendment."

This list, however, has never been held to be exhaustive. The objects enumerated in the statute and all objects which by analogy are deemed "within its spirit and intendment" are charitable in the legal sense; and these alone fall within the jurisdiction of Courts of Equity (Story's Eq. Jur. § 1155). Charitable purposes were classified by Lord Macnaghten as follows in *Commissioners of Income Tax* v. *Pemsel* (1891), A. C. 583: (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion, (4) other purposes beneficial to the community not following under the preceding heads. Within one of these heads all charity to be administered by the court must fall, though every object which might be brought within one of them is not a charity. *Re Macduff, Macduff* v. *Macduff* (1896) 2 Ch. 466, 474.

Classification of Lord Macnaghten.

Purpose must be of public nature

Only those purposes are charitable in the eye of the law, which are of a public nature, that is to say, they must benefit the community or some part of it, not merely particular individuals pointed out by the donor. *Jones* v. *Williams*, 1767, Amb. 651; where "charity" is defined as a gift to a general public use which extends to the poor as well as to the rich; *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, 1895, 2 Ch. 501, 504.

As to what charities are within the purview of the statute, see Story, Eq. §§ 1155 to 1158, 1164 and 1164 a to c., and Tudor's Leading Cases on Real Property, 2nd edition, pp. 474 *et seq.*

General, indefinite, private charities void.

If the charity be of a general, indefinite and mere private nature, or not within the scope of the statute of Elizabeth, it will be treated as utterly void and the property will go to the next of kin. Story, Eq. § 1183.

Where gift to charity generally, without trust.

When no trust is created and property is given to charity generally, *i. e.* to say, where no trustees are nominated and the charitable objects are not defined,—as *e. g.* a bequest to charity or the poor *simpliciter*, or where the testator intended but failed to name the objects of his bounty—the duty devolves on the Crown, as constitutional trustee, of disposing of the property. Halsbury's Laws of England, 'Charities,' 287.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Where no particular purpose named.

When the mode of executing a charitable gift is originally undefined, the intention of the donor will be carried out as far as possible by the gift being applied to charitable objects to be nominated by the court or the Crown or, in England and Wales, also the Charity Commissioners, a Board established under the Charitable Trusts Acts 1853 to 1894 for the due administration of charitable trusts.

General principle.

The general principle upon which the court acts is laid down by Lord Eldon in *Moggridge* v. *Thackwell* (*uti supra*), viz: "that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effected shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."

Ascertainment of intention.

In such cases any indication throwing light on the donor's intentions will be regarded, as *e. g.* his religious opinions, his interest in a particular locality, the nature of other charitable bequests in the same will, precatory directions in favour of a certain class, or even wishes expressed in an unattested codicil. If no indication can be gathered as to the particular intention of the donor, his general intention must be gathered. Thus, a gift for the poor generally could not properly be applied for a purpose unconnected with the relief of poverty, such as the rebuilding of a church.

Discretion of Court.

But if no particular charitable purpose is indicated and if the general charitable intention is subject to no restrictions express or implied, the discretion of the court in the application of the fund in what seems the most expedient manner is unlimited. Thus gifts for charity generally may be applied for the benefit of hospitals, schools, or other charitable institutions, while bequests for the poor may be used for educational purposes or for poor relations of the testator. Halsbury, *ibid.* 195, 196.

Jurisdiction of District Court.

This is generally done by the court directing a scheme to be settled to define the objects or prescribe the mode of administering the charity. Whether and how far jurisdiction under this Article will be exercised by the Ceylon courts, is a debatable point. The District Court, which by § 64 of the Courts Ordinance is vested with jurisdiction over the estates of *cestui que* trusts and trustees, and by § 639 of the Civil

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Procedure Code is empowered to deal with actions relating to public charities (see Article 150, p. 198 *infra*), would be the court, if any, to exercise the jurisdiction.

Procedure.

Lord Eldon in *Moggridge* v. *Thackwell* noticed the important distinction with regard to the administration of charitable funds, viz: that when the execution of the charitable purpose is committed to trustees with general or some objects pointed out, there the Court of Chancery will take the administration of the trust and carry it into effect by a Scheme; but when the property is not vested in trustees and the gift is to charity generally, not to be ascertained by the act of individuals referred to, the charity is to be disposed of not by a scheme, but by the Sign Manual of the King who has the disposal of such charities in his character of *parens patriæ* (Tudor, L. C. 498).

Disposition of property by Crown.

In England when the disposition is to be made by the Crown, the Attorney-General applies to the King for a warrant under the sign manual disposing of the property. The result is the same as when a charitable purpose is carried out by the court, though the procedure differs. *Moggridge* v. *Thackwell* (1802), 7 Vesey, 36, 86; *Morice* v. *Archbishop of Canterbury* (1807), 14 Ves. 364; *Re Pyne* (1903), Ch. 83; Halsbury, L. of E. 'Charities,' 287. In Ceylon this power of the Crown would more probably be exercised by legislative enactment than by warrant under the sign manual.

See under Article 147, p. 193 *infra* for the application of the principle of *Cy-pres* when the object of the foundation fails.

Article 143.

Alteration of constitution.

The founder may not alter the constitution of the foundation by increasing the number of corporators, or vary the trusts or the application of the endowment or revenues, unless special powers for this purpose are reserved by the instrument of incorporation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

A. G. v. *Dulwich College*, 1841, 4 Beav. 255; Grant 530, 531, 543; Halsbury's Laws of England, 'Charities', 286. As to charitable corporations created by royal charter, though they are the "creatures of the Crown," they are not subject to control by the Crown other than that reserved by the charter, though in one case (*Queen's College, Cambridge*, 1821, Jac. 1, 20, 21) it was held that the Crown had an implied power to dispense with the statutes. However, when a corporation is dissolved or an integral part of it is gone, the Crown may grant a new charter, or on failure of objects the court may dispose of the funds *cy-pres*. Halsbury's L. of E. *ibid.*

Article 144.

Patronage and visitation.

(1) The founder and his heirs have the perpetual right of patronage and visitation of the foundation.

(2) The right may be vested by the founder in others and is liable to be forfeited by neglect or improper use.

(3) The right devolves on the Crown if not otherwise provided for by the founder, or if the persons in whom it is vested are not discoverable, are lunatic, or have forfeited it.

Comment.

Patronage.

Patronage: e.g. (*a*) the right of nominating the beneficiaries of a charity, or (*b*) the right of nomination to a living. (*a*) belongs naturally to the founder and his heirs or nominees until forfeited by neglect or improper use. *A. G.* v. *Leigh* 1721, 3 P. Wms. 145 n.; Shelford, Law of Mortmain, p. 769. (*b*) is in England according to the general ecclesiastical constitution vested in the bishop of the diocese or a private person, but may be vested in trustees, parishioners or inhabitants.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Visitation.

A visitatorial power attaches as a necessary incident to all charitable corporations. Shelford, *ibid.* 329. Where no visitor has been appointed by the founder, the rule is that the king and his successors are visitors of all lay charitable corporations founded by the Crown alone, or by the Crown jointly with a private person, and of all royal foundations endowed by a private person. Where a private person alone is founder, he and his heirs are visitors, unless the jurisdiction of the heirs is expressly excluded. And if the heirs of the founder fail, are not discoverable, or are lunatic, the visitatorial power, in the absence of appointment by the founder, devolves on the Crown. The founder may delegate the visitatorial power wholly or partly to any other person or his heirs, thereby appointing them general or special visitors. Grant 517-519, 529-539; Halsbury L. of E. 'Charities,' 286-293.

Article 145.

Duties of Visitors.

The duties of a visitor of a foundation are to see that it conforms to the statutes of the founder, to interpret and explain them, to settle disputes between its members, to inspect and regulate their actions and behaviour, and generally to correct all abuses and irregularities in its administration.

Comment.

Visitor's jurisdiction.

The powers and jurisdiction of visitors of colleges and the doctrine relating thereto were considered at length by Lord Chief Justice Holt in *Philips* v. *Bury* (1694), 2 Term. Rep. 346; Show. 35, 52. The tribunal of the visitor is *forum domesticum*, in other words the court of the founder, its jurisdiction being derived from the right of the founder to determine concerning his own creation. A visitor is not a court but rather an arbitrator under certain directions; and his decision on certain matters within his jurisdiction is final and not subject to review by the court. But an action for

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

damages will lie against him for exceeding his jurisdiction. The extent of the power varies according to the terms of the foundation. If the power given to the visitor is unlimited and universal, he has in respect of the foundation and property moving from the founder no rule but his sound discretion. If there are particular statutes, they are the rule by which he is bound, and if he acts contrary to or exceeds them, he acts without jurisdiction and consequently his act is a nullity. Grant 517-519, 529-539; Halsbury, L. of E. 'Charities' 287-293.

Article 146.

Suppression of foundation.

If the fulfilment of the objects of the foundation has become impossible, or if it endangers public interests, the foundation may be suppressed.

Comment.

See pages 79-81 *supra* for compulsory dissolution. It may be effected by statute, by revocation of charter or letters patent by judgment upon writ of *scire facias* (p. 79 *supra*); possibly, also, by sentence of court on prosecution of corporation for crimes including treason (p. 62 *supra;* Voet 3.4.5 and 8; 48.4.4; Pothier, Œuvres, X. 496).

Devolution of property.

As to devolution of property of a foundation on its extinction, see Art. 60, p. 82 *supra*.

Article 147.

Change of object.

(1) If the fulfilment of the object of a foundation has become impossible, the foundation may be applied to a different object from that of the founder.

Cy-pres.

(2) In changing the object the intention of the founder shall be observed as far as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

possible, and the new object shall be as near as possible (*Cy-pres*) to that of the founder.

Revenues.

(3) The revenues of the foundation shall continue to be applied as far as possible in accordance with the will of the founder for the benefit of those persons whom he intended to benefit.

Change of constitution.

(4) The constitution of the foundation may be changed so far as the change of object demands it.

(5) Before any change of object or constitution is made, the directors of the foundation shall be heard.

Comment.

The king, guardian of public charities.

The king, as *parens patriæ*, is guardian of public charities, lunatics and others incompetent to act for themselves. In the case of a corporate foundation, if there be any abuse or misuse of the trust, the Court of Chancery as representing the king will interpose at the instance of the Attorney-General or the parties interested, to correct such abuse or misuse. The interposition is referable to its general jurisdiction as a Court of Equity to prevent abuse of the trust. Story, Eq. § 1191.

Origin of *Cy-pres*.

The objects of a foundation are changed according to the doctrine of *Cy-pres* which was inherited and developed from the Roman law (Dig. 33, 2, 16, 17; 2 Domat 4, 2, 6) by the English law, and is evidence of the peculiar favour with which charities have been always regarded by the law. The Courts of Chancery were in former times most astute to find out grounds to sustain charitable bequests, the reason assigned being *summa est ratio quæ pro religione facit.* The doctrines that thus grew up have not been seriously shaken by the disposition of modern judges to curb the excessive latitude of construction of earlier times. See comment on Article 142, pp. 187 *et seq.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Primary rule of *Cy-pres*.

The primary rule to be observed in the application of the *Cy-pres* doctrine is that the intention of the donor must be observed as far as possible. If the donor names a particular object which is capable of taking effect, any *cy-pres* application that becomes necessary must be restricted within the limits of that object ; and the mode of application must as far as possible coincide with the donor's wishes. A charity may be *cy-pres* to the original object although it seems to have no trace of resemblance to it, if no other can be found having no nearer connexion. But objects nearer the donor's intention will always be selected in preference to those more remote. Where the donor intended to benefit several charitable objects, one of which failed, the fund must not be distributed among the other objects, if the one that failed bore no resemblance to the others. *Ironmonger Co.* v. *A. G.*, 1840, Cr. and Ph. 208, 1844, 10 Cl. and Fin. 908, H. L. ; *Re Prison Charities*, 1873, L. R. 16 Eq. 129 ; Halsbury, L. of E., 'Charities,' 190.

Action by Attorney-General.

Where an action is necessary to enforce the execution of a charitable purpose, to remedy any abuse or misapplication of charitable funds or to administer a charity, the Attorney-General is the proper plaintiff, whether he is acting alone *ex officio* as the officer of the Crown and as such the protector of charities, or *ex relatione*, *i.e.* at the request of a private individual called a relator who thinks the charity is being or has been abused. Halsbury L. of E., 'Charities,' 318. In either case he has the entire control of the action. The object of having a relator is to have before the court one who in the event of costs being given against the Crown, may be made liable for them. *ib.* 323. As a rule, the Attorney-General is a necessary party to all actions relating to charities.

Relator.

Settlement of schemes by court.

The court, on being satisfied that there is ground for its intervention, would order a scheme to be prepared by or with the approval of the Attorney-General for its approval ; and the scheme so prepared would on its being approved by the court take the place of the original purpose designed by the founder.

Jurisdiction of District Court.

This jurisdiction in Ceylon belongs to the District Court which is by § 64 of the Courts Ordinance 1 of 1889 expressly vested with jurisdiction over the estates of *cestui que* trusts and over trustees, and by § 639 of the Civil Procedure Code (see Article 150, p. 198 *infra*) is empowered to deal with actions in regard to public charities.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 148.

Cy-pres when applicable.

The principle of *Cy-pres* set forth in the last article may be applied

(*a*) where the object is defined, but fails either initially or subsequently, or

(*b*) where the machinery for effectuating the charitable intention fails, or

(*c*) where a surplus remains after satisfying the objects defined by the founder.

Comment.

Charitable intention.

In all these cases if a clear charitable intention is expressed, it will not be permitted to fail because the mode specified cannot be executed, but the law will substitute another mode *cy-pres*, *i.e.* as near as possible to the mode specified by the donor. The charitable intention must be that the property should be held either for a particular purpose or for charitable purposes generally, the intention in the latter case being called a 'general intention of charity.'

Initial failure of purpose named.

If a general charitable intention is indicated but the particular object named is illegal, or an accumulation is directed to extend beyond the legal limit, the gift may be applied *cy-pres*. Or if the particular purpose becomes for any reason impracticable, as if a bequest to found a scholarship in a particular college is declined by that college, it may be applied in establishing a scholarship at another college. Or where there is a gift to a charity which never existed or cannot be identified, the court leans in favour of a general charitable purpose, and accepts even a small indication of the testator's intention as sufficient to show that a purpose, and not a particular charity, is intended. Where a particular locality is named, the funds will be given to institutions in that locality having similar objects to the society which cannot be identified. If the main object is practicable but a subsidiary object

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

fails, the latter may be varied or dispensed with. Impracticable conditions may be modified or removed.

Subsequent failure of particular purpose.

Where the charitable purpose prescribed by the donor takes effect in the first instance but subsequently fails, as by the abolition of a particular form of imprisonment, or of slavery in the colonies, or the dying out of particular diseases, or by reason of a particular congregation changing its tenets or a particular form of religious service ceasing to be required, and there is an over-riding charitable intention, the gift may be applied *cy-pres*. Where change of circumstances in a particular locality has rendered the revenues of an ancient charity inapplicable to the original objects, the revenues may be applied *cy-pres* in carrying out the principal intention of the donor by giving relief to the poor in that locality.

Failure of machinery.

Where the machinery for ascertaining the intended objects breaks down, as where the bequest is for charitable and non-charitable purposes in shares to be determined by persons who fail to make the necessary apportionment, or where objects are intended to be, but are not, named by the donor or others, or where a fund is to be divided among a particular class at the discretion of persons who fail to make the division, the charitable gifts may be applied *cy-pres*.

Surplus income.

If the income of the fund should either originally or in process of time become greater than is necessary for the purpose named, the court may apply the surplus *cy-pres* to other purposes.

Story, Eq. §§ 1169-1190; 4 Halsbury, L. of E. pp. 190-199; Tudor's L. C. 498-506.

Article 149.

When *cy-pres* not applicable.

The *Cy-pres* doctrine is not applicable

(*a*) where a contrary intention is expressed; or

(*b*) where the original foundation is capable of taking effect; or

(*c*) if the gift is conditional and the condition remains unsatisfied; or

(*d*) where there is no over-riding charitable intention.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

(*a*) As *e.g.* where there is a direction that on failure of a bequest, the property shall fall into residue.

(*b*) In this case the court has no authority to vary it, even in a manner which the court may surmise that the donor would himself have contemplated if he could have foreseen the changes which have taken place.

(*d*) In this case a gift for a particular purpose which cannot take effect cannot be applied *cy-pres*.

See authorities cited under last Article.

Article 150.

Actions relating to public charities.

In case of any alleged breach of any express or constructive trust created for public charitable purposes, or whenever the direction of the court is deemed necessary for the administration of any such trust, an action may be instituted in the District Court by the Attorney-General, or by two or more persons having an interest in the trust and having obtained his written consent, to obtain a decree

(*a*) removing any trustee of the charity and appointing new trustee;

(*b*) vesting any property in the trustees of the charity;

(*c*) declaring the proportions in which its objects are entitled;

(*d*) authorising the whole or any part of its property to be let, sold, mortgaged or exchanged;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*e*) settling a scheme for its management; or

(*f*) granting such further or other relief as the nature of the case may require.

Comment.

Civil Pro. Code. § 639.

§ 639, Civil Procedure Code, which is substantially the same as § 539 of the Indian Civil Procedure Code of 1882 and corresponds to §§ 1-3 of Lord Romilly's Act, 52 Geo. 3, c. 101. The Indian section adds that the powers under this section may, outside the Presidency towns, be, with the previous sanction of the local Government, exercised also by the Collector or by such officer as the local Government may appoint. Special provision for this purpose was unnecessary in Ceylon in view of the inherent powers of the Crown under the English and Ceylon law of corporations.

Effect of the Section.

The object of section 639, as of Lord Romilly's Act, is to provide a more summary remedy in cases of breaches of charitable trusts as well as for the just and upright administration of the same. The section does not affect other powers of the Crown or the courts, as *e.g.* under Articles 142, 146 and 147.

The corresponding section in the Indian Code (it has been held) is permissive or directory, not mandatory, and does not affect those special cases connected with religious uses in which the right of a private individual to sue has not been repealed by the Code; and any person interested in the proper observance of a religious endowment such as the worshippers or devotees of an idol, can sue in his own right or in behalf of himself and all others interested to have the trust properly administered or any breach of trust rectified. *Thackersey Sewraj* v. *Hurbhum*, I.L.R. 8 Bom. 433; *Zafaryab* v. *Bakhtawar Singh*, I.L.R. 5 Alla. 497, and so can any representative of the person endowing the property. *Brojomohan Dass* v. *Hurrolall*, I.L.R. 5 Cal. 700.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

TITLE III.—JURISTIC PERSONS OF PUBLIC LAW.

CHAPTER VII.—JURISTIC PERSONS OF PUBLIC LAW: THE FISC, MUNICIPALITIES, etc.

Juristic Persons of Public Law include

(1) the Fisc or the State (the most important member of the class), and

(2) Municipalities, and other such corporations intended for the government of towns, for the preservation of order and health, for the advancement of trade, and for the local administration of justice.

The Fisc or the State.

The Fisc is not subject to the general law of corporations as set forth in Chapter IV. The law of the Fisc is of considerable importance and complexity in Ceylon, and is dealt with in pages 207 *et seq.*

Municipalities.

To the 2nd class belong, in England, Municipal corporations (now governed by the Municipal Corporations Act, 1882, 45 and 46 Vict. c. 50), County Councils (Local Government Act, 1888, 51 and 52 Vict. c. 41), Urban and Rural District Councils (Local Government Act, 1894, 56 and 57 Vict. c. 73), Parish Councils and Parish Meetings (ibid.). In Ceylon Municipalities and Local Boards belong to this class. The provisions of Chapter IV. apply to Municipalities, &c., except where otherwise specially provided for by local statute. The special legislation in regard to Municipalities is voluminous and is contained in the Ordinances cited at p. 201. Only a brief abstract falls within the scope of this work. For more detailed information reference should be made to the Ordinances themselves. Local Boards of Health and Improvement constituted under Ordinance 13 of 1898 may also (for reasons given in p. 205) be deemed juristic persons, though there is no express incorporation as in the case of Municipal Councils.

Local Boards.

MUNICIPALITIES AND LOCAL BOARDS.

ARTICLE 151.

Municipalities and Local Boards.

The provisions of Chapter IV. apply to Municipalities and Local Boards of Health and Improvement, subject to the provisions

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of the Municipal Councils Ordinances 1887 to 1907 and of the Local Boards Ordinance 1898 to 1905.

Comment.

Municipalities were established in Ceylon by the Ordinance No. 17 of 1865, and are now governed by the Municipal Councils Ordinance No. 7 of 1887 and the amending Ordinances 26 of 1890, 1 of 1896, 11 and 12 of 1898, 8 and 25 of 1901, 7 of 1902, 21 of 1904, 13 of 1905, 5 of 1906 and 21 of 1907. A consolidating Ordinance is before the Legislative Council. There are three Municipalities in Ceylon, *viz.* at Colombo, Kandy and Galle.

Ceylon Municipal Councils Ordinances.

A Municipal Corporation in England is constituted by royal charter and consists of the burgesses (*i.e.* resident rate payers),* Mayor and aldermen (Municipal Corporations Act, 1882, §§ 8 and 9), and acts through the Council consisting of Mayor, aldermen and councillors (§ 10), the councillors being elected by the burgesses (§ 11) and electing the Mayor and aldermen (§§ 14, 15).† In Ceylon the Municipal Corporation does not include the rate payers, but consists of the Chairman and councillors only (Ordinance 7 of 1887, § 7). The Chairman is appointed by the Governor (§ 47). Of the Councillors at least one half are elected by the rate payers and the rest nominated by the Governor (§ 10). The incorporating words are: "Such chairman and councillors shall be styled the Municipal Council and shall by such name be a body corporate and shall have perpetual succession and a common seal and power to hold and sell property and may by such name sue and be sued" (§ 7).

Municipal Corporations in England.

In Ceylon.

Incorporating words.

The entire executive power and responsibility for the purposes of the Ordinance are vested in the Chairman, and all executive acts which are required to be done by the Council are (unless a contrary intention appears from the context) to be done by him or by his

Powers of Chairman of Municipal Council.

*Strictly, persons who by one year's residence in a borough and occupation of property are entitled to be enrolled and, when enrolled, to elect the Council.

†"The student cannot be too early warned that the practice of using the term 'corporation' as equivalent to the borough council is without legal authority and leads to confusion. The 'corporation' includes the whole of the burgesses or persons enjoying municipal rights." Stephen's Commentaries on the Laws of England, 15th Edition III. p. 18 n. In Ceylon, however, the statement taken exception to would not be incorrect.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

assistant with his special authority (§ 47 as amended by Ordinance 1 of 1896). The Chairman is thus the director of the corporation.* For a director's general powers see Article 40 *supra* and the comment thereon pp. 65, 66. As to the making and sealing of contracts (Articles 34, 35, pp. 48-52), the Chairman may make contracts for works provided in the budget, the contracts being reduced to writing and signed by him and (if the amount of the contract exceeds one thousand rupees) also sealed with the common seal of the Municipal Council (§§ 63, 64); and tenders for the contract should be called for, and the consent of the standing committee to the contract obtained in advance if the expenditure involved is Rs. 1,000 and upwards (§§ 65, 68). Sections 89 *et seq.* provide for meetings (general and special) and the conduct of business, and qualify the general provisions in Article 45, pp. 68-71. The Chairman presides at such meetings, and in his absence a president is elected by the councillors present (§ 94.)

Powers of Council.

The powers of the Council are enumerated in § 80, which however is not exhaustive. The chief of them are

(*a*) to deal with budgets (§§ 111-114);

(*b*) to make bye-laws* for specified purposes and repeal, alter or amend such bye-laws subject to confirmation by the Governor in Executive Council (§ § 122, 123) (For the general provisions as to bye-laws see Article 33, pp. 47, 48 *supra*);

(*c*) to assess and levy with the sanction of the Governor in Executive Council rates on real property in the town (§ 127) for the maintenance of the police and for the supply of light and water and for other purposes specified in § 46; to levy taxes on vehicles and animals (§ 128); to levy a yearly tax, payable in six days' labour or in money in commutation of labour, on able-bodied males between the ages of 18 and 55 years, except Buddhist priests, Indian coolies, &c. (§ 130, and Ordinance

* For the bye-laws of the Colombo Municipality, see *Government Gazette* of 30th January, 1903, 20th October, 1905, 2nd and 30th March, 20th April, 8th and 29th June, 1906, and 8th March, 1907; for Kandy, see the *Gazette* of 11th January, 1907; for Galle, the *Gazette* of 23rd January, 1903 and 30th September, 1904.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

10 of 1861 § 50); to establish tolls within the Municipality (§ 131);

(*d*) to purchase or acquire land for building purposes (§ 161), for the improvement of streets (§§ 162, 163), for markets (§ 228), and sell or lease land (§§ 158, 164);

(*e*) to raise loans on the security of rates and taxes (§ 263) or municipal property (§§ 86, 87);

(*f*) to provide for the general conservancy of the town (§§ 160, 225), to regulate dangerous and offensive trades (§§ 255 *et seq.*), and prevent infectious disease (§§ 246, 254);

(*g*) to provide public markets and charge rents (§ 227) and regulate private markets (§ 233 *et seq*).

Municipal Magistrate and his powers.

A Municipal magistrate has power to try and determine breaches of bye-laws and other specified offences (§ 55).

Liability of Municipality for contracts and torts of its officers.

The liability of the Municipal Council for the contracts entered into, and the torts committed by its officers, is governed by Article 39 (pp. 56-64) subject to the condition that no action may be instituted against the Council without one month's previous notice in writing or after three months from the date of the cause of action (§ 278). See *Kandasami* v. *Municipal Council, Colombo*, p. 63 *supra*.

Local Boards.

Local Boards of Health and Improvement were created under the Ordinance 7 of 1876 and are now governed by the Local Boards Ordinance 1898 (No. 13 of 1898) as amended by Ordinances Nos. 2 and 25 of 1901 and Nos. 13 and 19 of 1905.

There are now 20 Local Boards in the Island, viz. Kalutara, Negombo, Moratuwa and Minuwangoda in the Western Province; Gampola, Matale, Nawalapitiya and Hatton-Dikoya in the Central Province; Jaffna in the Northern Province; Matara in the Southern Province; Batticaloa and Trincomalie in the Eastern Province; Kurunegala, Puttalam and Chilaw in the North-Western Province; Anuradhapura in the North-Central Province; Badulla and Bandarawela in the Province of Uva; Ratnapura and Kegalla in the Province of Sabaragamuwa.

Constitution of Local Boards.

Local Boards are constituted by proclamation (Ordinance 13 of 1898, § 4), and consist of three official and three unofficial members; the former consisting of the Government Agent and two others

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to be appointed by the Governor, and the unofficial members being elected (§ 5) There is no express incorporation in the Ordinance as in the case of Municipal Councils (see the incorporating words quoted at p. 201 *supra*), nor has a Local Board a common seal. It has sometimes been said that a common seal is indispensable to a corporation. But the seal is not conclusive of the corporate character. The Inns of Court *e.g.* have common seals, but they are only voluntary societies, not corporations (Grant on Corporations, p. 58 (*a*)). "The original institution of the Inns of Court" said Lord Mansfield in *The King* v. *Benchers of Gray's Inn* (Douglas' Reports I. 354) "nowhere precisely appears, but it is certain that they are not corporations and have no constitution by charters from the Crown. They are voluntary societies."*

Common seal not essential to a corporation.

Inns of court.

A Local Board may own property (Ordinance 13 of 1898, §§ 52-54); may purchase and sell lands

Powers of Local Boards.

* "The Inns of Court", said Lord Campbell when Attorney-General, "are merely voluntary societies. They were originally dining clubs and nothing more, like the clubs established at the West End of the town" (*The Sergeants' Case*, reported by Sergeant Manning, 1840, p. 140).

Origin and purpose of Inns of Court.

More correct information as to the origin and purposes of Inns of Court is now available. Lord Justice Matthew said in *Smith* v. *Kerr*, 1902, 1 Ch. 782: "The history of the institution of the Inns of Court and Inns of Chancery is set forth in Dugdale's Origines (chapters 8 and 55). They had their beginning in an Ordinance and Commission issued by King Edward I. in 1290, at the time when the clergy were forbidden by the canons from taking part as advocates in civil suits. It had become necessary in the interest of the public to obtain the assistance of laymen who were trained lawyers and who were competent to take the part of their clerical predecessors in conducting the business of the Court of Common Bench, which was then permanently settled at Westminster. The Commission required the Chief Justice of the Common Bench and his fellow justices to bring together from the provinces men "of the best and most apt for their learning and skill," who should be near the Court at Westminster. Under the Commission and to fulfil its purpose, the Inns of Court and Inns of Chancery were established to provide for the legal education of students, The Inns of Chancery were affiliated with the Inns of Court and afforded instruction, as Sir J. Fortescue says, in 'the nature of original and judicial writs, which are the very first principles of the law.' After a short stay in the Inn of Chancery, the student desirous of practising at the bar passed on to one of the four Inns of Court." Collins, Master of the Rolls, in the same case quotes Lord Coke as saying of these institutions and Sergeant's Inn: "All these..altogether do make the most famous university for profession of law only, or of any one human science that is in the world."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(§ 60 (2) or acquire lands under the law for the acquisition of land for public purposes (§ 61); may make contracts (§ 88); may sue and be sued by the name of "Local Board of Health and Improvement" of the town for which it is constituted, no action abating by reason of the death or cessation from office of any member, and no member being personally liable for the payment of any sum due from the board (§ 22); may make bye-laws and alter, amend or cancel them (§§ 56-57); and has most of the powers enjoyed by a Municipality and necessary for the conservancy of the town, the preservation of the public health and the promotion of the comfort and convenience of the inhabitants.

Express words of incorporation unnecessary

With such powers vested in a Local Board by the Legislature, express words of incorporation would appear to be unnecessary. "It has been held (says Grant on Corporations, p. 8) that a body will be taken to be a corporation when it is constituted by an act of parliament in such a way and for such purposes as show that the meaning of the legislature was that the body should have a perpetual duration, although no express words are used constituting it a corporation: this is called a corporation by implication. And this agrees with the old law that if the Crown grant land to the men of Islington, *without saying to them and their successors*, rendering rent, this incorporates them for ever for the purpose of the farm, for without such incorporation the intention of the grant could not be fully carried into effect." The leading case is *River Tone Conservators* v. *Ash* (1829), 10 B and C 349, where Littledale J. held that no particular words are necessary in the creation of a corporation: it is sufficient if the intent to incorporate be evident. For example, where the Crown grants land to certain persons and their successors, it is implied from the word "successors" in this connexion that the Crown intended them to take as a corporation and not as individuals. Where by a statute a body of persons is empowered to sue and be sued by a special name, it is strong evidence that they constitute a corporation. (See also Halsbury's Laws of England, vol. 8, Corporations, pp. 315 and 320). There is therefore no doubt that a Local Board constituted under the Ordinance 13 of 1898 is a corporation.

Road Committees.

There are other public bodies in Ceylon such as Provincial and District Road Committees (Ordinance

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

10 of 1861 as amended by Ordinances Nos. 3 of 1883, 31 of 1884, 17 of 1885, 10 of 1887, 10 of 1902, 13 of 1905 and 25 of 1906), Boards of Health (Ordinances 8 of 1866 and 18 of 1892 as amended by Ordinances 11 of 1900 and 13 of 1905), Gansabhawas or Village Councils (Ordinance 24 of 1889 as amended by Ordinances Nos. 10 of 1891, 14 of 1893, 9 of 1894, 9 and 15 of 1896, 10 of 1898, 13 of 1905, and 29 of 1906.) The two latter bodies are clearly not corporations. As to Road Committees, section 12 of Ordinance 10 of 1861 empowers them to enter into contracts and to sue and be sued under the name of the Provincial or District Committee; and this would according to the decision in *River Tone Conservators* v. *Ash* (*supra*) be strong evidence to constitute the Committee a corporation. But the evidence is not so conclusive as in the case of Local Boards, and the juristic personality of Road Committees may be considered an open question.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CHAPTER VIII.

The Fisc, or the State.

History of the term Fisc.

The Fisc (from the Lat. *Fiscus*, a basket; then a basket used by the Romans for keeping and conveying money) originally meant the Emperor's exchequer as distinct from the *Œrarium* or the State exchequer. The distinction disappeared with the increase of the Emperor's power and the decline of the power of the Senate. The *Œrarium* was absorbed in the *Fiscus*, which came to mean the State treasury and then the State itself. (Savigny, Syst. des h. r. Rechts, II. 88; Voet 49. 14).

Fisc, or State, originally outside the law.

The State was quite outside the scope of the private law (*jus civile*), for this was a law for the individual (*civis*) only, and the State was not an individual. Whatever it possessed (*res publica*) was outside the pale of private law, was *extra commercium*, and could neither be owned nor in any way disposed of by private persons.

How it became a Juristic Person.

Under the Emperors this incapacity was removed,—a result due to the development of the system of municipal government which occurred towards the close of the Republic. The property of the *municipium* or town community was brought within the rules of private law, and the *municipium* was allowed to rank as a person capable of private rights and duties. After the example of these municipalities, lawful societies (*collegia*, *sodalitates*, *universitates*) were acknowledged to have proprietary capacity for purposes of private law. And finally the Roman State too, in the form of the *fiscus*, was ranged among private persons, and invested with rights and liabilities of its own as distinct from the individuals who constitute the people and from those who exercised the ruling power. To obtain this position the Sovereign State had to put aside its majesty and its power transcending the dimensions of an individual person, and to step into the domain of the law of property and become a new ideal or juristic person, a special unit taking its place in the ranks of other individuals or natural persons. But the numerous fiscal privileges it enjoyed remained to testify to its original exemption from the rules of private law (Dig. 49, 14, *de jure fisci*; Cod. Just. 10, 1. *ibid*; Cod. Theod.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

10. 1. *ibid*; Paulus 5, 12, *de jure fisci et populi*; Voet, 49. 14; 20. 2. 8-10; Savigny, Syst. des h. r. Rechts. II. 88, 101; Sohm § 37).

The Fisc, and its privileges, under the Roman Dutch law.

This conception of the State passed into the Roman-Dutch law. Of the privileges of the State under this law it has been said:—"There is abundant authority in the Civil law for the proposition that the State is entitled to the same measure of relief as minors who have suffered lesion..... In the Netherlands the rule of Civil law was fully adopted, and according to Matthœus (*de Auct* 1. 16. 29 and 30) and Voet (4. 4. 55) was extended to the Fiscus as the custodian of the public treasury. The latter author enumerates the several rights which the Fiscus and minors have in common, as *e.g.* that of tacit hypothecation upon the estates of persons administering their respective properties; and in the title *de jure fisci* (49. 14. 2) he repeats the statement that the Fiscus is entitled to the *restitutio in integrum* in the same manner as minors. There are of course many points in which the resemblance fails, *e.g.*, the Crown would not be relieved, like a minor, against prescriptive occupation of land which the Crown has the power of alienating, but in respect of land which it would be illegal for the Crown to alienate there can be no prescription." *Collector of Customs* v. *Cape Central Railway.* 6 Reports of the Cape Supreme Court, 407.

For an exposition of the privileges of the Fisc under the Roman Dutch law, see Voet 49. 14. 2-3; 4. 4. 55; 20. 2. 8-10; 20. 4. 22-25; and Articles *infra* on the right of the Crown to restitution, laches of Crown, prescription against Crown, Crown debts, &c.

The Fisc in Ceylon, law applicable to.

In Ceylon the legal status of the Fisc, inherited from the Roman Dutch law, has become complicated by the statutory introduction (by Ordinance 22 of 1866) of the English law of corporations, under which the King or the Crown is a corporation sole and the nearest equivalent of the Fisc, and by the influence of the principles of English Constitutional law. The rather paradoxical doctrines of the English law as to the King's perfection, immortality, invisibility, &c., with their consequences, must be deemed as much part of our law as the Roman Dutch law of the Fisc, subject to modifications introduced by local enactment or long established practice.

The State has three important functions: legislative, judicial and executive. With the first two the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

civil law is scarcely concerned, and with the third only so far as the rights of the State are affected by the conduct of individuals or the rights of the latter by the conduct of its officers. In these relations the State enjoys certain privileges which are deemed the prerogatives of the Crown under the English law.

Prerogative, of the Crown.

The term Prerogative comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the Common law to the Crown of England (Comyns, Digest, tit. Prerogative A). Blackstone defines prerogative as "that special preeminence which the King hath over and above all other persons and out of the ordinary course of the Common law in right of his royal dignity" (Commentaries 14th ed. I. 239); and this, as Blackstone says, is expressed in its very name, for it signifies in its etymology something that is required or demanded (*rogo*) before, or in preference to (*præ*), all others.

Prerogative, according to Blackstone.

This definition being rather vague, another has been suggested by Dicey and Anson: "the discretionary authority of the Executive," *i.e.* everything which the King or his servants can do without the authority of an Act of Parliament. (Dicey, Law of the Constitution, 6th edn., 368; Anson, Law and Custom, Pt. II. p. 3):—a definition borrowed apparently from Locke, according to whom prerogative consists in the discretionary power of acting for the public good where the positive laws are silent (*On Government*, part 2. § 166).

According to Locke and Dicey.

The prerogatives of the Crown are not given for the personal advantage of the King, but are allowed to exist because they are beneficial to the subject. They are therefore to be guarded on account of the public: they are not to be extended further than the lawful constitution of the country has allowed them, but within these bounds they are entitled to every protection (*per* Lord Kenyon, *Rorke* v. *Dayrell*, 4. T. R. 410).

Prerogative, its object and limits.

Where prerogative is claimed, the Courts have power to determine the extent and legality or otherwise of any alleged prerogative (*Case of Monopolies*, 1602, 11 Coke Rep. 84. b; *East India Co.* v. *Sandys*, 1683-5, 10 State Tr. 371), the maxim being *Rex non debet esse sub homine sed sub Deo et lege, quia lex facit regem* (Bracton, lib. 1. c. 8).

Subject to law.

The prerogatives of the Crown are not confined to the British Islands, but extend to the Colonies as fully

Prerogative extends to the Colonies.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

unless expressly limited by law.

Re Bateman's Trust.

in all respects as to England, unless otherwise prescribed by imperial or colonial enactment. *Re Bateman's Trust* (1873) L. R. 15 Eq. 355, where Bacon V.C. said: "The Queen's prerogative is as extensive in New South Wales as it is here in this county of Middlesex. It has been contended that the title of the Crown by forfeiture was confined to this soil, the soil of England. But the Queen is as much the Queen of New South Wales as she is the Queen of England, and I must hold that every right which the Queen possessed by forfeiture extended as much to the Colonies as to this country."

Liquidators Maritime Bk. Canada v. *R. G. New B'wick.*

This view was confirmed by the Privy Council in *The Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick*, 1892, A. C. 437, in which the Privy Council reiterated the view it had expressed in *The Exchange Bank of Canada* v. *the Queen*, 11 App. Cas. 157, that the prerogative of the Crown, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain.

Only prerogatives incident to sovereignty extended. *Mayor of Lyons* v. *E. I. Co.*

However, this must be taken subject to the ruling of the Privy Council in *The Mayor of Lyons* v. *East India Co.* (Moore, P. C. R. 283), that the whole royal prerogative is not necessarily introduced into a conquered or ceded country, but only those prerogatives incident to sovereignty. Thus Chitty says (Prerogatives of the Crown, p. 25): "Those fundamental rights and principles on which the King's authority rests, and which are necessary to maintain it, extend even to such of his Majesty's dominions as are governed by their own local and separate laws . ...But the various prerogatives and rights of the Sovereign which are merely local to England and do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not, it seems, *prima facie* extensible to the Colonies or other British dominions which possess a local jurisprudence, distinct from that prevalent in and peculiar to England....In countries which, though dependent on the British Crown, have different and local laws for their internal governance, as for instance the plantation Colonies, the minor prerogatives and rights of the Crown must be regulated and governed by the peculiar and established law of the place. Though, if such law be silent on the subject, it would appear that the prerogative established by the English law prevails in every respect; subject perhaps

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to exceptions which the difference between the constitution of this country and that of the dependent dominion may necessarily create."

Authorities on Prerogative.

For a full exposition of the Prerogatives of the Crown, reference may be made to Stephen's Commentaries on the Laws of England, 15th edn. Vol. 2. pp. 549 *et seq.*; Broom and Hadley's Commentaries I. 282 *et seq.*; Broom's Legal Maxims, 48 *et seq.*; Lord Halsbury's Laws of England, Constitutional Law, Vol. 6. pp. 371 *et seq.*; Chitty's Prerogatives of the Crown; Anson's Law and Custom of the Constitution, Part II; and Dicey's Law of the Constitution.

The Prerogatives which concern the civil law are mainly :—

The King's preeminence.

I. The supreme sovereignty and pre-eminence of Sovereign. He is the supreme head of the realm and accountable in his proper person to none, save only to God, either within or without the realm. But he is bound, by the terms of his coronation oath and the maxim of the Common law, to observe and obey the law (1 Blackstone, Com. 241). *Rex debet non esse sub homine, sed sub Deo et lege, quia lex facit regem* (Bracton, lib. 1. c. 2).

Immunity from action.

His person is inviolable; he is immune from all suits and actions, either civil or criminal, for no court can have jurisdiction over him from whom all jurisdiction proceeds; nor is there any power or authority capable of binding the Sovereign save only the Sovereign himself in Parliament, and then only by express mention or clear and necessary implication, for it is inferred *prima facie* that the law made by the Crown with the assent of Parliament is made for subjects, not for the Crown (Broom's Legal Maxims, 73). See Article *infra* on Crown's liability to statute. Justice Story said in *United States* v. *Hoar*, 2 Mason (U. S. Circuit Court) 311: "In general, Acts of the legislature are meant to regulate the acts and rights of citizens, and in most cases the reasoning applicable to them applies with different and often contrary force to the Government itself. It appears to me therefore a safe rule founded on the principles of the Common Law that the general words of a statute ought not to include the Government or affect its rights unless that construction be clear and indisputable on the text of the Act."

Non-liability to statute.

Reason.

Preference of King's title to subjects'.

By virtue also of the King's pre-eminence and the rule *detur digniori*, the King's title shall be preferred,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

where the title of the King and the title of a subject concur, *quando jus domini regis et subditi concurrunt, jus regis præferri debet.* 9 Coke, Rep. 129; Co. Litt. 30 b; Broom's Leg. Max., 69. It is on this principle that Crown debts have preference according to English law. But in the Roman Dutch law it is on the principle that the Fisc is in the position and has the privileges of a minor. Voet. 4. 4. 55. See Article *infra* on Crown debts.

Absolute perfection.

II. Absolute perfection. *Rex non potest peccare:* "The King can do no wrong," does not mean that everything done by the Government is just and lawful, but that the Sovereign, individually and personally, in his natural capacity is independent of and not amenable to any other earthly power or jurisdiction, and that no crime or misconduct can be imputed to him personally, as it would destroy the constitutional independence of the Crown; the prerogative of the Crown, having been created for the benefit of the people, cannot be exerted to their prejudice, and therefore the King cannot sanction any act forbidden by law, so that in this point of view he is under, and not above, the laws, and is bound by them equally with his subjects.

King's illegal acts, how dealt with.

While the King himself is not only incapable of doing, but even of thinking wrong, his acts may be contrary to law and invalid and may be set aside by the law, but in such manner as to maintain the respect due to the Crown: thus if a grant of a franchise or privilege made by the Crown is contrary to reason or prejudicial to the Commonwealth or any private person, it may be set aside as having been due to fraud or deception practised by the agents whom the King employed. 1 Blackstone, 245; Broom's Leg. Max., 54; Chitty's Prerog. Cr. 5. He can act only through his ministers or officers, and there is no act for which some officer or minister of the Crown is not responsible and may not be made liable. See p. 218 *infra*.

Responsibility of ministers.

Remedy against Crown by petition of right in England.

If any person has a just demand on the King in respect of property or arising out of contract, though he cannot in England bring an action against the King, he may petition him through the Secretary of State. Though in a sense such redress is a matter of grace, the petition will not be refused capriciously and the prayer is grantable *ex debito justitiæ*. The law presumes that to know of any injury and to redress it are inseparable in the royal breast; and the order issues as of course in the King's own name to the judges to do

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

justice to the party aggrieved. (Broom's Legal Maxims, 60; Stephen's Commentaries, II. 560).

No remedy for tort.

This does not however apply to claims arising out of torts. The law will presume that the subject cannot have sustained any such personal wrong from the Crown, because it cannot afford any adequate remedy: want of right and want of remedy are the same thing in law. If the King were to command a third person to commit an injury on a subject, such person would be of course liable to an action, and could not plead the invalid command of the King. Chitty's Prer. Cr. 340.

Viscount Canterbury v. *A. G.*

In the case of *Viscount Canterbury* v. *A. G.*, 1 Phill. 306, where the Speaker of the House of Commons claimed, by petition of right, compensation for damage done to his property by fire which destroyed the Houses of Parliament in 1834 and which was attributed to the negligence of the servants of the Crown, the argument turned chiefly on the meaning of the maxim "the King can do no wrong," and the Lord Chancellor held that since the Sovereign is clearly not liable for the consequences of his own personal negligence, he cannot be made answerable for the acts of his servants. In Ceylon a petition of right is unnecessary; by long usage the Crown has waived its immunity from actions in respect of property or contract. See Article *infra* on actions against the Crown.

In Ceylon remedy by action in respect of property or contract.

The redress thus granted, whether on petition of right or not, is founded on natural equity, not civil law. As Puffendorf says (Law of N. and N. Bk. VIII, ch. 10). "A subject, so long as he continues a subject, hath no way to *oblige* his prince to give him his due when he refuses it, though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him upon such contract in his own Courts, the action itself proceeds rather upon natural equity than upon Municipal law." The end of such an action, adds Blackstone, is not to *compel* the prince to observe the contract, but to *persuade* him. If judgment is obtained against the Crown, it cannot be enforced by writ, and satisfaction of the judgment is matter of grace only. See under Article *infra* on actions against the Crown.

Ground of redress.

In pursuance of the same principle of perfection the Sovereign can never be a minor or under age, and all acts done by him in the exercise of the prerogative are valid in law, though he has not attained 21 years. He needs no guardian, but it is usual, when he is of

No minority of King.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

tender years, to make satisfactory provision for the exercise of his powers through a Regent. The Crown has the privileges of a minor in the Roman Dutch Law. Voet 4. 4. 55. See Articles *infra* on Crown's right to restitution, &c.

No laches.

No laches or negligence can be attributed to the Sovereign at common law, and so the maxim *nullum tempus occurrit regi* prevailed. No delay in resorting to his remedy being held to bar the King's right, and the maxim *vigilantibus et non dormientibus jura subveniunt* applies only to his subjects and not to himself. For the law intends that the King is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects. (Finch. L. 82; Co. Litt. 90). The Supreme Court of the United States, in the *United States* v. *Kirkpatrick*, 9 Wheaton 720, explained the reason thus:—"The general principle is that laches is not imputable to the Government; and the maxim is founded not on the notion of extraordinary prerogative but upon a great public policy. The Government can transact its business only through its agents, and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not save the public from serious losses if the doctrine of laches can be applied to its transactions." A similar reason is given by Voet 4. 4. 55, based on the privileged position of the Fisc as a minor.

No limitation of actions.

Reason.

Exceptions.

But this rule has been modified in England by statute, as *e. g.* under the Crown Suits Act 1769 (as amended by the Crown Suits Act 1861) by which the Crown is now barred from its civil right in land suits after the lapse of sixty years; under the Municipal Corporations Act 1882 (re-enacting provisions of 32 Geo. 3. c. 58) the Crown is barred after six years in informations for usurping corporate offices or franchises, or after year in *quo warranto* against a Municipal Corporation; under the Treason Act 1695, an indictment for treason, except an attempt to assassinate the King, is barred after 3 years.

For the exceptions in the law of Ceylon see Articles *infra* on prescription against the Crown.

Immortality.

IV. "The King never dies," *i. e.* in his political capacity. Immediately upon the decease of the reigning Sovereign in his natural capacity, his kingship or imperial dignity is vested by act of law and without any interregnum in his heir, who is *eo instanti* King to all intents and purposes. The law is so tender of even

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

supposing a possibility of the King's death, that his natural dissolution is generally called a *demise*, which signifies merely a transfer of property ; or (as observed by Plowden, 177) when we say the demise of the Crown, we mean only that in consequence of the disunion of the King's natural body from his body politic, the kingdom is demised or transferred to his successor. It is by virtue of this immortality and capacity of perpetual succession that the King is regarded by English lawyers as a corporation sole. But according to Professor Maitland "the King is *not* a 'corporation sole,' but is the head of a complex and highly organized 'corporation aggregate of many.' I see no harm in calling this corporation a Crown. But a better word is Commonwealth," *i. e.* the Fisc of the Roman Dutch and Ceylon law. See pp. 35, 36 *supra*.

Supreme executive authority.

IV. As the supreme executive officer of the State, and the sole magistrate of the nation, all others acting only by commission from and in subordination to him, he has the right to the allegiance of his subjects ; is the owner of all property which has no other owner (see Art. 152 *infra*) ; he has the power to make war and peace, to make treaties, to issue letters of marque and reprisal and safe-conducts, to send and receive Ambassadors, to raise and regulate crimes ; is in supreme command of the army and navy, for the maintenance of which he is dependent on the annual supplies voted by Parliament ; he has the power to coin money, regulate weights and measures, establish markets and fairs, appoint ports and havens, and erect beacons, light houses and sea-marks, to constitute corporations (see pp. 41, 42, 183 *supra*) ; and as *parens patriæ*, to have the care of charities (page 187 *supra*), infants, lunatics, idiots.

Legislative authority of Crown.

The supreme power of legislation which in Great Britain is vested in the King, Lords and Commons, applies not merely to the original dominions of the Crown, but to territory ceded to or conquered by it as well. The legislative authority of the Crown in Ceylon was once delegated to the Governor alone, now to the Governor and Legislative Council, which was constituted by the Letters Patent of March 19th, 1833, amended by Letters Patent of June 16th, 1877 and the Royal Instructions of February 19th, 1907. (Ceylon Manual 1909, pp. 50-57, 60 *et seq.*) The Crown has also legislated here directly by Charters, *e.g.* by the Charters of Justice, 18th April, 1801 and 18th April, 1833.

Once the Crown has parted with its legislative

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

authority to a Legislature, it would appear that it cannot without the consent of such legislature revoke, modify or extend the legislative powers in respect of any particular matter specially delegated by it to such legislature. *Campbell* v. *Hall*, 20 State Trials 323. The point at issue in that case was the validity of a certain tax imposed by Letters Patent on the island of Grenada, which had been acquired by conquest from France. It was held that the Crown undoubtedly had power to legislate for any possession acquired by conquest, but that the imposition of the tax in question was invalid because the Crown had, at the date when it was imposed, already issued Letters Patent granting a constitution to the island, and thus had bestowed upon a local legislative authority the power to frame laws. Having parted with its right to legislate under prerogative, the Crown (it was held) was precluded from this further exercise of that right.

Once parted with to Colonial legislature, cannot be afterwards exercised.

Campbell v. *Hall*, *per* Lord Mansfield.

Right of veto.

As paramount authority in Parliament the King can dissolve or prorogue Parliament at pleasure and can veto bills passed by them. The power of veto has become obsolete in Great Britain since 1707, but continues to be exercised in colonial legislation. The Crown is not in general bound by a statute unless named therein by special and particular words. But where an Act of Parliament is expressly made for the preservation of public rights and suppression of public wrongs and does not interfere with any established rights of the Crown, it is binding upon the Crown as well as the subject. Further, the King may take the benefit of any Act, though not specially named therein. See under the heading King's pre-eminence, p. 211 *supra*, and under Article *infra* on Crown's liability to statute.

Liability of Crown to statute.

Fountain of justice.

V. He is the source and fountain of justice, and all jurisdiction exercised within the British dominions is derived from him. By the 'fountain of justice' is meant (as Blackstone has observed) not that the King is the author or original but only the distributor, and as it were the steward of the public, to dispense justice to whom it is due. He is deemed always to be present in court, and is never said to appear by attorney and cannot be nonsuited, but the Attorney General may enter a *nolle prosequi*. All writs and legal processes run in his name, and all judges and magistrates are appointed to derive their authority from him. Therefore no court can have jurisdiction over him, nor can he by his writ command himself to appear *coram*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

judice (Broom L. M. 50). All judges and magistrates must exercise their authority in a lawful manner without deviating from the known and stated forms. He is bound to cause law and justice in mercy to be administered in all judgments according to the words of the Magna Charta: *nulli vendemus, nulli negabimus aut differemus, rectum aut justitiam.* Nor may he interfere with the due administration of justice; and although his person is above the reach of the law, it is his duty to obey it.

Proclamation.

It is his prerogative to issue proclamations, and they have force if they are grounded on and enforce the laws. 3 Co. Inst. 154; *Case of Proclamations*, 12 Rep. 74.

Pardons.

He has the exclusive and inseparable right of granting pardons, a right delegated by him to Colonial Governors. The pardon is confined to offences of a public nature where the Crown is prosecutor and has some vested interest either in fact or by implication; but where any right or benefit is vested in a subject by statute or otherwise, the Crown by pardon cannot affect it or take it away; for *non potest rex gratiam facere cum injuria et damno aliorum*, the King cannot confer a favour on one subject which occasions injury and loss to others. Broom's L. M. 64; Stephen's Com. 413.

Limitation of Prerogative.

The Crown or its ministers may not punish, imprison or coerce the subject in an arbitrary manner or interfere with the ordinary course of justice; may not suspend or dispense with laws or bring pressure to bear on the judiciary. Where prerogative is claimed, the Courts have power to determine the extent and legality or otherwise of any alleged prerogative. (*Case of Monopolies*, 1602, 11 Co Rep. 84 B; *East India Co.* v. *Sandys*, 1683-5, 10 State Tr. 371), the maxim being *Rex non debet esse sub homine sed sub Deo et lege, quia lex facit regem* (Bracton, lib. 1. c. 8).

Subjection to law.

Habeas Corpus.

The freedom of the subject to act as he pleases (provided he keeps within the law) and his immunity from wrongful detention or confinement are ensured by the Habeas Corpus Act, under which, upon probable cause being shown by affidavit either of the prisoner or of some person on his behalf, a writ may be obtained directing the person having charge of the prisoner to produce his body before the High Court in order that the reason of his detention may be inquired into. The powers under this Act are vested in the Supreme Court of Ceylon by the Charter of 18th April, 1801 § 82 and

Power of the Supreme Court to issue it.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

subsequently by the Charter of 18th February, 1833 § 49. The Courts Ordinance No. 1 of 1889, §§ 49 and 50, now regulates the issue of writs of *habeas corpus*. See also W. Pereira's Institutes of the Laws of Ceylon, I. 170 *et seq.*

Taxation.

The Crown or its ministers may not impose direct or indirect taxes without the sanction of Parliament; nor in Ceylon, without sanction of the Legislative Council. *Campbell* v. *Hall*, p. 216 *supra*.

Responsibility of Crown servants for executive acts.

Though the King can do no wrong and acts only on the advice of its constitutional advisers and through the recognized executive departments and officers, there is no act for which some officer or minister is not responsible and for which he may not be made liable to punishment or impeachment or in a court of law for criminal or tortious acts, or to censure or loss of office for bad advice given to the Crown. This irresponsibility of the King, combined with responsibility of his ministers for advice given and acts done, has crippled the King's independent action and made his ministers reluctant to obey an irresponsible master whose command is no excuse for any acts (Anson, Part II. p. 42).

Article 152.

The Crown the owner of *res nullius*.

Subject to the provisions of Article 153 and the following Articles of this Chapter, the Crown is the owner of everything which has no other owner.

Comment.

Primitive rule of title by occupancy.

According to the law of nations, priority of occupancy alone constitutes a valid title. *Quod nullius est, id ratione naturali occupanti conceditur.* Dig. 41. 1. 3; Inst. 2. 1. 12: a rule based on the maxim *Qui prior est tempore, potior est jure.* But with the advance of civilization and in order to prevent contention and strife, the rule has been much restricted by positive law and has little practical application at the present day. The general rule now is to assign to the State what has no other owner, according to the maxim *Quod nullius est, est domini regis.* Broom's Legal Maxims. 345 *et seq.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Bona vacantia under the English law.

According to the English law '*bona vacantia*', or things found without any apparent owner, originally belonged to the first occupant, but now belong, as a rule, to the Crown. *Haec quae nullius in bonis sunt et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium* (Bracton, lib. 1. c. 12). The term *bona vacantia* includes the personal estate of persons dying intestate and without next of kin, wreck, treasure-trove, waifs, and estrays, but not goods lost or designedly abandoned, the property in which is vested in the first finder and is good against all except the true owner in the case of goods lost. (1 Blackst. Com. 298; 7 Halsbury, L. of E. 209.)

Res nullius under Roman Dutch law.

Grotius (Introd. 2, 1, 50-54) says:—

"'*Res nullius*' is that which, since its origin or since its abandonment, has not been taken possession of by any one, nor declared by positive law to be the property of any one. Things considered as not taken possession of since their origin are such things as shells cast up by the sea, also wild animals which have never been caught. Things not taken possession of since their abandonment are such things as wild beasts which, having been caught, have escaped, or things which have been abandoned, or property vacated by death and not adiated by any one, or largess thrown to a crowd. But that which a man unwittingly drops from a waggon or throws overboard in a storm, is not considered as abandoned; but only that which is abandoned with the intention of no longer owning it, which intention is to be gathered from the circumstances. We have been careful to add the words 'nor declared by positive law to be the property of any one.' For our law has declared many things to be the property of the State, although not reduced into possession, and formerly gave them to the Counts (of Holland) for their support, *e.g.* the larger wild fowl and game (so much so that the taking possession without the Count's consent was considered as a heinous offence), fish in the navigable waters, unoccupied lands, intestate inheritances to which there are no heirs by blood, flotsam and jetsam. In how far these things must be understood to be given or not given by the Counts to their vassals, and how far they were entitled or not so to give, will be shown in its proper place."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

See further Grotius 2, 4; Van Leuwen 2, 3; Voet 41, which deal at length with the acquisition of *Res nullius*.

Article 153.

Escheat to Crown, on failure of heirs.

The estate of a person dying intestate escheats to the Crown on the failure of his heirs.

Comment.

Escheat under English law:

"Another branch of the Queen's ordinary revenue arises from escheats of land which happen upon the defect of heirs to succeed to the inheritance, whereupon they in general revert to and vest in the Queen who is esteemed in the eye of the law the original proprietor of all the lands in the kingdom." Blackstone.

'Escheat' is derived from the French word *eschoir*, to happen, because it falls to the lord from an event and from an unforeseen circumstance (Co. Litt. 93). The right of escheat is the outcome of the feudal system and is based upon the failure to perform the services which were the condition on which the land was granted. Chitty, Prerogatives of the Crown, 226; 8 Campbell's Ruling Cases, 166.

Vander L. (1. 10. 3. 6) says:—

Under Roman Dutch law.

"When any one dies intestate, without next of kin or heirs, the estate escheats to the Crown; but this failure of heirs must be complete, since if any of kin can be found, even beyond the 10th degree, they take the goods. So also when the next of kin of one side fail, their part does not escheat, but goes to the next of kin on the other side." Cf. Voet 38. 17. 22 and 27, and Grotius 2. 30. 1-4. The latter adds that relatives are considered as failing for the benefit of the Crown if they do not appear within a year and a day, while Voet (38. 17. 29) gives the period as three years.

Ordinance 15 of 1876, section 38.

Ordinance 15 of 1876, section 38, enacts that "if any one dies intestate without heirs, his or her estate escheats to the Crown. If, however, any heirs can be found, even beyond the tenth degree, they take the inheritance."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

As to when a bastard may inherit and when not, see next Article. Bastard.

Article 154.

(1) An illegitimate child cannot inherit *ab intestato* from his father or from the relatives of his father or mother, but can inherit from his mother provided that he was not born *ex prohibito concubitu*. Illegitimate child, succession of

(2) An estate, which an illegitimate child is disqualified under the last sub-section from inheriting, falls to the Crown in failure of other heirs of the intestate. Escheat of estate of illegitimate child's parents.

(3) The estate of an illegitimate child dying intestate and leaving no spouse or descendants, falls to the Crown if the intestate was born *ex prohibito concubitu*, and if not, to his mother and her heirs and, failing them, to the Crown. Escheat of illegitimate child's estate.

(4) "Illegitimate child" means a child not born in lawful wedlock and not legitimated by the subsequent marriage of his parents.

"Born *ex prohibito concubitu*" means born of persons related to each other within the prohibited degrees of relationship. Meaning of "illegitimate child" and "born ex prohibito concubitu."

Comment.

An illegitimate child or bastard is "*a terminus a quo*, the first of his family, a *filius nullius*," and under the English law cannot inherit from either parent or be legitimated or have any heir except of his own body; an estate to which a bastard is the only claimant escheats to the lord of the fee; so does the bastard's Bastard under the English law.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

own estate if he dies intestate and without issue. (Broom and Hadley's Com. II. 298; Stephen's Commentaries II., 283-5).

Under the Roman Dutch law.

Under the Roman Dutch law a child illegitimate by birth may, unless born *ex prohibito concubitu* (which included children born in adultery), be legitimated by the subsequent marriage of his parents, and is then in the same position as a child legitimate by birth (Grot. 2. 31. 7; Voet 38. 17. pt. 2, section 21).

Succession of bastard.

An illegitimate child cannot inherit from his father or his relatives or *vice versa* (Grot. 2. 27. 28), but may from his mother (for a mother makes no bastards), unless born *ex prohibito concubitu* (Voet. 38, 17, 8, 19, 21; Van der L. 1. 10. 3; Van. Leu. 3. 3. 10). Whether a bastard could inherit from his mother's relations is uncertain. Van der Linden (1. 10. 3) was inclined to answer the question in the negative; Grotius (2. 27. 28) and Van der Keesel (341-345) *contra*.

Succession to bastard under Roman Dutch law.

A bastard's estate descended as follows:—Bastards, leaving children born in lawful wedlock might be succeeded by them as heirs *ab intestato*, and on failure of children the property went to the next of kin on the mother's side, so as to exclude the Crown (V. d. L. 1. 10. 3).

When estate escheats to the Crown.

In the case of a child illegitimate by birth and not legitimated, one half of his estate on his death went to the mother's side (for, with regard to the mother, there is not any difference between children born in and out of wedlock), and the other half to the Crown, because the deceased is understood to be on the one side without any next of kin. If the maternal branch was not dead, then the whole inheritance went to the Crown, because it would have gone to the father's side, if the deceased had been born in lawful wedlock (Grot. 2. 31. 4). This was apparently the law of Zealand (Voet 38. 17. 27). In North Holland all the property went to the mother's relatives, and probably also in South Holland (V. d. k. 468). In 4 N. L. R. 242 Bonser C. J. says that Grotius thought the Crown entitled in South Holland, but quotes no reference.

Escheat of estate of child born *ex prohibito concubitu*.

Of children born *ex prohibito concubitu* the whole inheritance went to the Crown, because they cannot reckon any relatives either on the father's or mother's side in consequence of their proscribed descent (Grot. 2. 31. 6; Voet 38. 17. 15 and 27). See under next Article, p. 225 *infra*.

Legitimation under Ceylon law.

Legitimation of birth may be effected in Ceylon by subsequent marriage of parents unless the child was

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

procreated in adultery (Ord. 2 of 1895 sec. 22); *Karonchihami* v. *Angohami*, 2 N. L. R. 276; 8 N. L. R. 1; *Rabot* v. *de Silva*, *per* Privy Council, 12 N. L. R. 81; and under Ordinance 15 of 1876, section 37, an illegitimate child inherits the property of his intestate mother but not of his father or of the relatives of the mother, and if he leaves no surviving spouse or descendants, his estate goes to the mother and her heirs so as to exclude the Crown and, failing them, to the Crown (See *Sinno Appu* v. *Abayawikrama*, 4 N. L. R. 242 for a decision as to the law before the Ordinance 15 of 1876).

Succession of and to illegitimate child.

Children born *ex prohibito concubitu* cannot succeed *ab intestato* to either parent (Grot. 2. 31. 6; Voet. 38. 17. 9; and other authorities cited under next Article, p. 225). Born *ex prohibito concubitu* meant, under the Roman Dutch law, born in adultery or of persons related to each other within the prohibited degrees of relationship. But adultery not being an offence in Ceylon, must be excluded from the definition under our law; and children born in adultery, though they cannot be legitimated by their parents' marriage, may inherit *ab intestato* from their mother. *Wikramanayaka* v. *Perera*, 1908, 11 N. L. R. 171; *Karonchihami* v. *Angohami*, 1904, 8 N. L. R. 1; *Rabot* v. *de Silva*, 1909, 12 N. L. R. 81.

Born *ex-prohibito concubitu*: difference between R. D. and Ceylon law.

Article 155.

A legacy, which becomes void, devolves on the Crown on the failure of the testator's heirs.

Devolution of void legacy on the Crown.

Comment.

A testamentary gift to an *incapax* or person declared incapable of taking property under a will becomes *caducum*, *i.e.* falls away (*cado*) from him, and as such may be claimed by the heirs and, in default of such heirs, by the Treasury (*caducorum vindicatio*). Gaius 2. 286; Ulpian 17, 1; Sohm 498; Grot. 2. 24. 22 *et seq*; Voet 34. 9.

Caducum.

Under the Roman Dutch law, as a general rule, any person could take under a will. All persons, old

Who may take under a will.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and young, foreigners as well as natives, who are not expressly prohibited by law may take under a will (Grot. 2, 16. 1; Van der L. 1. 9. 4); even persons not yet born (2. 16. 2; see also Art. 2, p. 2. *supra*). There are many prohibitions in the books, but how far they will be entertained by the Courts is doubtful. Under Ordinance 21 of 1844 § 1 every person competent to make a will may dispose of his property by will at his pleasure to any person not legally incapacited from taking the same, and may exclude any child or other person from his legitimate portion or to disinherit him. But there is no statutory prohibition except in Ord. 10 of 1840 § 10, referred to at p. 227 *infra*.

Legacies void according to Grotius.

Grotius says (2. 24. 22 *et seq*):—"A legacy, if left to persons incapable of taking, if left openly, is considered as not left; but if left surreptitiously, then it falls to the Crown. In times of old, the law in this country was understood to have been that anything left to those who were gone over to the enemy, or a bequest to banditti, went to the sovereign; and was considered as if not left or bequeathed as the Roman law enacts. The same takes place, according to the Roman law, whenever a person to whom anything was left or bequeathed was found to have been the cause of the testator's death, or neglected to discover the cause of it, or had unworthily opposed the last will, or had injured the memory of the deceased, or after the bequest had cherished a deadly enmity to the testator; or had violated his wife, or defrauded the inheritance, or had contracted with a third person for the inheritance of another during the testator's life. But the Crown has no right if there are any innocent heirs by substitution, or if there is a *fidei commissum* in favour of some one else annexed to the bequest; for such innocent persons take precedence of the Crown. So when the instituted heir, being of full age, neglects for a whole year after due legal notice to fulfil the legacy, the inheritance is offered first to the heir by substitution, 2ndly in default of such, to the coheir, 3rdly to the fidei commissary heir, 4thly to the legatees, 5thly to the heirs *ab intestato;* and failing these, to the Crown: in each case with the duty of paying the legacies, it being understood that, if the instituted heirs are parents or children, they are entitled to their legitimate portion."

Instituted Heir.

What has been cited above from Grotius as to the instituted heir hardly applies to Ceylon in view of the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

grafting upon our law of the English law of Executors and Administrators. The instituted heir has practically disappeared from our law, though there has been no authoritative recognition of the fact. The instituted heir under the Roman Dutch law was much the same as a devisee under our wills. With us an heir need not adiate an inheritance under a will to render the will effective. See Walter Pereira, K.C., on the Testamentary Heir under the Roman Dutch law, in the *Ceylon Standard*, Legal Supplement, December 6th, 1904.

The following is a list (with the authorities) of the prohibitions that the Courts may entertain at the present day.

Void legacies according to Voet, etc.

(1) Children born *ex prohibito concubitu* cannot succeed *ab intestato* to either of their parents nor to any relations of their parents, and even under the will of their parents they cannot take more than is sufficient for their maintenance. Voet, 28, 2, 14 and 38, 17, sections 9, 15, 19, 21, 27; Grot. 2. 16. 6; 2. 27, 28; 2. 31. 6; V. der L. 1. 9. 4; Van. L. 3. 3. 10. Children born in adultery in Ceylon are not born *ex prohibito concubitu*, and though they cannot be legitimated by their parents' marriage, may succeed *ab intestato* to their mother and take under either parent's will. *Karonchihami* v. *Angohami*, 1904, 8 N. L. R. 1; *Wikramanayaka* v. *Perera*, 1908, 11 N. L. R. 171; *Rabot* v. *de Silva*, 1905, 8 N. L. R. 82; 1907, 10 N. L. R. 148; 1909, *per* Privy Council, 12 N. L. R. 81.

(2) Persons who have contracted an incestuous marriage or who have committed adultery cannot inherit from each other. Voet, 24. 9. 3; Van. L. 3. 3. 10; Cens. For. 1. 3. 4. 35; But the disqualification on the ground of adultery does not exist in Ceylon. *Karonchihami* v. *Angohami*, 1904, 8 N. L. R. 1; *Rabot* v. *de Silva*, 1905, 8 N. L. R. 82, and *per* Privy Council, 1909, 12 N. L. R. 81.

(3) A person who has married a minor, without the consent of his or her parents, cannot take anything under the will of the spouse so married. Voet. 28. 5. 7; 23. 2. 11, 16 *et seq*; Grot. 2. 5. 8; 2. 12. 7; 2. 16. 5; V. L. 3. 3. 16.

(4) The guardian of a minor, and the wife and children of such guardian, cannot take any property, whether movable or immovable, under the will of such minor. Voet. 28. 5. 8. 9. 10; 34. 9. 3; Grot. 2. 16. 4; V. D. K. 285, 286; V. L. 3. 3. 12. This prohibition, however, does not extend to the curators appointed to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Void legacies according to Voet, etc.

minors for some particular purpose, Voet. 28. 5. 10; and it ceases upon the termination of the guardianship. Voet 28. 5. 11. A similar prohibition applies also to the concubines and sponsors of minors. Voet 28. 5. 8; Grot. 2. 16. 4.

(5) The person who wrote the will by which anything is left to him, even if he did so at the request of the testator, cannot take under the will; and this rule applies even to the case of a husband who wrote the mutual will of his wife and himself, by which they confer reciprocal benefits upon each other. Voet, 34. 8. 3. 4; V. L. 3. 2. 5.

(6) The notary before whom a will is executed cannot take under it. Voet, 34. 8. 3; V. L., Cens. For. 3. 4. 43; V. L. 3. 3. 15.

(7) Any person who has caused the death of the testator, either wilfully or through negligence, is incompetent to take from such person either as heir, legatee, or donee *mortis causa*. Voet, 34. 9. 6; Grot. 2. 24. 24; 2. 28. 42; V. L. 3. 3. 9. So also is one who has wilfully neglected to discover the person who was the cause of it. Voet, 34. 9. 3; Grot. 2. 24. 24.

(8) Any person who has since the date of any disposition in his favour lived on terms of mortal enmity with the testator (Voet, 34. 9. 2; Grot. 2. 24. 24), or has laid a criminal charge against him which placed him in peril (Voet, 34. 9. 3, 4), or has had criminal intercourse with his wife or slandered his memory. Grot. 2. 24. 24.

(9) Any one who has vexatiously disputed the testator's will (Voet, 34. 9. 3; Grot. 2. 24. 24), or has fraudulently concealed a will containing a disposition in his favour (Voet, 34. 9. 2), or has interfered with the testator's right to make a will, either by preventing him from making one or compelling him to make one. Voet, 34. 9. 3.

(10) A widow who marries a second time before the expiration of the year of mourning cannot take under her deceased husband's will, either by way of inheritance or legacy. Voet, 34. 9. 2.

With respect to the capacity to take under a will, it must be observed that it is essential under the Roman Dutch law that it should exist both at the date of the execution of the will and at that of the testator's death; and, in case there is a suspensive condition attaching to an institution or bequest, it must exist also at the date of the fulfilment of the condition. Voet, 28. 3. 12; 28. 5.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

21. But incapacity at any intervening period will not prejudice a disposition. Voet, 28. 5. 22.

Void legacy under Ord. 7 of 1840.

Ordinance No. 7 of 1840 section 10 provides that no attesting witness to a will or other testamentary writing can take anything under it, nor can the wife or husband of the witness nor any person claiming through such witness or wife or husband. But this does not apply to charges and directions for the payment of a debt.

ARTICLE 156.

Treasure-trove, property of the Crown.

(1) Treasure-trove is the absolute property of the Crown.

(2) The finder of treasure-trove is not of right entitled to any portion of it.

Duty of finder.

(3) Every person finding or possessing treasure-trove, or having information of the finding thereof,

(*a*) shall report the finding and surrender the treasure-trove to the nearest Police Magistrate or, if no Police Magistrate resides within ten miles of the place of the finding, to the nearest chief headman or to the nearest police officer not under the rank of sergeant, and

Share allottable to him.

(*b*) shall thereupon be entitled, if such treasure-trove be retained by the Crown, to receive from the Crown half the value thereof, as determined by the Governor in Executive Council, together with an additional one-fifth of such value.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Penalty for concealment.

(4) Every person

(*a*) omitting to report the finding or to surrender the treasure-trove in terms of the last sub-section, or

(*b*) concealing or attempting to conceal the treasure-trove,

shall be liable on conviction to simple or rigorous imprisonment for a term not exceeding two years, and to a fine not exceeding one thousand rupees.

Meaning of "Treasure-trove."

(5) "Treasure-trove" means any money, coin, gold, silver, plate, bullion, precious stones, antiquities, or anything of any value found hidden in, or in anything affixed to, the earth, and the owner of which is unknown or cannot be found.

Comment.

Treasure-trove under Roman Dutch law.

Under the Roman Dutch law, following the Roman law, treasure-trove is an ancient deposit of money (*vetus depositio pecuniae*) which has been concealed during such a long time that the proprietor of it is not known and cannot be discovered. That is not considered as treasure-trove and does not go to the finder (*occupanti*), which has been placed for the sake of greed or through fear or for safe keeping in the ground or in a wall and has been discovered by another person, while the owner is still alive and remembers the deposit of such money, even if he has forgotten the exact place of deposit, or if he has sold the land and forgotten to remove the treasure (Voet 41.1.11).

The Roman Dutch law is not quite clear as to the allotment of the treasure. Some writers maintain that the treasure belongs to the owner of the land in which it is found; others, that the finder is entitled to it if found in his own land but, if outside, half belongs to the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

finder and half to the owner of the land (Grot. 2.4.38; Van der L. 1.7.2; Cens. For. 2.3.17; Voet 41.1.11). The State also occasionally pretended to some right in treasure-trove (V.d.L., Cens. For. & Voet, *ibid*).

Treasure-trove under English law.

Under the English law treasure-trove means gold or silver in coin, plate or bullion found hidden in the earth or in any other secret place, and belongs to the Crown by prerogative right, unless the person who hid it is known or afterwards discovered, when it belongs to the latter (1 Blackst. Com., 14th edn., 295). The Crown gains no title unless the treasure is actually hidden in the earth with the *animus revocandi*. Therefore, where it is scattered in the sea or on the surface of the earth or lost or abandoned, it belongs to the first finder (*ibid*. 296). But where the circumstances under which the treasure is found raise a *prima facie* presumption that it was hidden, it will belong to the Crown unless another can show a better title. *A.G.* v. *British Museum Trustees*, 1903, 2 Ch. 598. See also 2 Steph. Com. 615 and 7 Halsbury, L of E. 213.

Under Ceylon law.

The Article gives the substance of Ordinance No. 17 of 1887 (as amended by Ordinance No. 3 of 1891), which was enacted to provide against the concealment of treasure-trove, and to remove the doubts that have arisen under the Roman Dutch law. The amending Ord. 3 of 1891 is based on the Indian Act 6 of 1878. The definition given in the Ordinance is more comprehensive than under the English law and includes precious stones, antiquities, &c.

Ordinance 15 of 1900 makes provision in regard to Antiquities. See next Article.

Article 157.

Antiquities, meaning of.

(1) The expression Antiquities means any of the following objects, lying or being, or being found in this Island, which date or may reasonably be believed to date from a period prior to the annexation of the Kandyan Kingdom by the British, *i.e.* to say,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*a*) statues and statuary, sculptured or dressed stone and marble of all descriptions, engravings, carvings, inscriptions, writings and the material whereon the same appear, all specimens of ceramic, glyptic, metallurgic and textile art, coins, gems, seals, jewels, jewellery; arms, tools, ornaments, and generally all objects of art and movable property of antiquarian interest; and

(*b*) temples, churches, monuments, tombs, buildings, erections or structures, and immovable property of a like nature or any part of the same.

(2) No antiquity shall, by reason merely of its being discovered on a person's land, be claimed as his property.

Antiquity, property of the Crown.

(3) The antiquities referred to in paragraph (*b*) of the sub-section (1) shall be deemed to be the absolute property of the Crown, unless in any case some person shall be the owner of the same.

(4) Undiscovered antiquities of the class referred to in sub-section (1) (*a*) are the property of the Crown.

Allotment of share to finder and landowner.

(5) On the discovery of antiquities other than those referred to in sub-section 1 (*b*), one-third part shall be taken by the Crown, one-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

third by the finder, and one-third by the owner of the land in which they are found; or (if he be the finder) two-thirds; but if the land be Crown land, two-thirds by the Crown and one-third by the finder. The share of the Crown may be taken in value or kind, as may be determined by the Governor.

Comment.

This gives the substance of the Ordinance 15 of 1900, which was enacted for the better preservation of the Antiquities of the Island and includes provisions for excavations with the Governor's authority (sections 5 to 15); and penalties for unauthorized excavation (sections 5-15), for buying illegally excavated antiquities (section 6), for failure to report the discovery of antiquities (sections 16, 17), for unauthorized export of antiquities, for wilful damage to antiquities, &c.

The Ordinance is based on the draft of a Bill published in the *Cyprus Gazette* of 5th May, 1897 (subsequently enacted as Law No. 4 of 1905).

Article 158.

Wreck, meaning of.

(1) "Wreck" includes jetsam, flotsam, lagan, and derelict, found in or on the shores of the sea or any tidal water.

Delivery to Receiver of Wrecks.

(2) All cargo and other articles washed ashore from a ship stranded or in distress or otherwise lost or taken therefrom, must be delivered to the Receiver of Wrecks, and any person, whether he is the owner or not, who secretes or keeps possession of such cargo or article, or refuses to deliver it to the Receiver, shall incur a penalty of one hundred pounds.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Unclaimed wreck property of the Crown.

(3) If wreck be found in Ceylon and no claim is established thereto by the owner within one year of the wreck coming into the possession of the Receiver, it shall be the property of the Crown, and he shall sell the wreck and, after paying the expenses and fees and salvage if any, deposit the balance of the proceeds to the credit of the Consolidated fund of the United Kingdom of Great Britain and Ireland in terms of the provisions of the Act 1 Victoria Ch. 2.

Comment.

Ceylon and English statutes.

Ordinance 5 of 1861 as amended by Ordinance 4 of 1862, based on the Merchant Shipping Act 1854, (17 and 18 Vict. c. 104) and amending Acts, now consolidated in the Merchant Shipping Act 1894 (57 and 58 Vict. c. 60).

Wreck.

'Wreck' strictly means goods driven ashore from a shipwreck, but under the Ordinance 5 of 1861 section 1 (following the English Acts) includes jetsam, &c. as stated in subsection 1 of the Article.

Jetsam.

Jetsam means goods cast into the sea and there sinking and remaining under water; if they continue floating on the surface,

Flotsam.

they are called *flotsam*;

Lagan.

if they are sunk in the sea but tied to a cork or buoy in order to be found again, *ligan* or *lagan*;

Derelict.

goods are derelict "which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time": *per* Tindal C. J., *Legge* v. *Bood.* 1.C.B.1.1.2.

Under Roman law.

Under the Roman law, wreck was restored to the owner if he claimed it before a judicial tribunal within a year and a day, the fisc waiving its claim after a constitution attributed to either Marcus Aurelius or Constantins. Theft from a wreck was regarded as aggravated by the helpless position of the owner, and the thief was liable for fourfold the loss if an action was brought against him within a year; after that time, for the loss simply. Plunderers of wreck and exhibitors of false lights were also punished criminally (Dig. 47. 9; Cod. 11. 5). A

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

concealer of wreck was liable to the fourfold penalty, according to the Leonine Constitution, c. 64.

Under English law.

Under the early common law of England, the Crown was entitled to all wrecks which came to shore, for it was held that, by the loss of the ship, all property was gone out of the original owner. But this was adding sorrow to sorrow and consonant neither to reason nor humanity. The right was subsequently restricted to goods remaining unclaimed by the true owner within a year and a day. Flotsam, jetsam, and lagan belonged to the Crown if the ship perished or the true owner did not appear to claim them, but only if found in the narrow seas adjoining the coast. Now by statute the Crown is entitled to all unclaimed wrecks, including jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water. (1 Broom and Hadley, 361 *et seq*; 7 Halsbury L. of E. 210 *et seq*; 2 Stephen's Com. 609 *et seq.*)

Dutch law.

Under the Roman Dutch law, goods thrown overboard or jettisoned for the purpose of lightening a ship during a storm did not thereby become derelict, but still belonged to the former owner, since they were not thrown overboard from a desire to get rid of them but in order to escape the perils of the sea. Anyone seizing such goods on the sea or when driven ashore, with the intention of retaining them, is guilty of theft (Voet 41.1.9). Sailors and others who found the property were entitled to place it in security so that the owners could not reclaim it without paying salvage (V. der L.1.7.2).

Ordinance 5 of 1861.

The Ordinance 5 of 1861, following the English Act, provides for the appointment of Receivers (§2) and their duties; entrusts Receivers with extensive powers to preserve ship and life and suppress plunder and disorder (§§ 7 to 20); provides for salvage in respect of services rendered by any person in assisting the ship or saving life or cargo, and for the manner in which the amount is to be assessed and recovered, &c. (§§ 21 to 27).

ARTICLE 159.

Right of pearl fishery exclusively vested in the Crown.

(1) The exclusive right of fishing for and taking pearl oysters off the coast of Ceylon and in all bays and inland waters of the Island is vested in the Crown.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Penalty for unlicensed fishing.

(2) Any person who, without a license from the Crown, fishes or dives for, or uses any ship, boat or raft for collecting, pearl oysters within the limits named in any proclamation of the Governor, shall be liable to a fine of fifty rupees and to imprisonment, simple or rigorous, for three months, and to confiscation of the ship, boat, or raft used and of all its appurtenances and contents and all pearl oysters unlawfully collected.

Comment.

Ordinance 17 of 1906, sections 3 to 6.

Right of Crown.

The pearl fisheries of Ceylon have been celebrated for centuries. The exclusive right of fishing in the pearl banks has been from time immemorial claimed and exercised by the Crown, and is declared by section 3 of the Ordinance 17 of 1906 to be vested in the Crown. For an account of the fishery and its operations under British rule, see the Ceylon Manual, 1909, pp. 500 *et seq.*

History of pearl fishery legislation.

The first regulation under British rule was No. 3 of 1811, which prescribes penalties for vessels found within the limits of the pearl banks, and is still in force, together with the Ordinance No. 18 of 1843 which declares illegal the possession of certain nets and instruments within certain limits, and Ordinance No. 17 of 1906 which declares the right of the Crown as stated above, and makes better provision for the protection of pearl fisheries.

In the early years of British rule the right of fishing was sold to the highest bidder. Afterwards the Government itself carried on the fishery, and the produce, after payment in kind of the divers' share, was sold for the benefit of the Crown. The profits realized were sometimes large and amounted in 1905 to Rs. 2,626,175. Since 1906 the fishery has been leased to the Ceylon Company of Pearl Fishers Limited, in terms of the Ordinance No. 8 of 1906, for 20 years for a yearly sum of Rs. 310,000, in addition to the payment of all expenses that may be incurred by the Government in the sanitary and police arrangements

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of the fishery, and to the yearly expenditure by the Company of from fifty thousand to one hundred and fifty thousand rupees in the culture of the pearl oyster and the improvement and development of the fishery. (Deed of Lease, p. 506 of the Ceylon Manual.)

Right of fishing within three mile limit.

The exclusive right of the Ceylon Government to the pearl fishery has never been questioned. As regards the pearl banks within reach of cannon-shot or a marine league from the coast, the right is quite clear. It is a settled principle of international law that every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as a cannon shot will reach from the shore, or at least three miles from the low water mark.

Sea incapable of appropriation, as a rule.

The general rule is that the sea, being an element which belongs equally to all men like the air, cannot become the exclusive property of any State and consequently the use of the sea is open and common to all men (Just. Inst. 2. 1. 1-5.) All property, says Grotius, is grounded upon occupation, which requires that movables shall be seized and that immovable things shall be enclosed. Whatever, therefore, cannot be so seized or enclosed is incapable of being made a subject of property: the vagrant waters of the ocean are thus necessarily free. The right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use, and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, *i.e.* to say in neither of the two ways in which it can be used (Grot. *Mare Liberum*, Cap. 5). The right of navigating and fishing in the open sea being, then, a right common to all men, the nation that attempts to exclude another from that advantage, does her an injury which may be repelled by force and furnishes ground for commencing hostilities. (Vattel, Law of Nations, 1. 23, 281.)

Sea near the coasts may be appropriated.

But even those who uncompromisingly asserted the sea to be incapable of appropriation admitted that such parts of it as may be necessary for the safety of a State might be controlled. Otherwise there would be no sufficient security for the lives and property of the subjects of the State upon land. They would be exposed to the violence of persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose State consequently could not be held responsible for their

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

deeds. "Each State," says Vattel, "may, on this head, make what regulations it pleases, so far as respects the transactions of the citizens with each other, or their concerns with the Sovereign." [This has been done in Ceylon by the legislation mentioned above.] "But between nation and nation all that can reasonably be said is that, in general, the dominion of the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it. . . . . At present the whole space of the sea within cannon shot of the coast is considered as making a part of the territory." (Vattel 1. 23. 289.)

The distance to which a nation may extend its right over the sea has been the subject of a prolonged controversy, which will be found summarized in Wheaton's International Law, §§ 186 *et seq*; Phillimore's Intern. Law §§ 172 *et seq*; Travers Twiss, Law of Nations in Time of Peace, Ch. X; Hall's Intern. Law 5th edn. pp. 144 *et seq*.

Maritime territorial jurisdiction.

The maritime territory of every State, says Wheaton (International Law, section 177) extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along all the coasts of the State, according to the rule of law *terrae dominium finitur ubi finitur armorum vis*. This limit is supposed to be three miles from the coast, being the supposed range of a gun in position, but will have to be increased in proportion to the increased range of modern artillery. Within these limits, the rights of property and territorial jurisdiction of the State are absolute and exclude those of every other nation.

Case of the *Franconia*.

The extent and nature of the jurisdiction of a State over its territorial waters was discussed at length in the well-known case of *The Franconia*, 1876, (*R.* v. *Kean*, 2 Ex. D. 63; 46 *L. J. N. S. Magistrates* Cases 17), in which the Court held that it had no jurisdiction over a criminal offence committed by a foreigner on board a foreign ship which was on the open sea but within three miles of the coast of England. Of fourteen judges who attended the arguments, seven pronounced against the jurisdiction, while six claimed it, and one who agreed with the majority died before judgment was delivered. But the question has now been set at rest, as far as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

English law is concerned, by the Territorial Waters Jurisdiction Act, 1878, by which any part of the open sea within one marine league of the coast measured from low water mark is deemed to be open sea within the territorial waters of His Majesty's dominions, and to be subject to his criminal jurisdiction, even where the offence is committed on board or by means of a foreign ship.

Territorial Waters Jurisdiction Act, 1878.

As to the pearl banks beyond the three mile limit (and the Ceylon banks are mostly far beyond this limit), the question is not free from difficulty. The general rule has been stated above, and was declared by Lord Stowell to be that "in the sea out of reach of cannon shot universal use is presumed. This (*i.e.* the reach of cannon shot or a marine league) is the limit fixed to absolute property and jurisdiction." In the *Franconia* case (*supra*) Lindley J. said: "Beyond this (3 mile) limit, or at all events beyond the reach of artillery on its own coasts, no State has any power to legislate save over its own subjects or over persons on board ships carrying its flag." In *Gommell* v. *Commissioner of Woods and Forests*, 3 Macq. 419-465. H. L., in which the exclusive right of the Crown to the salmon fishery on the coast of Scotland was in question, Lord Wensleydale said "that it would be hardly possible to extend fishery seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country—that which is within the dominion of the country by being within cannon range—and so capable of being kept in possession" "The rule of law," says Phillimore (International Law, I. p. 235), may now be considered fairly established, viz., that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon shot from the shore at low tide: '*quousque e terra imperari potest*,' '*quousque tormenta exploduntur*,' '*terrae dominium finitur ubi finitur armorum vis*,' is the language of Bynkershoek."

Right of fishing beyond three mile limit.

As to whether and how far the three mile limit should be extended, no agreement has been arrived at among nations. But it is growingly felt, says Hall (p. 154), not only that the width of three miles is insufficient for the safety of the territory, but that it is desirable for a State to have control over a larger space of water for the purpose of regulating and preserving the fisheries in it, in view of the destructive methods of

Should the three mile limit be extended?

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

fishing now commonly employed which seriously threaten the productiveness of the fisheries, and in view of the greatly increased number of fishing vessels frequenting the grounds. The subject was exhaustively discussed at the meeting of the Institut de Droit International in Paris in 1894. With regard to the necessity of ascribing a greater breadth than three miles of territorial water to the littoral State, there was no difference of opinion; but there was no agreement as to the extent to which the marginal belt should be enlarged or the principle on which the enlargement should be based. Ultimately it was resolved by a large majority that a zone of six marine miles from low water mark ought to be considered territorial for all purposes, and that in time of war a neutral State should have the right to extend this zone, by declaration of neutrality or by notification, for all purposes of neutrality, to a distance from the shore corresponding to the extreme range of cannon.

Right of fishing beyond three mile limit may be prescribed.

Whatever distance may be finally fixed, the general rule as to the common use of the open sea beyond that limit is subject to the principle that long and uninterrupted possession by one nation excludes the claim of every other. According to Vattel (1. 286), although the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement and thus becomes a title in favour of the nation against another.

"The various uses of the sea," continues Vattel (1. 287) "near the coasts render it very susceptible of property. It furnishes fish, shells, pearl, amber, &c. Now in all these respects its use is not inexhaustible. Wherefore the nation to which the coast belongs may appropriate to itself an advantage which nature has so placed within its reach as to enable it conveniently to make itself master of it and to turn it to profit in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property? And though, where the catching of (swimming) fish is the object, the fishery appears to be less liable to be exhausted, yet if a nation has on its coast a particular fishery of a particular nature and of which it may render itself master, shall it not be

According to Vattel.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

permitted to appropriate to itself that natural benefit as an appendage to the country which it possesses and to reserve to itself the great advantages which it may derive by commerce, in case there be a sufficient abundance of fish to enable it to furnish the neighbouring nations with a supply? But if, so far from making itself master of a fishery, a nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it: it has left them in its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it. The English not having originally taken possession of the herring fishery on their coasts, it has become common to them with other nations."

Per Lord Stowell in *Twee Gebrœders.*

So Lord Stowell in the case of *Twee Gebrœders*, 3 Rob. Ad. Report 338-340: "In the sea out of reach of cannon shot universal use is presumed: in rivers flowing through conterminous states, a common use of the different states is presumed. Yet in both of these there may by legal possibility exist a peculiar property excluding the universal or the common use. Portions of the sea are prescribed for, so are rivers flowing through contiguous states: the banks on one side may have been first settled, by which the possession and property may have been acquired, or cession may have taken place upon conquests or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence. The usual manner of establishing such a claim is either by the express recorded acknowledgement of the conterminous states, or by an ancient exercise of executive jurisdiction founded presumptively on an admission of prior settlement or of subsequent cession."

Right of Ceylon Government unimpeachable.

The exclusive fishery at the pearl banks beyond the 3 mile limit has been uninterruptedly and without question exercised by the Ceylon Government as well during the century of British rule as in the previous periods of Dutch and Portuguese rule, and therefore the exclusive right of the Ceylon Government is now unimpeachable. See also the Ordinance of the States General quoted under Article 163 'Mines' *infra* and according to which the pearl fisheries belong to the State.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 160.

Right of collecting and manufacturing salt vests in the Crown.

(1) The exclusive right of collecting salt naturally formed in the Island and of manufacturing salt therein, is vested in the Crown.

License for sale, possession and removal of salt.

(2) The Crown may, by license under the hand of the Government Agent or Assistant Government Agent of any district included in the Schedule B to the Salt Ordinance No. 6 of 1890, authorize any person in such district to sell by retail salt purchased from the Government stores, or to possess or remove the salt in greater quantity than three quarts; and any person licensed to sell by retail may grant licenses for the possession of salt purchased from himself in quantities not exceeding 24 quarts and for a period not exceeding 14 days.

Penalties.

(3) (*a*) Any person collecting or manufacturing, or attempting to collect or manufacture, or possessing or selling or disposing of or removing or landing or shipping, salt contrary to the provisions of the Ordinance or otherwise than in accordance with the license in that behalf granted under the Ordinance; and

(*b*) the occupier of any house or premises in which is found any salt, or earth or sand or water impregnated with salt, which he is unable satisfactorily to account for; and

(*c*) any master or person in charge of any vessel who lands or ships salt from or to any

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

vessel without a permit, or (if the salt is for the use of the crew) without having obtained a permit from a Collector of Customs; and

(*d*) any person abetting the commission of any of the aforesaid acts,

shall be liable to a fine at the rate of one rupee per quart or part of a quart of the salt in respect of which the offence is committed, and to a further fine of one hundred rupees and, in default of payment of the fine, to imprisonment, rigorous or simple, for twelve months, and also to the confiscation of the salt and of the vessels, carts, horses, cattle, and machinery employed in the collection, manufacture, possession, sale or removal of such salt.

Comment.

Government monopoly in salt.

The manufacture of salt is a Government monopoly protected by the imposition of a duty of Rs. 2·13 per cwt. on imported salt, and is one of the principal sources of the revenue of the Island, producing over Rs. 1,750,000 in 1908.

Modes of making salt.

There are two descriptions of salt collected in the Island, viz., first, what is called naturally-formed or self-formed salt; second, manufactured salt. The former forms in, and is collected from, shallow salt-water lakes and marshes called *lewayas*; the latter is also obtained by solar evaporation, but from artificially made pans, as they are called, into which the salt water is led by channels. The lewayas are all the property of the Crown. The salt pans in which salt is manufactured, as it is termed, are private property; but nobody can manufacture salt in them without a license from the Government Agent.

Districts.

The districts in which salt is now chiefly collected or manufactured are:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(1) the Hambantota district of the Southern Province,
(2) the Puttalam district of the North-Western Province,
(3) the Jaffna district of the Northern Province, and
(4) the Trincomalie district of the Eastern Province.

In the Hambantota district the collection is entirely of self-formed salt, which forms in extensive lewayas, extending from Palatupana on the east to Lunama on the west of the Walawe river. In Puttalam the collection is entirely of salt manufactured in the salt pans at Puttalam and at Nachchikali, on the opposite side of the lake south of Kalpitiya. In the Northern Province both self-formed and manufactured salt are collected. In the Trincomalee district the collection is of salt manufactured at Nilaveli, about 6 miles to the north of Trincomalee.

History of salt legislation.

The law relating to the salt revenue is contained in the Salt Ordinance No. 6 of 1890, which has consolidated and amended the laws previously in force. The Ordinances so consolidated were Nos. 3 of 1836, 1 of 1838, 17 of 1840, 26 of 1852, 5 of 1856, and 2 of 1864. Ordinance 3 of 1836 was not the earliest on the subject; it replaced the Regulations No. 16 of 1813 and 2 of 1818.

The licenses referred to in subsection 2 of the Article are provided for by sections 5, 6, 7, 11 of Ordinance 6 of 1890; and the penalties in subsection 3 of the Article by sections 16 and 17. The Ordinance does not apply to salt imported into the Island and on which customs duty has been paid (section 22).

Article 161.

Sea and foreshore, right of Crown and public in.

(1) Subject to the rights of the Crown under Articles 158, 159, 160, 163 and 164, and to other rights vested in the Crown by statute or by prescription, the sea and its bed, and the foreshore or land between high and low water mark, are common to all persons.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Public use of sea and foreshore.

(2) All persons are entitled to use the sea for navigation and fishing, and the foreshore for access to the sea, for hauling or drying nets, for the erection of huts, and other lawful purposes, provided that the exercise of the right by any person is not detrimental to the rights of others.

Crown may regulate the use.

(3) The Crown may make such regulations as may be necessary for the due exercise of the public rights, and may authorize any person to erect buildings on the shore, provided that the public rights are not interfered with.

Navigable rivers, etc., property of the Crown, subject to public rights.

(4) The Crown is deemed the owner of all navigable rivers, lakes and other waters, and their beds and banks, subject to the public right of navigation and fishing in the waters and of using the banks for purposes ancillary thereto and other lawful purposes. The public right may be restricted by local laws and regulations.

Comment.

General rule as to the sea, and limitations of the rule.

The general rule as to the sea—that it is incapable of appropriation and that its use is open and common to all—and the limitations of, and exceptions to, the rule have been discussed under Article 159 *re* Pearl fishery, pp. 235 to 239 *supra*.

Law of foreshore in Ceylon.

The law of the foreshore in Ceylon is not free from doubt and difficulty. The law applicable is the Roman Dutch law, subject to local statute or custom. The Roman Dutch authorities are scarcely agreed, while there is no local enactment, established custom or authoritative judicial decision defining the rights of the Crown and the subject. I have summarized below the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Roman law, the Roman Dutch law, the local decisions and the English law. In the Article above I have stated what I understand to be the law in Ceylon. But in view of the uncertainty of the law, it is possible that our Courts may, when the question arises, apply the English law, which at least is certain and rests upon a long line of authority, both of text-writers and judicia decision. In *Doe dem Raja Sub Krish v. East India Co.*, 1856, 10 Moore P. C. C. 140, the Privy Council applied the English law of foreshore and alluvion to India. A like application to Ceylon would be in accordance with the tendency of legislation and judicial decision in Ceylon to give waste land to the Crown; and the seashore is waste land (see page 247 *infra*).

Under English law:

If the English law be applied, it would probably be on some such lines as the following:—

Crown's right to foreshore and land covered by sea or navigable river;

(1) The Crown is the *prima facie* owner of
  (*a*) all lands covered by the narrow seas adjoining the coast or by arms of the sea or public navigable rivers, and
  (*b*) of the foreshore or land between high and low water mark.

Limit landwards and seawards;

(2) The right to the soil
  (*a*) extends landwards to the medium line of high tide between spring and neap tides, and from the coast outwards to a distance of three miles, and

Mines under the sea.

  (*b*) includes the mines under the waters of the ocean up to the three-mile limit

Crown's right is subject to *jus publicum*;

(3) The right is subject to
  (*a*) the *jus publicum* or public right of navigation and fishing in the sea, and rights ancillary thereto, and to
  (*b*) the right of owners of adjoining land to have access to the sea at all times for purposes of navigation.

May pass by grant or prescription.

(4) The right of the Crown may be vested in a person by grant or prescription, but always subject to the right mentioned in sub-section 3.

For the authorities in support of these propositions, see pp. 247 to 250 *infra*.

Foreshore, under Roman law, common to all

Under the Roman law the seashore was common to all and incapable of ownership even in the Emperor. "The following things" says Justinian, "are by natural law common to all—the air, running water, the sea, and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

consequently the seashore . . . . . No one therefore is forbidden access to the seashore . . . . . The seashore extends to the limit of the highest tide in storm or winter . . . . . The public use of the seashore, as of the sea itself, is part of the law of nations; consequently everyone is free to build a cottage upon it for purposes of retreat, as well as to dry his nets, and haul them up from the sea. But they cannot be said to belong to any one as private property, but are subject to the same law as the sea itself with the soil or land which lies beneath it" (Inst. 2.1.1. and 5).

Also under the Roman Dutch law.

So also Grotius holds that a man cannot have any property in the shores and sands of the sea; these are all incapable of improvement and can only be exhausted by the only uses to which they can be applied, viz: of supplying fish and sand. (*De Jur. Bell ac. Pac. 2 sections 3 & 4.*)

Grotius.

The sea and light are common to mankind in general, and from their immeasurable extent and the service to which they are appropriated in common, remain undivided amongst persons. Therefore it is always understood in this country that foreigners as well as inhabitants may sail and fish in the open sea and even in our own coast. The sand of the sea, and consequently the shore in as far as the same is covered by the sea either at high water or half low flood, is subject to the same right as the sea. But the naked, uncovered shore belongs to the inhabitants of the country adjoining. The sea and the shore, when it is covered, may be freely used by every one of common right without, however, injuring another (Grot. Introd. 2.1.17 *et seq*).

Voet.

Voet (1.8.3) after stating the law as above, adds that every one can build on the sea, so that not merely the building, but even the part of the sea or shore occupied by the building, begins to be his private property and remains so until the building is destroyed; from which time the shores reverts to its pristine condition. But he who erects the building must take care that he does not injure the public rights or villas, &c., erected by private persons in the vicinity. In order to build on the shore no permission is necessary from the Crown, for *res nullius* belongs to the first occupant. But such permission it is prudent to obtain, lest the erection should have to be stopped or pulled down because it interferes with public or private rights; and moreover if he has such permission, he is liable only for damage arising from faulty construction to those who

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

suffer thereby, whereas without the permission he would be liable also for damage caused by defect in the soil or subsoil (ib. 4). The rights of the Crown in respect of the seashore are those of custodians on behalf of the public, and any grants by the Crown are subject to the condition that they do not materially interfere with the public right (Bruyn's Op. of Grot. 132).

In *Anderson and Murison vs. Colonial Government* (8 Cape S. C. 293), the applicants had purchased a wrecked steamer which lay on the seashore of Dassen Island, the property of the Crown. The Government agreed to allow the removal of the wreck on certain conditions, which applicants refused to comply with. The Government then refused permission to the crew of a vessel belonging to applicants to collect the cargo of the wrecked steamer, and warned the said vessel off the shore of the island. Applicants thereupon claimed an interdict restraining the Government from obstructing the removal of wreckage and stores from the wrecked steamer. The Cape Supreme Court refused the interdict, holding that no ground had been shown for preventing the Government from asserting their ordinary rights as landowners. It was said by De Villiers, C. J.: "Upon the cession of this Colony to the English Crown the laws of the country (Roman-Dutch) were retained. Under those laws the public had the right to the free use of the seashore, that is, to the land between high and low water marks, and it is no more in the power of the Government than it is that of any private individual to deprive the public of that right. No doubt the Government are, in one sense, the custodians of the seashore, but they are such only on behalf of the public. They may, as Voet points out, grant permission to individuals to build upon the seashore, and without such permission no one is at liberty so to build; but that permission is subject to the condition that the rights of the public shall not be interfered with. Any structure between high and low water marks, which materially interferes with the general use of the shore, whether constructed with or without consent of the Government, would be a nuisance which this Court would be justified in restraining. *A fortiori* would the Court restrain any direct interference with the rights of any of the public to recover, or temporarily deposit, ship wrecked goods on the shore. It is a very different matter, however, to ask the Court to interfere with the right of Government to ward off trespassers from Crown land."

Rights of the public to foreshore, under R. D. law; *per* Villiers C. J.

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Under the English law, however, the Crown is deemed the owner of all lands covered by the narrow seas adjoining the coast or by arms of the sea, and also of the foreshore or land between high and low water mark, as stated p. 244 *supra*.

Under English law Crown deemed *prima facie* owner.

The principle of the rule which gives the shore to the Crown is that it is waste land incapable of cultivation and therefore is in the nature of unappropriated soil (*per* Bayley J, in *Scrutton* v. *Brown*, 4 B & C. 485 ; *per* Cranworth, L. C. in *Attorney General* v. *Chambers*, 4 de G. M. & G. 210). The narrow sea adjoining to the coast of England, says Lord Hale, is part of the waste and demesne of the Kings of England, and the King is the owner of that great waste, the sea (*De Jure Maris*, c 4).

This right of the Crown is said by Moore (History of the Foreshore, p. 182) to have been first asserted in the reign of Queen Elizabeth by a writer of the name of Thomas Digges (1568-9). However, this right was maintained by the high authority of Lord Hale in his *De Jure Maris* and has been affirmed by an unbroken series of judicial decisions. The leading case is *Blundell* v. *Catterall*, 1821, 5 B. and A. 268, 24 R. R. 353. See p. 248 *infra*.

How presumption in favour of Crown rebutted.

The right is *prima facie* in the Crown, and the burden of proving the contrary is on the claimant (*A. G.* v. *Richards*, 1795, 2 Anst, 603). The *prima facie* title of the Crown may be rebutted by a clear grant from the Crown or by evidence of clear and distinct acts of ownership exercised without interruption during a period of 60 years, the acts showing such user as the subject matter was capable of. (*Ex parte Alston*, 1855, 28 L. T. 337 ; Moore on Foreshore, 310.) In Ceylon the period of prescription would be a third of a century (See Article *infra* : 'Prescription against Crown in land suits').

Foreshore, meaning of.

Foreshore is the land between high and low water mark. Hale says (*De Jure Maris*, C. 4): "That, therefore, I call the shore, *i.e.*, between the common high water and low water mark and no more.... ..This (shore) doth *primâ facie* and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea."

Limit of foreshore landwards.

Under the Roman law the limit was the limit to which the highest natural tides extend (*quatenus hybernus fluctus maximus excurrit*, Inst. 2.1.3, as far as the highest tide in time of storm or winter). But under the English law it is the limit reached by the highest ordinary

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

tides, and this was held in *A. G.* v. *Chambers*, 1854, 4 de G. M. and G. 206, to be the line of the medium high tide between spring and neap tides.

Seawards to the three mile limit and includes underlying mines.

The right extends from the coast outwards to the three mile limit (see under Article 159, pp. 235 *et seq.* as to the three mile limit) and includes all mines underlying the waters of the ocean to that limit. *Lord Advocate* v. *Wemyss*, 1900, A.C. 48 (*per* Lord Watson): a decision in regard to Scotland, but the same principle would be applicable to other British territory. 7 Halsbury L. of E. 112, 118.

Crown right in foreshore subject to public right of navigation and fishing.

Blundell v. *Catterall.*

In *Blundell* v. *Catterall* (5B. and Al. 268), Holford J. in his judgment said: "By the common law all the King's subjects have in general a right of passage over the sea with their ships, boats and other vessels, for the purposes of navigation, trade and intercourse, and also in navigable rivers; and they have also *prima facie* a common of fishery there. But they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. . . . By the common law (according to Lord Hale) though the shore, *i.e.* to say, the soil between the ordinary flux and reflux of the tide, as well as the sea itself belongs to the King, yet it is true the same are also *prima facie publici juris* or clothed with a public interest. But this *jus publicum* appears from Lord Hale to be the public right, in all the King's subjects, of navigation for the purpose of trade, commerce and intercourse, and also the liberty of fishing in the sea or the creeks or arms thereof, which, Lord Hale says, the common people of England have regularly, as a public common of piscary, and which he says they may not, without injury to their right be restrained of, unless in such places, creeks, or navigable rivers where either the King or some particular subject has granted a proprietory exclusive of that liberty" (*ibid.* 294, 296).

In the end Holford J. found, with the approval of the majority of the Court, that "the public common law rights with respect to the sea, independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the seashore covered with water; and though as incident thereto the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing or embarking where they please upon

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the seashore or the land adjoining thereto, except in case of peril or necessity" (*ibid.* 301). Accordingly it was held that the public have no common law right of bathing in the sea or, as incident thereto, of crossing the seashore on foot or with bathing machines for that purpose.

No public right of bathing.

This view was accepted as unquestionable by the Court of Appeal in *Brinckman v. Matley*, 1904, 2 Ch. 313, C. A. "The Crown holds the foreshore upon the terms that it must recognise the *jus publicum*, whatever it may be, over the foreshore, and do nothing inconsistent with that *jus*. This *jus*, as regards the rights of navigation and fishing—the right to use the foreshore for those purposes has a great deal of authority to support it; but except as regards those rights, and in so far as any act of the Crown would defeat those rights, the Crown has the beneficial ownership of the foreshore" (*per* Vaughan Williams L. J. *ibid.* 325).

Brinckman v. *Matley*.

The Roman law declared all navigable rivers to be so far public property that a free passage over them was open to everybody, and the use of their banks (*jus littoris*) for anchoring vessels, lading and unlading cargo, and acts of the like kind, to be incapable of restriction. Inst. 2. 1. 1-5; Dig. 1. 8. 5. The navigable rivers were, however, classed according to the law among *res publicae* and not, as might appear from a superficial view, among *res communes*, as the sea was. Rivers were, like public roads, harbours and public places, the public property of the State destined for the public use; not common to the whole world and incapable of human dominion, like the sea, air, running water. *Res publicae* are distinguished from *res communes* by having been appropriated and taken possession of on behalf of the public, whereas *res communes* are not properly speaking 'things' in the legal sense of the word, nor susceptible of human dominion any more than the sun, moon and stars. Inst. 2. 1. 1-2; Phillimore 189; Sohm § 59 (1).

Navigable rivers, under Roman law.

Res publicae distinguished from *Res communes*.

Under the Roman Dutch law the State was the proprietor of the large rivers within its limits and of the lakes and other navigable waters and their beds and banks (Grot. 2. 1. 25; V. L. 2. 1. 12): the right of fishing belonged to the State, but the right of fishing with the rod was free (Grot. 2. 4. 17-18; V. d. L. 1. 7. 2).

Navigable rivers, etc., under R. D. law.

Under the English law a navigable river is (like the sea) a public highway, and the right of the Crown and of those claiming under the Crown is subject to the public right of passage; and so also the general right

Under English law.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of fishing in a public river common to all subjects of the realm, must therefore be exercised only in such a manner as not to prejudice the right of passage when the latter right is exercised in a public manner (Br. & Had. II. 108).

Foreshore of tidal navigable river.

Accordingly it was held in *Fitz Hardinge (Lord) v. Purcell* 1908, 2 Ch. 139, that the public had no rights over the foreshore of a navigable river, when not covered by the tide, except such as are ancillary to their rights of fishing and navigation: when covered by the tide, the foreshore is part of the sea, and the only rights of the public in and over it are the rights of navigation and fishing and rights ancillary thereto. The public have no right of shooting over the foreshore (*ibid*), nor of holding meetings on or passing over the foreshore when dry, except for purposes connected with navigation or fishing (*Brinckman v. Matley, supra; Landudno Urban Council v. Woods*, 1899, 2 Ch. 705).

The right of the Crown may pass by grant or prescription but subject always to the public rights. 7 Halsbury L. of E. 113; Bruyn's Op. of Grot. 132.

Right of fishing in Ceylon.

Under the Roman Dutch law the right of fishing in the sea is common to all. So also is the right of fishing in public rivers, streams, and waters, except where restricted by local laws and regulations (V. D. L. 1. 7. 2; Grot. 2. 4. 17, 18); but fish contained in a man's private tanks or fish ponds are considered as his private property, and may not be caught (Grot. 2. 4. 24). The right to fish on the coasts of Ceylon is common to everybody.

Control of Crown over seashore.

The Crown may exercise some control as to the use of parts of the seashore by private individuals. It has been thought that the fishing industry would be impossible unless the occupation of the shore for spreading nets and such other purposes was regulated by some responsible authority, and so it has been held that it is competent to the Crown, by its regularly appointed agents, to grant licenses to fishermen to spread their nets on the seashore or on land belonging to the Crown adjacent to the seashore (*Rowel v. Pieris*, 1 N. L. R. 81).

Right of fishing controlled by custom.

The common right of fishing in the open sea may be controlled by custom regulating the time and mode of fishing (3 Lor. 161). No right of exclusive fishing in any particular part of the sea or at any particular time can, however, be acquired by any custom among fishermen regulating the times and places of fishing; but where a fisherman has actually begun

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

fishing operations, and is prevented by force or violence from exercising his occupation, or is disturbed therein by another, then an action accrues to him to recover compensation (*Arumokam v. Tampaiya*, 2 C. L. R. 205; 2 S. C. R. 57). A party enclosing fish within a *madelle* (a large net, sometimes 300 yards long), although he has not actually captured them, has sufficient possession of them to entitle him to maintain trespass (2. Lor. 115; Vand. D. C. 247). The fact that one particular kind of net has been used for a large number of years at any place, does not prevent the use there of any other kind of net (*Don Louis* v. *Veyado*, Ram. Rep, 1872-1876, 111).

Where fish are enclosed by fishermen.

The Governor in Executive Council may make regulations prohibiting or restricting the use of nets or other appliances for taking fish within any specified area of the territorial waters of the island, or in any river, canal, lake, or inland water or specified part thereof. The use of nets, &c., contrary to such prohibition is an offence punishable with fine and imprisonment and forfeiture of nets, &c. (Ordinance 1 of 1909 § 27 replacing Ordinances No. 19 of 1866 and No. 13 of 1887). Local Boards are given by Ordinance 13 of 1898 § 56 (10) the power to make by-laws for regulating the mode and times of fishing.

Regulation of fishing by Government and Local Boards, Ord. 1 of 1909 & 13 of 1898.

In *The Chairman of the District Road Committee* v. *Juse Fernando*, 1910, (Police Court, Panadure, the defendant, the licensee of a fish kraal in the Panadure river, was convicted and fined under Ordinance No. 10 of 1861 § 94 (12) for so constructing his kraal as to be an impediment to the convenient navigation of the river, and was ordered to remove the obstruction within ten days, with a fine of one rupee for every day's default. Wood-Renton J., in setting aside the conviction and remitting the case for a new trial, said: "Every case of this description has to be considered on its own merits. What might be no obstruction of navigation in a side river, might readily constitute a serious obstruction in a main river where boats and crafts of all kinds are constantly passing up and down . . . . . The charge against the appellant is the creation of an obstruction by planting coconut branches in a gap of his kraal, and the evidence should be strictly confined to the question whether or not what he has done constitutes an impediment to navigation under the circumstances applicable to this case . . . . There ought to be evidence as to the breadth of the branch river where the alleged obstruction exists, as to the

Impediment to navigation by fish-kraal.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

space which it leaves free for navigation, and as to the kind and degree of navigation to which that river is subjected. Moreover the appellant's license for the use of such a kraal ought to be produced. The grant of such a license would not of course justify the contravention of the Ordinance, but its terms might throw light on this question before the Court. Most important of all, there should be evidence as to the history of that kraal. . . . . The Vidane Arachchi says that from his earliest recollection the kraals have existed, and the evidence for the defence is to the same effect. But the point of importance is as to when the method of closing the gap of the kraal was adopted. Both sides should have the opportunity of adducing further evidence." (*Ceylon Independent*, 8th February, 1910.)

Collection of salt.

In Ceylon it is not lawful for any person to collect or attempt to collect salt naturally formed, or to manufacture or attempt to manufacture salt by any process whatsoever, except on account of Government, and under the written license of the Government Agent of the Province or Assistant Government Agent of the district in which it is collected or manufactured (Ord. No. 6 of 1890, sect. 4). See Article 160, p. 240 *supra*.

Government Agent may prohibit removal of sea sand.

The Government Agent of any province may prohibit the removal of stones or other substances from the seashore adjoining or near public roads and thoroughfares in any part of the district within his province, if, in his judgment, such removal is calculated to injure such roads and thoroughfares, and he may cause notice of such prohibition to be given in the district by such means as may seem to him likely to give the greatest publicity thereto. Removal after such prohibition is an offence punishable with fine and imprisonment (Ord. No. 20 of 1865).

Article 162.

Alluvion.

(1) Land formed by alluvion, that is by the casting up of sand or earth by sea or river in increments so gradual as to be imperceptible, belongs to the owners of the adjacent lands in proportion to the frontage

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of the lands at the place of alluvion, whether the accretions are due to natural causes or to artificial means employed by such owners, provided in the latter case the means employed do not interfere with the rights of navigation and fishing.

Avulsion.

(2) A piece of land suddenly torn off by the force of the water and washed up against another land remains the property of the original owner, until it becomes firmly attached to the latter land, when it becomes the property of the owner of that land.

Islands arising in sea and river.

(3) (*a*) An island arising in the sea belongs to the first occupier subject to the consent of the Crown.

(*b*) An island arising in a navigable river, and a floating island in a river, whether navigable or not, belong to the Crown subject to the public rights under Article 161 (4).

(*c*) Other islands arising in the middle of a non-navigable river, belong to the riparian owners on each side in proportion to their river frontage; but if arising nearer to one bank than to the other, belong to the owner of the nearer bank.

(*d*) A land converted into an island by a river separating into two branches and surrounding it, remains the property of the original owner.

Diluvion.

(4) Land left bare by diluvion, or the reflux or dereliction of the sea or river,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

belongs to the Crown or the owner of the adjacent land, in the same way as an island arising in a river.

Comment.

Under the Roman law ; Among the modes of acquiring dominion under the Roman law was Accession (*accessio*), whereby a thing becomes the property of a person by reason of its

Accession ; acceding or becoming attached to a thing which is called the principal thing. The accessory object becomes the property of the owner of the principal thing.

Alluvion ; Alluvion (*alluvio*) is a species of Accession, and is a latent increment or increase, whereby an addition is made to your ground by the action of sea or river, but in so slow a manner that it is impossible to ascertain how much has been added at any particular time (Inst. 2.1.20). It is to be distinguished from Avulsion or

Avulsion ; Appulsion (*avulsio*, *appulsio*), whereby earth is torn away from your estate by the force of a stream or river and carried to another estate on the banks, enlarging that estate in a perceptible manner. The ground so carried remains yours until it becomes firmly attached to the other estate, and the trees or vegetation, if any, carried with the ground take root in the estate, when the ground and the trees become part and parcel of that estate (*ibid.* 2.1.21).

New islands ; An island arising in the sea (*insula nata*) is *res nullius* and belongs to the first occupant. An island arising in the middle of a river belongs in common to the land owners on either bank in proportion to the extent of their riparian interest; but if an island lies nearer to one bank than to the other, it belongs to the land owner on that bank only. If a river divides into two channels and, by uniting again, these channels transform a man's land into an island, the ownership of the land is in no way altered (2.1.22). *Alveus*

Derelict river-bed. *derelictus*, or the derelict bed of a river which has changed its channel, follows the same rule as *insula nata*, while the new channel acquires the same legal character as the river itself and becomes public. But if after a while the river returns to its old channel, the new channel again becomes the property of the riparian owner. If a land is wholly flooded and the flood retires, the soil belongs to its previous owner (2.1.24).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Under the Roman Dutch law.

The Roman Dutch law mainly follows the Roman, but with deviations as to which the authorities are not always agreed. It is a question whether, if the point arises, our Courts may not in view of this uncertainty apply the English law, for which see pp. 260 *et seq.* The Roman Dutch authorities may be summarized as follows:—

Sand-drift.

By the overflow or drifting of sand, says Grotius, the lords of certain wastes in Holland acquired adjoining lands which had for a period of ten years remained unenclosed from the waste, and which had become so completely covered with drift sand as to be exactly like the waste (Grot. Introd. 2.9.6).

Inundated lands.

Land which, having been inundated by the sea or river, remained in that state for ten years and upwards, and afterwards became dry land, fell to the Sovereign (*ibid.* 2.9.7). Intermittent inundations, which admitted of the owners attending to their lands from time to time, did not deprive them of ownership. Inundated lands became one with the shore or the beds of rivers, so that they were no longer dry land, but seashore or beds of rivers; and if by deposits of mud they again became dry land, they were no longer the old lands which were lost, but new and unowned lands which, like all other unowned things, became the property of the Government (*ibid.* 2.9. 8 and 9).

Alluvion.

Alluvion of mud or soil, that is, an imperceptible addition made by the sea or river to the land, became the property of the owners of the land to which the alluvion had been made, each in proportion to the frontage of his land at the place of alluvion (*ibid.* 2.9.13).

Right of Crown to alluvion.

In Holland and West Vriesland it was maintained, on behalf of the Government, that the alluvium as a consequence of the waters belongs to the Government; others denied this, and what must be considered the law on this point was, from the variety of customs and sentences, very uncertain (*ibid.* 2.9.18).

Alluvion, how aided.

Whoever had the right of alluvion might assist such alluvion by throwing dams, planting stakes and erecting other works, provided the public navigation and private rights of fishing on the opposite lands were not injured thereby (*ibid.* 2.9.23).

Alluvion on *fidei commissary* estate.

It had been decided by the Court of Holland that when a *fidei commissary* estate was augmented by alluvion, such augmentation was not subject to the *fidei commissum* (V.d.K. 211).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Avulsion.

A piece of land forcibly torn by a river from one place and washed up at another, remained the property of its former owner, unless the same was neglected by him for some time and became attached to another man's land (Grot. 2.9.13).

Islands rising in sea river.

Islands rising in the sea belonged to the first occupier. Sandbanks or islands arising in rivers belonged to the nearest landholders, the same as lands which, from their being altered and becoming beds of rivers, were lost to the proprietors and became general property. If there were two equally near the sandbank or island, it was their common property, and was shared between them, each in proportion to their river frontage. If a man's land was surrounded by water through a river separating into two branches, and was thus converted into an island, it still remained his property (Grot. 2.9.15).

Islands, when private property and when public.

Grotius, discussing the subject in his *De Jure Belli ac Pacis*, says :—

"As in a river which is private property, an island which makes its appearance, or a deserted river-bed, is the property of the private person; so in a public river, both of these belong to the people, or to him to whom the people has given them.

"What we have said of the bed of the river, is true also of the bank, which is only the extreme portion of the bed, that is, where the river naturally stops. And we find that this is now the general usage. In Holland, and the neighbouring countries, where of old these controversies were more frequent on account of the lowness of the land, the magnitude of the rivers, and the neighbourhood of the sea, which receives the mud carried down and brings it back by the reflux of the tide, it was always settled that islands which were true islands were the public property; and in like manner, the deserted beds of the Rhine and the Meuse; which has often been adjudged, and rests on the soundest reasons.

"For even the Roman jurists allow that an island which floats in a river, for instance, one resting on roots and branches, is public property; because the party who has a right to the river has a right also to an island produced in the river. But the same reason holds for the bed as for the river: not only in the way in which the Roman jurists take it, because the bed is covered by the river, but for another, which we have mentioned above, that the bed and the river were occupied at the same time

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

by the people, and have not since passed into private ownership. And therefore we do not accept as Natural Law what they say, that if the lands are marked by boundaries, the island belongs to him who takes possession of it. That would be so, only if the river and the bed of the river were not already occupied by the people; as an island which rises in the sea belongs to him who takes possession of it." (2.8.9 1-3.)

Alluvium, when private property and when public.

"Concerning alluvium, that is, the addition of particles which cannot be claimed by any one, because it is unknown whence they come, (for otherwise the part would not, by Natural Law, change its owner) it should be considered as certain that this also belongs to the people, if the people have assumed possession of the river as owner, which in a case of doubt is to be supposed; otherwise, the property of him who takes possession of it.

"But as the people may concede this right to others, so undoubtedly it may concede it to the possessors of the adjacent lands; and it is supposed to have done so, if those lands have no other boundary on that side than the natural boundary, that is, the river. Wherefore we are not to despise the laborious discussion of this subject by the Romans; in which they have distinguished *limitatum*, land bounded by artificial limits, from other lands; provided we recollect that land *mensura comprehensum*, determined by its measured quantity (see 2.3.16.), is governed by the same rule as *limitate* land." (2.8.11.12.)

Deserted river-bed, when private property and when public.

"What we have said of alluvium, is also to be considered to apply to a deserted river-bank and a part of the bed dried up; namely that, in places not occupied, they belong to him who takes possession; in occupied rivers, to the people; and to private persons only if they have received from the people or from one who derives right from the people, land running on to the river, as such." (2.8.13.)

The following is the substance of what Voet says on the subject (41.1.15-18).

Alluvion, acc. to Voet.

Alluvion (*alluvio*) is a species of accession, a latent increment or increase (*i.e.* one so gradual as to be scarcely visible), whereby an addition is made to one's ground in so slow a manner that it is impossible to ascertain how much has been added at any particular moment.

Alluvion takes place in the case of estates which have no boundaries on the side where the alluvion takes

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

When it takes place, and when not.

place and are contiguous, on the side, to a stream or river. It does not take place where estates have fixed boundaries on all sides, or are bounded by a lake or swamp. Hence those who obtain or purchase ground right up to the banks of a river have the right to alluvion, as if the boundary had been undefined. Hence, too, those who purchase or obtain estates bounded, towards the sea, in Holland, by defined dykes, have not the right to alluvion (41. 1. 15).

Avulsion.

Alluvion is distinguished from appulsion (*appulsio*), or avulsion (*avulsio*), whereby earth is torn away from an estate by the force of a stream or river and carried to another estate situate along the banks of such stream or river. It differs from avulsion, inasmuch as the increase in the ground to which the earth or soil has been carried by the stream is clearly visible in the case of avulsion. The ground so carried does not immediately belong by right of alluvion to the owner of the estate whither the ground has been carried, but only after the ground has become firmly attached to such estate, when it becomes the property of the owner of such estate, together with any trees or vegetation which it may have carried along with it. An evidence of such attachment is that such trees strike their roots in the soil of the estate to which they have been carried. After the trees have so struck root, neither they nor their value can be recovered by the former proprietor, since it is due to his own negligence that he has not vindicated his right of ownership before such accession or attachment (41. 1. 16).

New islands, in sea and river.

Islands, likewise, to a certain extent, may be the subjects of accession. If they arise in the sea, they are *res nullius* and belong to the first occupier, subject to the consent of the Crown which is not always given. With regard to islands in streams or rivers, a distinction must be made, according as the island floats, or is attached rigidly to the bed of a river. If the island

Floating islands.

floats, that is, if it be a collection of trees and undergrowth to which a certain amount of soil is attached, and does not adhere rigidly to the bed, but moves about freely in the current, it is almost public and follows

Other islands.

the ownership of the stream. If it is attached to the bed of a river, and is adjacent to the boundaries of a certain estate, being nearer to that estate than to any other property bordering on the river, it does not belong to the owner of such estate, if the estate has specified boundaries on all sides, but to the first

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

occupier. If such island is adjacent to property which has no fixed boundary on the side contiguous to the river banks, it belongs, if it rises in the middle of the stream, to the persons who own estates on either bank of the stream, contiguous to such banks, in proportion to the extent of such estates. If it is nearer to one such estate (having no defined boundary on the river-side) than to the estate on the opposite bank, it belongs by right of accession, to the owner of the former estate. And whatever adheres subsequently to such island by alluvion belongs to the owner of such island, even if such alluvion brings the island near to the estate on the opposite bank. If the island is formed near a usufructuary estate, it belongs to the person who has the ownership and dominion of such estate, and not to the usufructuary (41. 1. 17).

Uncertainty of R. D. law.

Voet seems to take the view that alluvion benefits the owners of adjacent estates with undefined boundaries, but that, contrary to Roman law, islands which rise in a stream belong to the Crown, being considered as *regalia*. Grotius (Introduction, 2, 10, 14-26) expresses no decided opinion on the matter. Later on (in the same section, 17) Voet shows that there was no very decided and uniform rule on the subject.

Van Leeuwen (Cens. For. 1, 2, 4, 12) says:

"In this matter we think a distinction should be taken between islands in a river which have arisen apart and separate from the lands on its banks, and which are certainly subject to the same rules of law as rivers themselves; and, inasmuch as public rivers are assigned to the ownership of the Sovereign and classed among royal properties, it follows also that the increment which results from them accrues to the Sovereign or the Treasury, or those who are in the enjoyment of a right ceded to them by the Sovereign.

"But (in accordance with the *Institutiones, de rerum divisione*, 2, 1, 20-22) no law even now prohibits the acquisition for ourselves or our property of other alluvial deposits or accessions to adjacent lands." In view of the uncertainty of the Dutch authorities, it would appear safer, says Nathan (Common law of South Africa, 1. 323), to hold that the rules of Roman law on the subject are still in force there.

Derelict bed.

If a river leaves its bed, and flows in a new course or channel, which channel is upon the land of another, the old channel is divided between the contiguous properties in the same manner as an island rising in a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

public river, if such properties were not bounded by any fixed limits on the side adjacent to the former channel. The new bed and channel occupied by the river becomes as public as the river which flows along them. If the river leaves this second channel and returns to its former bed, or follows a new channel, the second channel will be governed, as to accession, by the same rules as the former channel was when deserted. Voet, however, states that in Roman-Dutch law the deserted bed of a public stream belongs to the Crown, in the same manner as an island which arises in a public stream becomes public and goes to the Crown. In-

Inundation.

undation, in Dutch law, does not deprive the owner of the inundated soil of his rights, unless the owner deserts and abandons the ground. If the ground remains under water for ten years, and during that time the former proprietor exercises no act of ownership (such as fishing in the waters covering his land), the land will be regarded as abandoned, and will go to the Crown. (Voet 41, 1. 18-20.)

Under English law, alluvion and dereliction.

The English law is different in that it is more favourable to the Crown. "As to lands gained from the sea," says Blackstone (2 Com. 261), "either by alluvion, *i.e.* by the washing up of sand or earth so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the low water mark, in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining, for *de minimis non curat lex*, but if the alluvion or dereliction be sudden and considerable, the land shall go to the King as the lord of the sea."

Rex v. *Yarborough.*

This view was upheld in *Rex* v. *Yarborough*, 1828, 1 Dow and Gl. 178; 5 Bing. 163, where eleven judges were unanimously of opinion that "by the general custom of the realm, lands gained gradually and imperceptibly from the sea by alluvion or projection belong to the owner of the adjoining demesne lands and not to the Crown; when the sea retreats suddenly and leaves a tract of land uncovered, that land belongs to the Crown, but it is otherwise with lands gained gradually and imperceptibly by alluvion or projection."

Att. General v. *Chambers.*

In *Att. General* v. *Chambers*, 1859, 4 De G. and J. 55. Lord Chelmsford was disposed to base the law not so much on the principle, *de minimis non curat lex*, as on the principle, *idem est non esse et non apparere* ("that which cannot be perceived in its progress is taken

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to be as if it had never existed at all"), as stated by Baron Alderson in the case of *Hull and Selby Railway Co.*, 5, N. and W. 327. Lord Abinger said in the same case: "The principle as to gradual accretions is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property. It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss, from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property which is thus silently transferred by the law to the proprietor of the seashore."

New islands, under the Roman and English law.

With respect to an island arising in the sea, while the Civil law gives it to the first occupant, the English law gives it to the King. Islands arising in a river belong to him to whom the piscary of the river belongs. If a river between two lordships gains imperceptibly on one, the owner loses his ground. If the sea encroach on private land, the land accrues to the Crown, for the shore belongs to the Crown.

Under English law.

See Hale *De Jur. Mar.* 14, 17, 26, 36; 2 Blackst. 261-2; 2 Br. and Had. 412-416; Moore on Foreshore 786, 831; 7 Halsbury 116; from which is framed the following statement which probably represents correctly the English law on the subject of this Article.

Alluvion, right of Crown and of adjacent land owner;

(1) Where land is formed by alluvion, *i. e.* by the casting up of earth or sand on the shore of the sea, the additional increment belongs

(*a*) to the Crown where the casting up of the earth or sand takes place suddenly, and

(*b*) to the owner of the adjacent land, if the new land is formed by small increments so gradual as to be inappreciable, whether the increments are due to natural or artificial causes, provided in the latter case the user of the land be lawful.

Diluvion;

(2) Where land is left bare by diluvion, *i. e.* the reflux or dereliction of the sea or of a river as far as the sea flows, such land

(*a*) if left suddenly bare, belongs to the Crown;

(*b*) if the diluvion or dereliction takes place gradually, belongs to the owner of the adjacent land;

(*c*) if before the land was covered, it belonged to a person who, on its being left bare, can recognise any portion which belonged to him, the land belongs to him;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*d*) if the land is left bare in a creek or river, the soil of which belongs to a person by grant from the Crown or by prescription, the land left bare belongs to him.

New islands; (3) Islands arising in the narrow seas or arms of the sea, and in rivers as far up as the tide flows and reflows, belong to the Crown; but where the soil of the creek or river belongs to a person by grant from the Crown or by prescription, new islands formed in such soil belong to him.

Non-tidal rivers. (4) Land left bare, or new islands arising, in rivers in which there is no tide, belong to the riparian owner or owners.

Article 163.

Right of Crown to mines on Crown land (1) The Crown is entitled

(*a*) to all mines of gold and silver, gems and base metals and minerals on its lands, and

and under the sea; (*b*) to mines under the waters of the ocean within the narrow seas and up to a distance of three miles from the coast outwards;

on private land. (*c*) to one-tenth share of gold and silver, gems and base metals and minerals found in mines on private land, and

Royalty on plumbago. (*d*) in lieu of the share due in respect of plumbago, to levy a royalty of twenty-five cents on every cwt. of plumbago exported.

Crown license for working mines of gold, etc. (2) No mines of gold, silver, gems, or precious stones shall be opened, worked or used except on a license from the Crown.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Mines on private land, under English law.

In English law the maxim is *cujus est solum, ejus est usque ad caelum et inferos.* The owner of the soil is *prima facie* the owner of all that is above the soil,—castles, houses and other buildings, water, forests, and trees—and all below the surface, mines, earth, clay, quarries and the like. The law admits of separate ownership of the surface and of the minerals beneath, such division of the property arising by contract or by rule of law. Thus a man, being owner of the land, may sell or dispose of the minerals, retaining the surface and giving his purchaser only a right of so far breaking the surface as may be necessary for the purpose of opening a mine (Br. and Had. II. 16-17).

Crown entitled to gold and silver in private land.

By prerogative right the Crown is entitled in England to gold and silver within the realm, whether such mines are situate in its own lands or in the lands of a subject. *Case of Mines* (1568) 1 Plowd. 310,315,316 Ex. Ch.; 1 Blackst. 294; Chitty, Prerog. Crown, 145. The prerogative is said to owe its origin to the King's need of supplies for war and the coinage. The right includes mines under the foreshore. The prerogative right until 1688 included, but does not now include, mines of copper, tin, iron or lead, although gold or silver may be extracted therefrom. 7 Halsbury, 117.

Law applicable in Ceylon.

The prerogative of the Crown in this respect, inasmuch as it is not incident to sovereignty, does not extend to the Colonies (see p. 210 *supra*); and the law applicable to Ceylon is the Roman Dutch law (*per* Creasy, C. J. in the *Plumbago Case*, 1873, D. C. Part III, 128 I), subject to local enactment or established custom.

Mines in private land under Roman law;

Under the Roman law, minerals, metals and precious stones (not being hidden treasure, for which see Art. 156, p. 227 *supra*) belonged to the owner of the ground; and if it was sold, the right to such minerals, metals or precious stones passed to the purchaser, while a usufructuary was entitled to mine on the property over which he held the usufruct. Dig. 18.1.77; 7.1.9 (2.3); 7.1.13 (5); Voet 41.1.13.

Royalty on metals.

But among the tithes levied for the benefit of the public treasury under the Roman Emperors was a tithe on metals, and the right of the soil owner was subject to this tithe. Digest 50.16.17. The term 'metals' meant any substance dug out of the earth, and included marble, sulphur, &c. Facciolati, Lex.; Cod. 11.6.3 and 6. Persons working such metals in another's land paid

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

one-tenth share to him and a like share to the Fisc. Cod. 11.6.3.

Difference between Roman and English law.

The Civil Law thus differed from the English in important respects. The Crown is entitled in England to all the produce of gold and silver mines on private land, and to nothing in other private mines; under the Civil law the Fisc is entitled to one-tenth share only of the produce of private mines, and this right is not limited to gold and silver, but embraces gems and base metals and minerals.

Roman Dutch law.

The Roman Dutch law followed the Civil law (Voet 41.1.13; 49.14.3). Voet mentions, and rejects, the claim sometimes made by the Fisc to the whole produce. But as regards the Colonies of Holland he quotes (41.1.13) an Ordinance of the States General dated 13th October, 1629, which provided that all metals, minerals, and precious stones found in the possessions of the Dutch East India Company should belong to the Company.

This Ordinance (which includes in its scope pearl fisheries) runs as follows:—

Mines in Colonies: Ordinance of the States General.

"All recently found minerals and mines that may hereafter be discovered, whether of gold, silver, copper or any other metal, as also of precious stones, diamonds, rubies, and the like, together with the pearl-fisheries and amber collections, shall only be worked by or on behalf of the Company and for their profit. But if any of the inhabitants or of the garrisons or colonists or others of whatever race or condition shall happen to find any of the foresaids, they, their heirs or representatives shall have, as recompense and reward, one twentieth part of the clear (*suyver*) proceeds of the said gems, mines or pearl-fisheries, and that for the period of the first five years, reckoning from the day when the Company has undertaken their working, and also the twentieth share of amber, &c."

The Plumbago Case.

The right of the Crown in Ceylon was the subject of protracted argument and consideration in the *Plumbago Case* 1873 (Grenier D. C. Part III. 128 A): see the learned judgments of Berwick D. J. and Creasy C. J. The question there at issue was the right of the Crown to levy a royalty on plumbago dug from private lands. It was held that the Crown had this right. It does not appear why the Ordinance of the States General, cited above, by which the Crown would have been entitled in Ceylon to the whole of the minerals in private land was ignored. Perhaps it was deemed overridden by local custom.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Right of Crown and soil owner in Ceylon.

However, it must now be taken as settled law that in Ceylon mines and minerals belong to the soil-owner subject to the payment of one-tenth share to the Crown, and (unless specially reserved) pass under a conveyance of the soil.

Export duty on plumbago.

By Ordinance 21 of 1873, as amended by Ordinance 22 of 1877, the royalty due to the Crown on plumbago has been commuted by an export duty of 25 cents per cwt. at the port of shipment. The revenue from this source is about Rs. 12,500 a year.

Precious minerals and gems: Ordinance 5 of 1890.

The Gemming Ordinance No. 5 of 1890, (as amended by the Ordinances 10 of 1894 and 13 of 1905) provides for the better protection of the prerogative rights of the Crown in respect of gold, silver, gems and precious stones which may be found in mines in private lands, and for the regulation and inspection of such mines. No mine shall be opened, worked, or used without a license from the Government Agent (section 3 to 5); rules may be made by the Governor in Executive Council for the inspection, examination, and registration of mines (section 10); and penalties by way of fine, imprisonment, and confiscation are prescribed against persons opening, working or using such mines without a license or contrary to its conditions or to the provisions of the Ordinance (sections 11 and 12.)

Royalty on cabook, sandstone and sand.

Under Ordinance 4 of 1892 a royalty is levied on cabook stones, at the rate of Rs. 3·75 per 1,000 cut from Government pits in Colombo and Negombo districts; on sandstone quarried between Hendala and Pamunugama, at the rate of 50 cents per 100 cubic feet; on white sand at the rate of 6 cents on every cart load removed from Maradana, Cinnamon Gardens, Colombo.

Regulation of mines.

Ordinance 2 of 1896 provides for the regulation and inspection of mines and machinery and for the safety of persons employed in working mines and machinery. Ordinance No. 8 of 1889 makes provision for the working of quarries within Municipal and Local Board towns.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 164.

Right of Crown to levy Customs duties on imported goods. Ord. 17 of 1869 section 11.

The Crown is entitled

(1) to levy on all goods, wares, and merchandise imported into this Island the several duties of customs as set forth in the Schedule B to the 11th section of the Ordinance 17 of 1869 as amended by section 2 of Ordinance 40 of 1908, or such other duties as may be imposed by the Legislative Council under proviso (a) of section 11 of the Ordinance 17 of 1869 as so amended;

Port dues. Ord. 17 of 1869 section 17.

(2) to levy port dues for entry inwards, and for clearance outwards, on all ships arriving at or departing from any port in this Island, according to the table of port dues set forth in schedule D to the Ordinance 17 of 1869 as amended by section 3 of the Ordinance 40 of 1908;

Royalty on plumbago exported. Ord. 21 of 1873 section 1, as amended by Ord. 22 of 1877

(3) to levy as a royalty on all plumbago, the produce of this Island exported beyond seas, a duty of 25 cents per cwt.;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(4) to levy on all chanks entered for exportation a royalty at a rate not exceeding one cent on each chank as the Governor in Executive Council shall by notification in the *Government Gazette* appoint;

Royalty on chanks imported Ord. 18 of 1890 section 4.

(5) to levy a duty not exceeding Rs. 14 per cwt. as the Governor in Executive Council by proclamation may appoint on all horns (excluding cut horns) of spotted deer and sambur exported from this Island;

Duty on hides and horns of spotted deer &c. Ord. 11 of 1891 section 3, and Ord. 13 of 1900.

(6) to levy on all arrack distilled in this Island, when exported therefrom, a duty of one rupee and twenty-five cents per gallon of the strength of proof by Syke's hydrometer and so in proportion for any greater or less strength or quantity;

Export duty on arrack. Ord. 7 of 1898.

(7) to levy on all coffee, tea and cocoa exported from the Island a duty of ten cents per cwt. and on all cinchona exported a duty of five cents per cwt.;

Export duty on coffee, tea, cocoa, cinchona. Ord. 9 of 1882 section 4.

(8) to levy on all elephants exported a royalty of two hundred rupees per elephant.

Royalty on elephants. Ord. 1 of 1909 § 11.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Customs duties, history of

The Customs are the duties, toll, tribute, or tariff payable upon merchandise exported and imported. They are among the oldest and commonest modes of levying revenue for public purposes, and may be levied on land frontiers as well as seaports. In Great Britain special customs were during a long period levied on goods passing between England and Scotland, and the trade of Ireland with Great Britain and with foreign countries was subjected to fiscal regulations which would now be considered highly oppressive. In course of time customs duties came to be levied only or chiefly in the sea ports and thus applied only to the foreign commerce where they may be brought under the control of fair and reasonable principles of taxation. (Encyclopœdia Britannica, VI. 729.) The considerations upon which this revenue, or the more ancient part of it, which arose only from exports, was vested in the King were said to be two: (1) because he gave the subject leave to depart the kingdom and to carry his goods along with him; (2) because the King was bound of common right to maintain and keep up the ports and havens, and to protect the merchants from pirates (1 Blackst. 313).

Legislation in Ceylon.

The earliest proclamation of importance in Ceylon relative to Customs duties is that of the 30th December, 1802. That proclamation directed that all and singular the customs or impositions of Government by virtue of any proclamation or proclamations, advertisement or advertisements, law, usage, or custom then in force upon the importation and exportation of any goods, wares, or merchandise should cease, and declared the duties to be levied from and after the 1st February, 1803. This proclamation was repealed by Regulation No. 6 of 1820, which, in its turn, was repealed by Ordinance No. 9 of 1825. This regulation was repealed by Ordinance No. 5 of 1837, which was, in part, repealed by several subsequent enactments. The remainder of it was repealed by Ordinance No. 18 of 1852, and that by Ordinance No. 17 of 1869, which, as amended and added to by several subsequent Ordinances, is now the principal Ordinance on Customs duties. The amending Ordinances are No. 1 of 1871, No. 21 of 1873, No. 1 of 1875, No. 3 of 1883, No. 12 of 1884, No. 4 of 1886, No. 11 of 1891, Nos. 17 and 20 of 1892, No. 4 of 1894, Nos. 18 and 22 of 1896, Nos. 7

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and 20 of 1898, Nos. 12 and 13 of 1900, No. 7 of 1901, No. 2 of 1903, No. 9 of 1904, No. 4 of 1905, No. 3 of 1906, No. 40 of 1908 and No. 2 of 1909.

Schedule B to the Ordinance 40 of 1908 enumerates the import duties leviable on various goods and includes a table of exemptions. Schedule C is a table of prohibitions and restrictions inwards. Schedule D enumerates the harbour dues with exemptions.

Customs Department.

The Customs Department is in charge of the Principal Collector of Customs, who is by section 3 of Ordinance 17 of 1869 vested with the general superintendence of all matters relating to the Customs, and is also Superintendent of Wrecks (Ordinance 7 of 1863, section 2), and Registrar of Shipping and Seamen (Ordinance 7 of 1863, section 2). The Customs Department in Ceylon is concerned only with Sea Customs, and has no part in or control of the excise or the collection of any internal revenue as in some other Colonies, a duty discharged in Ceylon by Government Agents. The customs revenue in 1908 was Rs. 8,993,111, and the harbour and port dues Rs. 2,186,626.

The provisions of the Customs Ordinances are voluminous. The following are some of the matters dealt with by the principal Ordinance 17 of 1869 as amended by the Ordinances noted above :—

Customs Ordinance, chief provisions.

Ordinance 17 of 1869, section 11 : Duties to be levied (Schedule B).

Section 17 : Port dues to be levied. Schedule D.

Section 20 : No goods to be landed or bulk broken before due report of ship to the Collector nor except at the prescribed times and places of landing.

Section 26 : Forfeiture of goods unshipped or landed contrary to rules.

Section 36 : Prohibitions and restrictions upon importation of certain goods (Schedule C).

Section 41 : Goods not duly entered forfeited.

Section 43 : Goods undervalued to be detained and sold for benefit of Crown.

Section 47 : Ships to be entered and goods cleared before shipment.

Section 48 : Time of shipment.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Sections 57-78: Warehousing of goods.
Section 85: Ports and quays may be appointed by the Governor.
Section 104: Smuggling, penalty on and forfeiture.
Ordinance 21 of 1873 as amended by Ord. 22 of 1877: Royalty of twenty-five cents per cwt. on plumbago exported.
Ordinance 11 of 1891 §3; Ord. 13 of 1900: Duty on horns exported of spotted deer and sambhur, but exclusive of cut horns, of which and of hides the exportation for commercial purposes is prohibited for seven years from 1st September, 1909, by notification of 26th June, 1909.
Ordinance 1 of 1909 §11: Royalty on elephants exported.
Ordinance 9 of 1882 §4, and proclamations of 12th January, 1884 and 25th August, 1891: An export duty of 10 cents per cwt. on coffee, tea and cocoa, and of 5 cents per cwt. on cinchona. This is utilized for the purpose of providing a special fund to defray the cost of the medical care of labourers on estates. An export duty, levied under the Ordinances 15 of 1892 and 4 of 1894 for expenditure in efforts to increase the consumption of tea in foreign lands ceased on 31st December, 1908.
Ordinance 18 of 1890 §4: Royalty on chanks exported: fixed at two rupees per 1,000 chanks by proclamation of 12th April, 1891.
Ordinance 7 of 1898: Export duty on arrack.

Royalty on Plumbago.

The Crown has always asserted a prerogative right to levy a royalty on plumbago dug in private lands (Gren. 1873, part III A); and provision is made by Ordinance 21 of 1873 to collect the royalty by levy of an export duty at the ports of shipment, the rate being twenty-five cents per cwt. (section 1). See Article 163, pp. *262 et seq.*

Royalty on Chanks.

Ordinance No. 18 of 1890 (which has replaced the Ordinances 4 and 5 of 1842) provides for a royalty at a rate not exceeding one per cent. on chanks exported from Ceylon (section 4), and now fixed by proclamation of 12 April, 1891, at two rupees per 1,000 chanks; prohibits their export except from specified ports (section 6); prescribes the procedure in regard to bill of entry, &c. (section 5); and prohibits the collection of chanks, bêche-de-mer, coral or shells in the seas within the limits defined by the Ordinance or hereafter by the Governor in Executive Council (section 9).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 165.

Crown's exclusive right to manufacture and sell intoxicating liquor.

(1) The right of manufacturing and selling arrack and toddy and other intoxicating liquor in the Island is exclusively vested in the Crown.

License for manufacture, sale, &c.

(2) The Crown, may, by license under the hand of the Government Agent or of some person thereto empowered by him, authorize any person to draw fermented toddy from the coconut or other palm, or to distil arrack from the palm or from sugar cane, or to sell any intoxicating liquor, or possess or remove the same.

Penalties.

(3) Any person drawing, distilling, selling, possessing or removing arrack, toddy, or other intoxicating liquor contrary to the provisions of the Ordinances in that behalf enacted, or otherwise than in accordance with a license issued thereunder, is guilty of an offence and is liable to the penalties prescribed in the said Ordinances.

Comment.

Legislation.

The earliest regulation to restrict the sale of arrack and toddy appears to have been Regulation No. 8 of 1814. This was repealed by the Ordinance No. 5 of 1834, which was repealed by the Ordinance No. 10 of 1844. This Ordinance (as amended by the Ordinances Nos. 1 of 1889, 12 and 13 of 1891, 9 of 1892, 3 of 1894, 13 and 18 of 1905 and 39 of 1908) now regulates the distillation and sale of arrack, rum and toddy in the Island. Ordinance 9 of 1892 imposes a duty on tavern licenses within Municipalities, and Ordinance 7 of 1898 imposes an export duty on arrack. Ordinance 12 of 1891

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

consolidates and amends the licensing laws of the island and regulates the manufacture and sale of intoxicating liquor other than toddy and arrack which are obtained from the palm.

Government monopoly.

The right of manufacturing and selling arrack, toddy or other intoxicating liquor is a Government monopoly, and is sold by Government on various conditions. The revenue in 1908 from this source exceeded four million rupees. A full report on the system is given in Sessional Paper XXXI. of 1897.

Toddy drawing, mode of.

The first step in the manufacture of arrack is the drawing of *toddy*, which is the juice which exudes from the flower of different kinds of palms when the flower is bruised and cut. The flowers of the *kitul* and *coconut* tree are rather like a small elephant's tusk. The toddy-drawer bruises with a small mallet this flower, which lies encased in a sheath; he then cuts four or five inches off the end, and ties strings or rags round the sheath to keep the flower together. After having shaved thin slices off the end of the flower two or three times, he hangs a pot on the tree so that the juice, as it exudes drop by drop from the small branches of the flower, falls into the pot This juice is toddy, and can be made into *sweet* or *fermented* toddy at the option of the drawer. If the pot is perfectly clean, the toddy will not ferment for one or two days. If a small piece of the bark of the *hal* tree be put into the pot and kept for about twelve hours, the toddy will not ferment at all. If, however, a very small quantity of the sediment of fermented toddy be left in the pot, the juice of the tree will begin to ferment immediately it falls, and the contents of the pot will always be in a condition of fermentation. Sweet toddy is made into a species of sugar or jaggery; fermented toddy is either made into arrack or sold in its fermented state for immediate consumption. Toddy and arrack are practically the native beer and whisky.

No restriction on sweet toddy.

By section 47 of Ordinance No. 10 of 1844 it is laid down that no restrictions are placed upon the drawing, possession, or removal of *sweet* toddy. By section 39 it is declared illegal for any one to draw fermented toddy for purposes of distillation without a permit signed by the Government Agent, or some one authorised by him in writing, or the retail dealer, that is, the renter of the district. This license must be issued free. A license must also be taken out (section 40) to enable any one to draw fermented toddy for consumption as toddy. For this license a fee of ten rupees per tree can be

Restrictions on fermented toddy.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

recovered. Toddy cannot be sold without a license issued by the retail dealer—that is, the renter—nor can it be removed or possessed in quantities exceeding one gallon without a license issued by the Government Agent, some one authorised by him, or the renter of the district (sections 41, 42, 43). By section 45 those authorised to issue these licenses are required to do so on pain of a penalty. Toddy unless sold for immediate consumption is taken to distilleries to be made into arrack.

Arrack distillation, restrictions on.

Spirits, except for scientific purposes, cannot in this country be lawfully distilled from anything except the palm or the sugar cane (section 3). No one can distil spirits without a license from the Government Agent, the application for which must contain a description of the still (which must be of a capacity of not less than 150 gallons), and a statement of the names and residences of the applicant and manager. The premises must be secured by a wall or otherwise to the satisfaction of the Government Agent, and must contain a secure store in which all spirits must be deposited. No tree or shrub is allowed within twenty feet of the premises (sections 4, 5, 6, 7, 8). The license, which costs a hundred rupees, should ordinarily be issued for a period of twelve months, but may be for five years. It is liable to be cancelled on a conviction for certain specified offences. No distiller can sell arrack in quantities of less than 35 gallons (section 14). The manufactured arrack is disposed of either to a wholesale dealer or renter.

Wholesale dealing in arrack.

No one can deal in arrack wholesale without having obtained from the Government Agent a license on a stamp of a hundred rupees (sections 16, 17, 18, 19). The applicant for a license must have a secure store, called the arrack godown, apart from any dwelling-house, and the whole of his spirits must be kept within the store. The Government Agent can order a search of the premises at any time. A wholesale dealer cannot sell in quantities of less than 35 gallons, and can only sell at his store. The Government Agent may lock the store and put one of his own officers in charge of it, if he thinks it necessary, but must then allow access to the wholesale dealer (sections 22, 24). Both distillers and wholesale dealers are required to send in weekly returns to the Government Agent of all arrack manufactured, received, or disposed of during the week, and to keep copies of them (sections 16, 17, 18 of Ordinance No. 13 of 1891).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Retail dealing.

The retail dealer is commonly known as the arrack renter. He purchases, usually by auction, from Government the right to sell arrack by retail within a certain prescribed area. It will be noted that none of the persons hitherto alluded to can deal in arrack in quantities of less than 35 gallons. This right is the exclusive property of the renter. When the rent is sold, the places at which arrack can be retailed (called taverns) are specified, and the Government Agent issues a license to one or more persons, nominated by the renter, to carry on business at each tavern. This license is issued free (except in municipalites, see Ordinance 9 of 1892), but can be cancelled by the Agent (section 26 of Ordinance No. 10 of 1844). The retailer is bound to sell two quarts of arrack to any one on demand (section 17), and by the conditions agreed to by him when he bought the rent he cannot sell at a less price than Rs. 4·48 per gallon. He must also sell toddy at a minimum price fixed by the Government Agent (34 cents per gallon).

Removal of arrack.

Arrack exceeding in quantity two quarts cannot be removed from one spot within a renter's district to another without a permit from the retail dealer, his agent, or the Government Agent; but when a sale of over two quarts is effected, the seller must give a certificate, or permit of removal, which the purchaser must take with him as his authority for removing the arrack. No one can remove arrack in a quantity exceeding one pint from a spot within one renter's district to a spot within another district without a permit from the Government Agent (Ordinance 10 of 1844, sections 33 to 37).

Possession of arrack.

No one, except a distiller, wholesale dealer, or renter, can lawfully possess arrack in less quantity than 35 gallons unless it has been bought from the renter, or unless the possessor has the certificate or permit of removal alluded to above, or has a license from the Government Agent. If the quantity be over three gallons, the certificate ceases to be in force after forty-eight hours; it legalizes the possession of that quantity of arrack for that time (sections 28, 31, 32, 33). Persons removing arrack can be stopped by any one authorized by the Agent in writing, and if there be no permit for removal, or if the removal be contrary to the terms of the permit, the arrack and the vehicle used for its removal can be confiscated and the persons removing it fined (sections 35 and 36). Renters are however compelled to issue permits for removal free of charge (section 36).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 166.

Postal service, Crown's exclusive privilege.

(1) Whenever posts or postal communications are established, the Crown has the exclusive privilege of conveying by post from one place to another all letters (including post cards), and of performing all the incidental services of receiving, collecting, sending, despatching and delivering all letters.

Exceptions.

Provided that

(*a*) Letters may be sent by a private friend in his way, journey, or travel, to be delivered by him to the person to whom they are directed, without hire, reward, or other profit or advantage for receiving, carrying, or delivering them;

(*b*) Letters solely concerning the affairs of the sender or receiver thereof, may be sent by a messenger on purpose;

(*c*) Letters solely concerning goods or property may be sent either by sea or by land to be delivered with the goods or property which the letters concern, without hire, reward, or other profit, or advantage for receiving, carrying, or delivering them;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*d*) Common carriers of passengers or goods and their servants or agents, may carry letters solely concerning goods in their carts or carriages; and

(*e*) Owners and masters of vessels sailing or passing on any river or canal in Ceylon or between any ports or places in Ceylon, and their servants or agents, may carry letters solely concerning goods on board, and postal articles received for conveyance from an officer of the post office.

Liability of Crown for loss or damage.

(2) The Crown shall not incur any liability by reason of the loss, misdelivery, or delay of, or damage to, any postal article in course of transmission by post, except in so far as liability may in express terms be undertaken by the Governor in Executive Council in terms of rules under the Ordinance No. 11 of 1908; and no officer of the post office shall incur any liability by reason of any such loss, misdelivery, delay, or damage, unless he has caused the same fraudulently or by his wilful act or default.

Liability for insured articles.

(3) Subject to such conditions and restrictions as may be by rule prescribed, the Crown shall be liable to pay compensation, not exceeding the amount for which a postal

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

article has been insured, to the sender thereof for the loss of the postal article or its contents, or for any damage caused to it in course of transmission by post; and the compensation shall in no case exceed the value of the article lost or the amount of the damage caused.

Liability for money and postal orders.

(4) No suit or other legal proceeding shall be instituted against the Crown or any officer of the post office in respect of

(*a*) anything done under any rule made under the provisions of sections 47 and 49 of the Ordinance 11 of 1908, or

(*b*) the wrong payment of a money or postal order, or

(*c*) any loss or injury occasioned by delay in payment of a money or postal order, or

(*d*) any other irregularity in connection with a money or postal order.

Comment.

Ceylon Postal Ordinance No. 11 of 1908, sections 6 and 7 of which correspond to sub-section 1 of the Article, section 8 to sub-section 2, section 34 to sub-section 3, and section 51 to sub-section 4 of the Article. See Article 202 *infra* as to Actions against the Crown.

History of postal service.

The germ of the modern postal systems of the world is to be looked for in the earliest organized establishment of a staff of Government couriers. When or under what precise circumstances such an establishment was first made available by a State for the carriage of letters of private persons, there is no satisfactory

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

evidence to show. The practice, at the outset only connived at, would be formally permitted even for financial reasons, and also because it gave ministers of State the power of inspecting the correspondence of the public. Royal couriers can be traced in England as early as the 13th century. The post-master had the supervision of them, and the first English post-master of whom a distinct account can be given is Sir Brian Tuke (*circa* 1533). Encyclopædia Britannica, XIX. pp. 562 *et seq;* Broom and Hadley I. 384 *et seq.*

Post office as source of revenue.

As a source of revenue the Post Office was, like the excise, first established in 1643, having been invented or organised by Prideaux, Attorney-General to the Commonwealth, who was appointed Postmaster-General. When the Common Council of London endeavoured to erect an opposition post office, the House of Commons declared that the office of Postmaster is, and ought to be, in the sole power and disposal of Parliament; and in 1656 a regular post office was erected, by the authority of the Protector and his Parliament, on nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of Queen Anne. (Steph. Com. II. 631.) The rates of inland postage were reduced in 1839 by the great reform of Rowland Hill to a uniform rate of one penny per ½ ounce, and many further regulations added by many subsequent statutes (*a*); and, by the Post Office Act, 1875, the duties authorised by the Post Office Acts are declared to be stamp duties, and are placed under the management of the Commissioners of Inland Revenue.

Probably, no more eligible method of raising money upon the subject can be devised than these Post Office duties, and the system has been, in recent years, very largely and diversely extended. Thus, in the year 1840, by the Post Office (Duties) Act of that year, the privilege formerly exercised by all members of Parliament, of *franking*, or sending and receiving letters free of duty, was wholly abolished. Since that

(*a*) Post Office (Management) Acts, 1837 to 1884; Post Office (Offences) Act, 1837; Railways (Conveyance of Mails) Act, 1838; Post Office Duties Acts, 1840 to 1891; Post Office (Money Orders) Acts, 1848 to 1906; Post Office Acts, 1837 to 1904; Post Office (Sites) Act, 1885; Conveyance of Mails Act, 1893 (Mails on tramways); and Post Office (Literature of the Blind) Act, 1906. As to the Isle of Man and Channel Islands, see Post Office Act, 1892.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

year the postage has been gradually reduced to an uniform rate, irrespective of distance, and amounts at present to the sum of only one penny for every letter conveyed between places in the United Kingdom, provided it does not exceed four ounces in weight. The rate to India and almost all colonies and Egypt is one penny the ounce; and foreign letters and letters to the few other colonies are carried at the rate of twopence halfpenny for the first ounce, and one penny half-penny for every ounce after the first. In further development of the system, books, newspapers, and other postal packets are now also carried, at low rates of postage in proportion to the weight conveyed; and, since the year 1875, post cards (*i.e.*, open letters) have come into use, bearing a halfpenny stamp only (*b*). The produce arising from this branch of the revenue is steadily increasing.

Extension of Post Office activities in Great Britain.

The machinery of the Post Office is also now used for the management of that class of savings bank which is called the Post Office Savings Bank, for the issuing of money orders and, of postal orders (*c*), for the granting of small life insurances and life annuities (*d*), and for the conveyance of small parcels by parcel post (*e*). For a considerable number of years, the Post Office has also had the direction of the electric telegraphs of the kingdom (*f*). Special postal and telegraph facilities for outlying places are also now provided (*g*); and specific provisions have been made for the punishment of offences relating to the Post Office in its various departments and branches. Since 1st January, 1909, the Post Office is the agency through which old age pensions are paid (*h*).

Legislation in Ceylon.

The earliest postal enactment of importance in Ceylon appears to be Regulation No. 20 of 1813. It

(*b*) Post Office Act, 1875, s. 1; and (as to reply post cards) see the Post Office (Reply Post Cards) Act, 1882.

(*c*) Post Office (Money Orders) Acts, 1848 to 1906.

(*d*) Government Annuities Act, 1882.

(*e*) Post Office (Parcels) Act, 1882.

(*f*) The Telegraph Acts, 1863 to 1904, include Acts of the following years, viz.:—1863, 1866, 1868, 1869, 1870, 1878, 1885, 1889, 1892, 1897, 1899 and 1904. It was by the Act of 1885 that the minimum rate for inland telegrams was reduced to sixpence. See also Wireless Telegraphy Acts, 1904 and 1906.

(*g*) Post Office Act, 1891, s.8; Post Office Amendment Act, 1895; Post Office and Telegraph Act, 1897; and the Post Office (Guarantee) Act, 1898.

(*h*) Old Age Pensions Act, 1908.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

was followed by Ordinances 8 of 1836 and 10 of 1841, which were repealed by Ordinance 1 of 1846, and that by Ordinance 27 of 1865. They were replaced by Ordinance 2 of 1878 which, with the Postal Savings Bank Ordinance 5 of 1882 and the Postal Orders Ordinance 21 of 1885, was replaced by the Ceylon Postal and Telegraph Ordinance 13 of 1892. This was repealed by the Ordinance 11 of 1908, which is now in force. The Governor in Executive Council is empowered to make rules as to postage and other matters for the administration of the Ordinance (sections 10, 11, 12, 18, 20, 23, 30, 33, 38, 39, 47, 53, 93); penalties are prescribed for various offences of officers of the post office (sections 59 to 67) and of others (section 68 *et seq*). No provision has been made in Ceylon, as in England, for the granting of life insurances and annuities through the Post Office, nor for old age pensions. But in other respects the Ceylon Post Office has followed the English model.

Postage stamps, how protected.

Postage stamps do not fall under the provisions of the Stamp Ordinance, but are protected by the Ceylon Penal Code, sections 248 to 256, being deemed stamps issued for the purposes of revenue. Ordinance 11 of 1908, sections 18 (4), 19 and 83.

Article 167.

Telegraph: Crown's exclusive privilege.

(1) The Crown has the exclusive privilege of establishing, maintaining and working telegraphs within Ceylon and its dependencies.

Meaning of 'telegraph.'

(2) "Telegraph" means an electric, galvanic, magnetic, or mechanical telegraph, and includes appliances, wires, and apparatus or any combination thereof for making, transmitting, or receiving telegraphic, telephonic, or other communications by means of electricity, galvanism, magnetism, or mechanism with or without wires, and any apparatus or installation for transmitting or receiving messages by means of wireless telegraph.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

License for telegraphs.

(3) The Governor may license any person to establish, maintain, or work a telegraph within Ceylon and its dependencies.

When no license required for telephones.

(4) Any person may without license establish telephonic communication between any two or more buildings within the limits of any property belonging to the same owner.

Liability for loss or damage.

(5) The Crown shall not be responsible for any loss or damage which may occur in consequence of any telegraph officer failing in his duty with respect to the receipt, transmission, or delivery of any message; and no such officer shall be responsible for any such loss or damage, unless he causes the same fraudulently or by his wilful act or default.

Comment.

Ceylon Telegraph Ordinance No. 35 of 1908, sections 3 and 9. For the English Acts see note (*f*) to last Article.

Legislation in Ceylon.

The earliest Telegraph Ordinance in Ceylon was No. 2 of 1857. This was replaced by the provisions regarding telegraphs in the Ceylon Postal and Telegraph Ordinance 13 of 1892. These provisions, with the Telephone Ordinance 16 of 1882, have been amended and consolidated by the Ordinance 35 of 1908, which is now in force.

The Governor in Executive Council is empowered to make rules for the administration of the Ordinance and prescribe fines for breach of rules (section 7); and the telegraph authority is empowered to place and maintain telegraph lines and posts on lands not belonging to the Crown, reserving right of owners to compensation for any damage sustained (section 10), the amount of compensation in cases of dispute to be determined by the District Court (section 15). Penalties are prescribed for resistance to exercise of lawful

Penalties.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

powers of telegraph authority (section 15), for establishing or working a telegraph line without or contrary to the conditions of a license (section 20), for using such a line (section 21), &c. The Wireless Telegraphy Ordinance 8 of 1903 prohibits the establishment or use of wireless telegraphy in Ceylon without license from the Governor.

Wireless telegraphy.

Article 168.

Crown's right to levy stamp duty.

(1) The Crown is entitled to levy, on the instruments specified in the Stamp Ordinance, 1909, as chargeable with duty, the respective duties set forth in the schedule B thereto, subject to the provisions of the Ordinance.

Duty how levied.

(2) The duties shall be paid by means of adhesive or impressed stamps of the proper value, and of the kind prescribed by the Governor in Executive Council by notification in the Government Gazette.

Comment.

Stamp duties;

Stamp duties constitute an important branch of the revenue of the Crown, being imposed upon many legal and mercantile documents. The revenue from this source in Ceylon exceeds a million rupees a year.

their origin.

The duties were invented in Holland in 1624. They were first instituted in Great Britain in 1694 by Act 5 & 6 William & Mary c. 21, and have been added to and altered by numerous statutes.

Stamp Acts in force in Great Britain.

The principal Stamp Acts now in force in Great Britain are the Stamp Acts, 1815 and 1891. The latter consolidates the law and repeals the Stamp Act, 1870, and many other Acts relating to Stamp duties, and has been amended by the Revenue Act, the Stamp Duties Management Act, 1891, the Customs and Inland Revenue Act, 1893, ss, 3, 4, and the Finance Acts of 1895 to 1906. See also the following statutes containing enactments on this subject: Demise of the Crown Act,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1830; London Hackney Carriage Act, 1831; Stage Carriages Act, 1832; Oxford University Act, 1855; Cambridge University Act, 1858; Revenue Act, 1867, ss 20 to 24; Revenue, Friendly Societies, and National Debt Act, 1882, Part 2; Customs and Inland Revenue Act, 1885, Part 2; Revenue Act, 1903, ss 5 to 9; and Revenue Act, 1906, s 10.

Stamp legislation in Ceylon, history of.

The earliest proclamation in Ceylon referring to stamps on pleadings and other documents in civil suits is that of the 13th August, 1802. By it all stamps required for pleadings and other proceedings in civil suits before any court of original jurisdiction, or for the copies of such pleadings or other proceedings, or for acts, extracts, or copies of any kind made or granted in the course of any civil suit were, until further orders, declared wholly remitted and excused. This proclamation was annulled by a proclamation of the 13th November, 1802.

Then by Regulation No. 1 of 1806 the use of detached stamps on transfers of property was prohibited, and provision made for the issue of stamped olas, paper, and parchment on which deeds and instruments requiring a stamp were to be written, and licensed sub-distributors of olas and stamps were appointed to the different sub-divisions of districts to act under certain rules forming part of this Regulation. By Regulation No. 1 of 1809 all deeds and other instruments relating to the transfer of movable or immovable property which had been stamped since the execution thereof were declared valid, and provision was made permitting the stamping, within a certain time, of such documents as had remained unstamped. By Regulation No. 1 of 1811 the period was extended as regards the district of Mannar.

By Regulation No. 2 of 1817 the Regulations No. 1 of 1806 and No. 1 of 1809 were repealed, and other provision made for the stamping of conveyances and other documents. By Regulation No. 1 of 1820 the Regulation No. 2 of 1817 was amended, and provision made for simplifying the collection of stamp duties. Regulation No. 18 of 1820 amended Regulation No. 1 of 1820 and simplified further the collection of stamp duties. Regulation No. 11 of 1821 declared illegal the annexation (in order to make up the stamp duty payable) of stamps to deeds and instruments which the law required to be written on stamped paper of certain amounts, and Regulation No. 22 of 1822 amended Regulation No. 1 of 1820 and further simplified the collection of stamp duties.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Stamp legislation in Ceylon.

Regulation No. 7 of 1823 repealed Regulations No. 2 of 1817, No. 1 of 1820, No. 18 of 1820, No. 11 of 1821, and No. 22 of 1822, and consolidated all enactments imposing stamp duties on deeds and other instruments; and Regulation No. 20 of 1823 amended in some respects the tables annexed to Regulation No. 7 of 1823. Regulation No. 1 of 1827 authorised the use of stamps expressed in the currency of Great Britain in all cases where stamps expressed in rix dollars, fanams, or pice were required to be used.

Regulation No. 4 of 1827 repealed Regulations Nos. 7 and 20 of 1823 and established new tables of stamp duties payable upon deeds and other instruments in British currency, and Regulation No. 2 of 1830 amended Regulation No. 4 of 1827 as regards the stamp duty thereby imposed on conveyances of immovable property. Regulation No. 1 of 1831 relaxed the provisions for stamp duties in favour of transactions relating to the pearl fishery.

Ordinance No. 6 of 1836 repealed Regulations No. 4 of 1827 and No. 2 of 1830, and revised the stamp duties and made provision for the general use of stamps throughout the Colony. Ordinance No. 7 of 1841 made provision for the use of stamps in certain judicial proceedings; and both these Ordinances were repealed by Ordinance No. 2 of 1848, which imposed certain other stamp duties in lieu of those then existing; and this Ordinance in its turn was repealed by Ordinance No. 19 of 1852.

Ordinance No. 19 of 1852 was amended by Ordinances No. 1 of 1855 and No. 7 of 1860, and these three Ordinances were ultimately repealed by Ordinance No. 11 of 1861. This Ordinance was amended by Ordinances No. 9 of 1865 and 8 of 1868, and the three were repealed by Ordinance No. 23 of 1871.

Ordinance No. 23 of 1871 was amended by Ordinance No. 8 of 1880, and all local enactments providing for the levy of stamp duties were consolidated by Ordinance No. 43 of 1884. These three Ordinances and so much of any other Ordinances as was inconsistent with Ordinance No. 3 of 1890 were thereby repealed. In respect of stamp duties in cases for partition under Ordinance No. 10 of 1863, it was amended by Ordinance No. 10 of 1897.

Stamp Ordinance now in force.

The Stamp Ordinance now in force in Ceylon is the Ordinance No. 22 of 1909, which has repealed all previous Ordinances. For the numerous and elaborate

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

provisions of the Ordinance reference should be made to the Ordinance itself.

Instruments chargeable with duty.

The duties mentioned in Schedule B are, under section 4, leviable (subject to exemptions contained in the schedule) on

(*a*) every instrument mentioned in the schedule, which, not having been previously executed by any person, is executed in Ceylon;

(*b*) every bill of exchange, cheque or promissory note made out of Ceylon and accepted or paid or presented for acceptance or payment or negotiated in Ceylon; and

(*c*) every instrument mentioned in the schedule, other than (*b*), which, not having been previously executed by any person, is executed out of Ceylon relating to property situate, or matter or thing done or to be done, in Ceylon and is received in Ceylon.

Exemptions in favour of Crown, &c.

But instruments executed by or on behalf of or in favour of the Government are exempt from duty, as also instruments of sale, transfer, mortgage or other disposition of any interest in a ship registered under "The Merchant Shipping Act, 1894."

Instruments relating to distinct matters.

Instruments relating to several distinct matters are chargeable with the aggregate amount of the duties with which separate instruments, each relating to one such matter, would be chargeable (section 6).

Ad valorem duties.

Ad valorem duties are imposed on agreements to secure repayment of loans by hypothecation of title-deeds, &c. (No. 5 in Schedule B), on appraisements (No. 7), bills of exchange (13), bonds (15), conveyances (22), leases (31), assignments of bonds, &c., (53); on law proceedings (Part 2 of Schedule B); on testamentary proceedings (Part 3); on service of process in civil cases (Part 4).

Rate of exchange.

Ad valorem duty is calculated on an instrument, when the amount in respect of which it is chargeable is in a currency other than that of Ceylon, according to the current rate of exchange on the date of the instrument (section 19).

Consideration must be fully and truly stated in the deed.

In order the better to determine the duty, the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of duty chargeable, must be fully and truly set forth in the instrument (section 26).

Transfer in consideration of debt.

Where a property is transferred to a person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

payment or transfer of any money or stock, whether or not a charge or encumbrance on the property, such debt, money or stock shall be deemed the whole or part (as the case may be) of the consideration for the transfer. In the case of a Fiscal's sale, the duty is to be calculated on the consideration expressed for the transfer (section 23).

Fiscal's sale.

Sale subject to mortgage.

When a property is sold subject to a mortgage or other incumbrance, any unpaid mortgage money or money charged, together with the interest (if any) due on the same, shall be deemed part of the consideration for the sale (section 23, explanation).

Time of stamping.

All instruments executed in Ceylon must be stamped at or before execution, unless otherwise expressly provided (section 16).

Use of special stamps: compounding of duty.

The Governor in Executive Council may by notification in the *Government Gazette* (1) direct special stamps to be used for particular instruments, and (2) may authorize banks to compound for stamps on cheques, and (3) joint stock companies to compound for duty on share certificates (section 5).

Stamps prescribed.

By *Gazette* notification of January 25th, 1910, the Governor in Executive Council has prescribed the stamps as follows:—

(*a*) Stamp bearing the words "Ceylon Stamp duty" with the word "Judicial" printed thereon in red.	For all instruments in respect of which the stamp duty is fixed in Parts 2, 3, and 4 of Schedule B to "The Stamp Ordinance, 1909," and by the Schedule to "The Village Tribunals Stamp Ordinance, 1902."
(*b*) Stamps bearing the words "Ceylon Stamp Duty" only without the word "Judicial" printed thereon.	For all instruments in respect of which stamp duty is fixed by Schedule B other than those referred to in (*a*) and (*c*).
(*c*) Stamps bearing the words "Ceylon Postage Revenue."	For instruments subject under the Ordinance to stamp duty of 5 cents and specified in the Notification, such as receipts for, or acknowledgments of debt of, Rs. 20 or over, bills (other than promissory notes), payable on demand, cheques and drafts payable on demand.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Judicial stamps, proposed abolition of.

It has since been decided to abolish Judicial stamps and to require the use of Revenue stamps, *i.e.* stamps bearing the words "Ceylon stamp duty," for all instruments for which Judicial stamps are now required. The notification will shortly be published, and is expected to take effect from 1st July, 1910. See Appendix VI.

Duties by whom payable.

In the absence of an agreement to the contrary, the expense of providing the proper stamp shall (sec. 28) be borne—

(*a*) In the case of any of the following instruments, namely:

Administration bond;
Agreement to mortgage;
Bill of exchange;
Bond;
Bottomry bond;
Debenture;
Further charge;
Indemnity bond;
Mortgage bond;
Promissory note;
Release;
Respondentia bond;
Security bond or mortgage bond;
Settlement;
Transfer of shares in an incorporated company or other body corporate;
Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not;
Transfer of any interest secured by a bond, mortgage deed, mortgage bond, or policy of insurance;

by the person drawing, making, or executing such instrument.

(*b*) In the case of a policy of insurance, by the person effecting the insurance.

(*c*) In the case of a conveyance, by the grantee; in the case of a lease or agreement to lease, by the lessee or intended lessee.

(*d*) In the case of an instrument of exchange, by the parties in equal shares.

Obligation to give receipt in certain cases.

Any person receiving any money amounting to twenty rupees or upwards, or any bill of exchange, cheque, or promissory note for an amount of twenty rupees or upwards, or receiving in satisfaction or part satisfaction of a debt any movable property amounting to twenty rupees or upwards in value, shall, on demand by the person paying or delivering such money, bill, cheque, note, or property, give a duly stamped receipt for the same (section 29); and failure to do so, and devices to evade duty on receipts, are punishable with a fine of a hundred rupees (sec. 61).

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Article 169.

To determine the duty necessary facts to be set forth in instrument.

(1) The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein.

Penalty for default.

(2) Any notary or other person employed or concerned in or about the preparation of any instrument, who wilfully fails to set forth fully and truly the consideration and other facts as required by subsection 1, or abets such default, shall be punishable with a fine of one thousand rupees.

Comment.

Stamp Ordinance, 1909, sections 26 and 67. The information required by this Article is necessary for the purpose of determining the duty, especially on instruments chargeable with *ad valorem* duty. See page 285, comment on Article 168.

Article 170.

(1) An adhesive stamp affixed to an instrument must be cancelled

Cancellation of adhesive stamps.

(*a*) by the person executing the instrument and at the time of execution, if the stamp has not been already cancelled; or by the person affixing the stamp to an executed instrument and at the time of affixing the stamp; or by the notary public attesting the instrument and at the time of its execution or acknowledgment before him; and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*b*) by his writing in ink on or across the stamp or each of the stamps the name or initials of himself or of his firm, with the true date of his so writing, so as effectually to obliterate and cancel the stamps or so as not to admit of the same being used again.

Penalty for non-cancellation.

(2) Any person failing to cancel a stamp as aforesaid, shall be punishable with a fine of one hundred rupees, and if he be a notary public, with a fine of two hundred rupees.

Comment.

Impressed stamps.

Stamp Ordinance, 1909, sections 9, 10 (1) & 59; and section 29 (19) *f* of the Notaries' Ordinance 1 of 1907. Instruments written on paper stamped with an impressed stamp must be written so that the stamps appear on the face of the instrument and cannot be used for any other instrument (section 12).

A notary public is required also to state in his attestation the number and value of the stamps affixed, subject to a fine of Rs. 200 for default.

Article 171.

When instrument deemed duly stamped.

An instrument is deemed duly stamped, if it bears an adhesive or impressed stamp of not less than the proper value and of the proper description, and in the case of an adhesive stamp, if it has been affixed and cancelled according to law.

Comment.

Stamp Ordinance, 1909, sections 3 (10), 5 (1) *a* and 8. The proper description of stamp for any

T

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

particular instrument is prescribed by the Governor in Executive Council under sections 5 (1) *a* and 8 of the Ordinance. See Article 168 (2), page 282, and page 286 *supra*. For the cancellation of stamps see Article 170, page 288. An instrument not duly stamped is inadmissible in evidence in civil cases and incapable of being acted on by a public officer except under the circumstances stated in Articles 172 and 173; and the execution, &c., of such an instrument is punishable (Article 174).

Article 172.

Instrument not duly stamped, inadmissible in civil cases, or by public officer.

(1) An instrument not duly stamped shall not be admitted in evidence in civil cases, nor acted upon, registered or authenticated by a public officer,—

Exceptions.

(*a*) except upon payment of the duty, or deficiency of duty, chargeable thereon, together with the prescribed penalty; or

(*b*) unless the instrument has been executed by or on behalf of the Government; or

(*c*) unless it bears the certificate of the Commissioner of Stamps under section 31 or other provision of the Stamp Ordinance, 1909; or

(*d*) except under the provisions of Article 173.

(2) The exception (*a*) does not apply to an instrument chargeable with a duty of five cents only, or to a bill of exchange or promissory note.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Stamp Ordinance, 1909, section 36. This Article does not apply to criminal cases, in which an unstamped instrument may be admitted (*ibid*, proviso c). Even in civil cases an instrument not duly stamped may be admitted under certain circumstances, as stated in the next Article.

Duty of public officer and banker to examine instruments, &c.

It is the duty of a public officer to examine instruments coming before him, in order to ascertain whether they are duly stamped (sec. 34). It is the duty of a public officer and of a banker to see that no instrument, not duly stamped, is received, admitted, registered or issued by him; and to prick, punch or cut every adhesive unpricked stamp coming before him for the first time, other than stamps on receipts attached to public accounts or stamps on foreign bills of exchange drawn in but payable out of Ceylon: sec. 10 (2).

Impounding of instruments.

An instrument not duly stamped may be impounded by any public officer except an officer of police (sec. 33).

Instruments not duly stamped admissible on payment of deficiency and penalty.

An instrument not duly stamped (not being one chargeable with a duty of five cents only or a bill of exchange or promissory-note) may be admitted in evidence in civil cases or acted upon by a public officer on payment of the duty or deficiency of duty, and of a penalty calculated on the following scale (section 36, proviso a):

Scale of penalty.

	Rs.	c.
In cases where the duty or deficiency does not exceed Rs. 2, a penalty of ..	2	50
In cases where the duty or deficiency exceeds Rs. 2 but does not exceed Rs. 7·50, a penalty of	5	00
In cases where the duty or deficiency exceeds Rs. 7·50, but does not exceed Rs. 20, a penalty of	10	00
Where the duty or deficiency exceeds Rs. 20, the amount of penalty to be imposed shall be determined by the Commissioner of Stamps.		

The penalty on an unstamped receipt is one rupee (proviso b).

The Commissioner of Stamps may, on production of an instrument and on payment of a fee of Rs. 5, declare (subject to appeal to the Supreme Court) the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Adjudication as to proper stamp by Commissioner of Stamps.

Endorsement on instrument.

duty chargeable on the instrument; and, on the payment of the duty or deficiency of duty, certify, by endorsement on the instrument, that the full duty has been paid, and the instrument shall then be deemed duly stamped (sections 30 to 32). But no such endorsement shall be made on an instrument chargeable with a duty of 5 cents only, or on a bill of exchange or a promissory note, or on an instrument brought to him after the expiration of one month from its execution in Ceylon, or (if executed out of Ceylon) after the expiration of three months after its receipt in Ceylon. Sec. 31 (3), proviso.

Stamping of impounded instrument by Commissioner.

When an instrument (other than an instrument chargeable with a stamp duty of five cents only or a bill of exchange or promissory note) is impounded by the Commissioner as not duly stamped, or is sent to him by a public officer as not duly stamped, and is found to be not duly stamped, the Commissioner may, on recovery of the duty or deficiency of duty and of a penalty of five rupees or a penalty up to ten times the proper amount of duty, certify the instrument to be duly stamped (section 41).

Instrument not duly stamped by accident.

Instruments (other than an instrument chargeable with duty of five cents only or a bill of exchange or promissory note) not duly stamped by accident, mistake or urgent necessity, and produced by any person of his own motion to the Commissioner within one year of its execution, may, on payment of the duty or deficiency of duty, be endorsed by the Commissioner with a certificate of such payment, and shall then be deemed duly stamped (sections 43 and 44).

Instrument bearing stamp of improper description.

The Governor in Executive Council may make rules providing that, when an instrument bears a stamp of sufficient amount but of improper description, it may on payment of the proper duty be certified to be duly stamped, and an instrument so certified is deemed duly stamped from the date of its execution (section 38).

Time of objecting to want of stamps.

Where an objection is raised to an instrument for want of a stamp, the objection should be taken as soon as the instrument is tendered and before it is received in evidence. If the instrument is received and read without objection, it cannot afterwards be objected to for want of a stamp. *Robinson* v. *Lord Vernon*, 7 C.B. (N.S) 235; *Kanakal* v. *Velupillai*, 2 N.L.R. 80.

Admission of instrument by court, when not to be questioned.

When an instrument has been once admitted in evidence by a Court, the admission cannot be questioned at any stage of the same suit on the ground that the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

document has not been duly stamped. But the Supreme Court may revise the order and determine the amount of duty leviable and cause the document to be impounded and sent to the Commissioner of Stamps for prosecution of the persons who have committed an offence in respect of the instrument, and for the recovery of the proper duty and penalty (section 37).

Revision of order by Supreme Court.

ARTICLE 173.

An instrument not duly stamped may be admitted in evidence in a civil court for a collateral purpose, *i.e.* to say, when it is offered merely to show something independent of the purpose for which the stamp is required, and not for the purpose of giving effect to the instrument itself.

Instrument not duly stamped, when admissible in civil cases.

Comment.

An unstamped instrument, though not admissible in evidence in civil cases, as stated in the last Article, may be admitted in a criminal court (section 36 of the Ordinance, proviso *e*); and even in a civil court for a collateral purpose, *i.e.* to say when it is offered merely to show something independent of the purpose for which the stamp is required, and not for the purpose of giving effect to the instrument itself, and to show the illegality of the plaintiff's claim (*Coppock* v. *Bower*, 4 Mee and W. 361), or to refresh the memory of a witness or challenge it (*Mangham* v. *Hubbard*, 8 B. and C. 14; *Birchell* v. *Bullough*, 1896, 1 Q. B. 325), or to prove fraud (*Gregory* v. *Fraser*, 3 Camp. 454; *R.* v. *Gompertz*, 9 Q. B. 824; *Holmes* v. *Sixsmith*, 7 Ex. 802, 21 L. J. Ex. 313; *Haigh* v. *Brooks*, 10 Ad. and E. 309; *Clarke* v. *Haughan*, 3 D. and R. 323, 20 L.J.Q.B. 244).

Unstamped instruments admissible in criminal case.

When admissible in civil case.

A document requiring a stamp for some purposes but not for others, will be strictly admissible for such latter purposes. A document, void as a receipt for want of a proper stamp, may be evidence of an account stated or other outstanding accounts (*Matheson* v. *Ross*, 2 H. L. Cas 301), or of a contract (*Evans* v. *Prothero*. 1 De G. M. and G. 572).

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Other evidence, admission of.

When an instrument is inadmissible by reason of the stamp law, it is allowable to resort to other admissible evidence. Thus, when a promissory-note is defectively stamped, a holder may give evidence of the original consideration, as by showing, on a count for money lent, that the defendant has acknowledged the debt for which the note was given (*Farr* v. *Price*, 1 East 56); and when a receipt is unstamped, payment may be proved by oral evidence (*Rambert* v. *Cohen*, 4 Esp. 213).

Presumption as to stamp on document not produced.

It will be presumed that an instrument lost or not produced after notice was duly stamped (*R.* v. *Long Buckley*, 7 East 45), unless there is evidence that it remained without stamp for some time after the execution, in which case the onus is shifted and lies upon the party who relies on the instrument (*Marine Investment Co.* v. *Hairside*, L.R. 5 E. and J. 624). See also the Ceylon Evidence Ordinance, 1895, sec. 89. If an instrument is produced bearing adhesive stamps properly cancelled, it will be presumed they were affixed at the proper time (*Bradlaugh* v. *De Run*, L.R. 3 C. P. 286).

It will be presumed, in the absence of contrary evidence, that the original was properly stamped (*Marine Investment Co.* v. *Hairside*, L.R. 5 E. and J. 624), and an unstamped copy will be good secondary evidence; but secondary evidence of the contents of an unstamped agreement cannot be given, even though it was destroyed by the wrongful act of the party objecting to such evidence (*Reppiner* v. *Wright*, 2 W. and A.C. 478).

Secondary evidence of unstamped agreement inadmissible.

Article 174.

Executing or negotiating instruments not duly stamped, penalty for.

Any person

(*a*) executing, issuing or negotiating or presenting for acceptance or payment, or accepting, paying or receiving payment of, a bill of exchange, cheque or promissory note which is not duly stamped, or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*b*) executing any other instrument which is not duly stamped,

shall be punishable with a fine of two hundred rupees.

Comment.

Stamp Ordinance, 1909, section 58.

Among other offences created by the Ordinance are the refusal to give stamped receipt and the evading of duty on receipts (section 61), not making out insurance policy or making it not duly stamped (section 62), postdating bills and other devices to defraud the revenue (section 64), not properly stamping probate (section 73), obstruction of search warrants for forged stamps (section 81), hawking stamps (section 82), &c. Other offences.

No prosecution is to be instituted without the sanction of the Commissioner of Stamps (section 65), and he may stay any prosecution or compound any offence (section 66). Sanction and stay of prosecution.

Article 175.

(1) All forest, waste, unoccupied or uncultivated lands are presumed to be the property of the Crown until the contrary is proved. Forest, waste and unoccupied land, presumed to be Crown property.

(2) All chenas and other lands which can only be cultivated after intervals of several years,— Chenas

(*a*) if situated in the districts formerly comprised in the Kandyan provinces, are deemed to belong to the Crown and not to be the property of any person claiming the same against the Crown, except only on proof by such person in Kandyan districts;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(i) of a *sannas* or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or

(ii) of such customary taxes, dues or services having been rendered within 20 years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts;

in non-Kandyan districts.

and (*b*) if situated elsewhere in the island, are deemed to be forest or waste land within the meaning of subsection (1).

Comment.

Ordinance 12 of 1840, object of.

This Article gives the substance of section 6 of the Ordinance 12 of 1840, an important enactment made (as stated in the preamble) for the prevention of encroachment on Crown lands by persons "without any probable claim or pretence of title." In *Queen* v. *Habibu Mohammadu*, 1846, Ramanathan, 1843-1855, 129, the Collective Court explained "probable" as "that which has more of evidence for than against it, which is more likely to be true and substantial than false and unfounded."

"Probable," meaning of.

Summary proceedings for ejectment.

Sections 1 to 4 provide a summary procedure in the District Court for the ejectment of such persons, reserving to them the right to proceed in the ordinary course of law for the recovery of possession. See next Article.

Land presumed to be Crown land.

Section 6, reproduced in this Article, declares that forest, waste, unoccupied uncultivated land is presumed to be the prop he Crown unless the contrary is proved, and t &c., are deemed the property of the Crown e the circumstances

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

stated. For similar provision see section 24 of Ordinance 1 of 1897 and Article 186 *infra*.

Section 7 authorizes a Government Agent, on the application of a person in possession of a land, to issue, after inquiry and a survey (Ordinance 12 of 1844, section 2), a certificate that the Crown has no claim to the land. Crown certificate no claim.

Section 8 provides for the issue by the Crown of a grant of its land to a person who has, without grant or title from the Crown, cultivated and improved it and been in uninterrupted possession for at least ten years, provided that he pays the Crown half the improved value. But this provision does not extend to the lands referred to in section 6 or to any public road or high-way or to *tunhawul* land (Ordinance 9 of 1841, section 2). The whole Ordinance is printed with allied Ordinances in the Appendix II. Crown grant on payment of half improved value.

A "chena," according to Sir John D'Oyly, is "high jungle ground in which the jungle has been cut and burnt for manure at intervals of from five to fourteen years for the purpose of cultivating dry grain (such as hill paddy, kurakkan, &c.), and roots (such as mannoca, sweet potatoes, &c.), and other vegetables, and which, after two or at most three crops, is abandoned till the jungle grows again" (*A Sketch of the Constitution of the Kandyan Kingdom*, R.A.S. Transaction, Vol. III, Part II, 1833). What is a chena.

"The process of bringing waste land under rice cultivation is among the Sinhalese known as *aswedduмizing*, often a laborious and expensive process, by which the arable mark or *mada bima* is extended. In practice nearly every field or *kumbura* has its appurtenant high land (*pillewa*) which the villager according to his ability and needs brings under cultivation. The high land, which consists of forest and scrub, constitutes with the *mada bima* the common land or *ganwasiya* of the village community. That portion of the high land which cannot be *aswedduмized* is subjected to an irregular mode of cultivation called *hena* cultivation, which is as ancient as rice cultivation, being referred to in the *Mahawansă*, c. 23 (160 B. C.). The scrub jungle (or, it may be, forest) is cleared by felling all but the largest trees, and after the wood and branches have been allowed to dry for about a month they are set fire to, and when the soil has cooled, the surface is raked to work in the ashes, and the soil thus enriched with manure is cultivated with kurakkan, hill paddy, or maize, and afterwards gingelly, mannoka, &c. The rotation of crops extends to three or four years, and Chena cultivation. *Asweddumizing.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

when the last crop has been gathered, the land is allowed to run into jungle again to secure a fresh supply of ash manure before raising another crop, meanwhile serving as pasture land for cattle and supplying sticks, &c., for fencing rice-fields. This method of cultivation, being practicable only after intervals of years, was called *hin* or *hen—i.e.*, weak, irregular—as opposed to the regular yearly cultivation of which rice land is capable; and the land subjected to such cultivation is called *hena* or, in Ceylon official English, *chena*. *Hin* also means 'thin' or 'fine,' and the word *hena* may have reference to the 'fine grains' cultivated in henas.

Origin of term *chena*.

"It has always been a popular mode of cultivation in Ceylon and the most formidable foe of forest conservation. It involves far less labour and attention than rice cultivation. It enjoyed till recently special advantages as regards taxation over rice, and it yields enormous crops, reaching 150 to 500 fold, in return for a minimum expenditure of labour. In olden times such land was considered fit only for chena cultivation, but with improved agricultural knowledge it has been found in many cases adapted for the profitable cultivation of tea, cocoanuts, &c. Thus an unexpected inversion of the old order of things has occurred. The high land which formerly for the most part had an insignificant and spasmodic value and only as an appurtenant to a field, has in many cases become the really valuable land, and the field has been almost reduced to the level of an appurtenant to the high land, and yields so little profit that it has all but ceased to be cultivated by the larger landowners, while the small landowner only cultivates it because of the old and honourable associations of rice cultivation, and because if he did not cultivate it he would hardly have anything to do": *per* Arunachalam, D. J., in *Adippola Sannas Case*, 1904, D. C. Chilaw, 2954.

Presumption in favour of Crown as to chenas, etc.; applies to what suits.

The words in section 6 of Ordinance 12 of 1840 (sub-sec. 2 of this Article) "all chenas, &c., in the Kandyan Provinces shall be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown," refer only to suits in which the Crown is a party (*Mulkadoowame* v. *Rang Ettena*, 1845, Ram. 1843-1855, p. 25). In this case the Chief Justice (Oliphant) was of opinion that in all probability the words, "and not to be the property of any private person claiming the same against the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Crown," have crept into the Ordinance *per incuriam*. In *Attorney-General* v. *Samarasinha*, 1900, 1 Br. 220, it was held that the presumption is not confined to cases instituted under section 1 of the Ordinance but arises generally; and in *Weeresekere* v. *Seelawanka*, 2 S. C. R. 12, that the presumption attaches to the land after it has passed from the Crown to private individuals.

Not confined to cases under the Ordinance.

In order to bring land within the above provision, it is not enough to prove that a land is chena, it is also necessary to prove that it is chena incapable of being cultivated otherwise than after intervals of several years (*Queen's Advocate* v. *K. Appuhami*, 1878, 1 S.C.C. 26, *per* Phear C. J. & Dias J.; *Corea* v. *Andirala* and *Amarasekara* v. *Baiya*, 1900, 3 Br. 159, 161, *per* Browne A. P. J.). The burden of proving this foundation for the application of the section is upon the Crown. It is not for the Crown to enter on a man's land and say, "This is my land unless you prove that it is neither forest nor waste." It must first show that the section applies, *e.g.* that the land is waste or forest land or land cultivable only at intervals of several years. *Attorney-General* v. *Samarasinha*, 1900, 1 Br. 222, *per* Moncreiff J. and Browne A. P. J.

What evidence required to raise presumption.

The words, 'chenas and other lands which can only be cultivated after the intervals of several years,' occurring in section 6 of Ordinance 12 of 1840, mean lands which were so cultivated at the date of the passing of the Ordinance, and may include lands fit for the cultivation of tea and coconut palm. *Corea* v. *Punchirala*, 1899, 4 N.L.R., 135, *per* Lawrie J. But see *contra*, *Q. A.* v. *K. Appuhami*, 1878, 1 S. C. C. 26, *per* Phear C. J. and Dias J. quoted *supra*; *Kirihami* v. *G. Fernando Appuhami*, 1879, 2 S. C. C. 88, *per* Phear C. J. and Dias J.; *Corea* v. *Andirala* and *Amarasekara* v. *Baiya*, 1900, 3 Br. 159, 161. In *Kirihami* v. *G. Fernando Appuhami*, the land in question had been cultivated and possessed by the plaintiff for a long period as appurtenant to his ancestral paddy land, but from absence of water and the fertilizing concomitants of water, due to relative elevation of the ground, and from want of manure, was cultivable with cereals only at considerable intervals of time: *held*, that the land was not chena within the meaning of section 6 of the Ordinance and the presumption which is the creature of that section did not arise.

Meaning of expression "chenas and other lands incapable," &c.: conflicting decisions.

The periodical cutting of the jungle and sowing of the land with fine grain, being hurtful to the soil and

Reason for presumption.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the villagers, cannot be said to be bringing the land into cultivation, and this seems to be one of the reasons why the legislature by section 6 of the Ordinance, No. 12 of 1840, declared that chena lands should be deemed to be "forest or waste lands." The better the proof that the land in dispute between the Crown and a private party is chena, the stronger is the presumption that it belongs to the Crown (*Attorney-General* v. *Wanduragala*, 1901, 5 N.L.R., 98, *per* Lawrie J.).

How presumption rebutted in Kandyan Provinces.

The presumption under section 6 of Ordinance 12 of 1840 is a rebuttable presumption merely (*Lewis* v. *Kiriappu*, 1883, 5 S. C. C. 194). In the case of lands situated in "the districts formerly comprised in the Kandyan Provinces," this presumption is rebuttable only by proof of a grant by the Crown or by payment of tax to it. It is not to be rebutted by proof such as that, more than a hundred years ago, the land was private property, and had been chenaed for sixty years before the institution of the suit by the Crown. If it had been a chena for sixty years since 1840, the Ordinance No. 12 of 1840 applies. If it has ceased to be a chena and is now a forest, then too the Ordinance applies (*A. G.* v. *Wanduragala*, *supra*). The presumption is not confined only to cases instituted under section 1 of the Ordinance, but arises generally (*ibid.*; *Attorney-General* v. *Samarasinha*, 1900, 1 Br. 220).

Land in *gabadagama*. or royal village.

Evidence that land is situated within the limits of an old Kandyan *gabadagama* does not raise a conclusive presumption that the land is the absolute property of the Crown, for there may be *paraveni* lands as well as *maruwena* lands within the limits of a *gabadagama* (*Queen's Advocate* v. *Kirimenika*, 1880, 3 S.C.C. 18, *per* Cayley C. J.).

Kandyan Provinces. "districts formerly comprised in."

What is the precise meaning of the expression in section 6 of the Ordinance No. 12 of 1840 (reproduced in sub-sec. 2 of the Article), "districts formerly comprised in the Kandyan provinces," is not clear, and does not appear to have been authoritatively decided. The question is a difficult and complicated one, and raises points of much historical and legal interest as to the constitution of the ancient Kandyan Kingdom and the changes introduced under British rule. I have discussed them at some length in Appendix V, and endeavoured to fix the districts.

Presumption, how rebutted, in non-Kandyan districts.

In non-Kandyan districts the presumption under section 6 of Ordinance 12 of 1840, that all chenas and other lands which can only be cultivated after intervals

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of several years are forest or waste lands and therefore the property of the Crown, may be rebutted by any of the ordinary proofs which would go to show that the land was not in fact the property of the Crown but of private individuals. Where, therefore, the plaintiff relied upon a Crown grant of land which was admittedly chena, and the defendants proved acts of possession and cultivation of the chena for a long period of years, *held*, that the defendants were entitled to judgment (*Lewis* v. *Kiriappu*, 1883, 5 S. C. C. 194, *per* Burnside C. J.; *Weeresekere* v. *Seelawanka*, 1893, 2 S.C.R. 12 *per* Lawrie and Withers J. J.).

In the absence of conclusive documentary proof, a title to land claimed by the Crown cannot be established by a private party without parol evidence of possession and occupation (C. R., Panadure, 14,635, Gren. Rep. 1873, Part II., p. 1).

Evidence of possession of chena.

Possession, in the absence of any grant or deed, should be indicated by continuous acts of overt ownership some time before and up to a trespass, to entitle a plaintiff to have even a trespasser, who can show no title in himself, ejected from land he has trespassed upon and occupied; but chenas, unlike ordinary lands, are only cultivated at long intervals, and closely continuous acts of ownership cannot, in such cases be expected, or rigidly insisted upon (*per* Withers, J., in *Appurala* v. *Dawson*, 1893, 3 S.C.R. 1).

Chena appurtenant to paddy field.

Chena land, possessed and cultivated by plaintiff and his ancestors for a very long time as appurtenant to his ancestral paddy lands and as forming part of his ancestral property, is not chena within the meaning of this provision (*Kirihami* v. *G. Fernando Appuhami*, 1879, 2 S.C.C. 88).

Low land appurtenant to chena.

When the ownership and possession of the low land to which a chena is appurtenant continue in the same person, or those claiming through him, it shifts the burden of proof even to a person in actual possession to show that, by that actual possession, he has acquired a prescriptive title (*per* Burnside, C.J., in *Appurala* v. *Dawson*, 3 S.C.R. 1).

When presumption in favour of Crown arises independently of Ord. 12 of 1840; and when not.

Independently of Ordinance No. 12 of 1840 there is no presumption in favour of the Crown in the case of chenas when they have been regularly cultivated at the ordinary short intervals of not more than seven years, but a presumption in favour of the Crown does arise independently of the Ordinance, when the land, though formerly chena land, has been neglected, and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

has not been sown in the usual course; then it becomes a waste or uncultivated land, a wilderness, and it is presumed to be at the disposal of the Crown (*per* Lawrie, J., in *Appurala* v. *Dawson*, 3 S. C. R. 1).

When presumption in favour of Crown does not arise.

In an action of ejectment the plaintiff founded his title upon a grant from the Crown. The evidence showed that the land in question was at the date of the grant covered with low jungle, that there were coconut trees of considerable age standing on the northern margin of it, jak trees more or less in a group on another side, and also some old cinnamon bushes scattered over it—*held*, that no one of the four alternatives mentioned in the first passage of clause 6 of Ordinance No. 12 of 1840 was established, and that the presumption created by that clause in favour of the Crown did not arise. (*Meera Lebbe* v. *Fernando*, 1879, 2 S. C. C. 139, *per* Phear C. J.) See also *Kirihami* v. *G. Fernando Appuhami*, p. 299 *supra*.

'Unoccupied,' 'uncultivated,' meaning of.

"Unoccupied," and "uncultivated," as used in this clause, are equivalent to "which have not been occupied or cultivated within the limit of time to which ordinarily available evidence extends." *Meera Lebbe* v. *Fernando*, *supra*.

Presumption, benefit of, passes from Crown to its grantee.

The presumption of title thus created attaches to the land after it has passed from the Crown to a private individual (*Weeresekere* v. *Seelawanka*, 1893, 2 S. C. R. 12).

Forest, presumption as to.

Forest lands are presumed to belong to the Crown until the contrary is proved (*Lokoo Banda* v. *Adochia* Lor., Rep. Part II., 23). For definition of "forest" under the Forest Ordinance, 1907, see Article 188 *infra*.

Sannas, or royal grant: its history.

Sannas, referred to in section 6 of Ordinance 12 of 1840 and in subsection 2 (*a*) of this Article, is a royal grant. "The origin and development of *sannases* was, as far as can be ascertained, as follows. A royal grant was originally made by word of mouth of the king in his assembly. The oral declaration was sufficient, and needed no written record for its validity. But in order to obviate the risk of repudiation in subsequent reigns, it was usual for the recipient to apply for a written *sannas* to an official who was charged with the duty of reducing royal grants into writing, and who was called *Sannas Peruma* or *Nilame*. To him a fee would be tendered with the material on which the record was to be made. A *sannas* was thus obtained, it may be, a considerable time after the original grant. The

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

earliest grants, especially to temples, were inscribed on stone in the buildings themselves. Grants to individuals were usually written on palm leaf and called *talpat* or *tudupat*. About 1200 A. D. King Kirtti Nissanka Malla appears to have introduced copper *sannases* for greater security and permanence, as he says in his inscription on the Dambulla rock (Forbes' *Eleven years in Ceylon*, 351; 1 *Epigraphica Zeylanica*, 123). Sometimes silver was employed and inlaid in gold. If the *sannas* was furnished at the expense of the king, it would be according to the recipient's dignity and merits; if at the expense of the recipient, according also to his means. The Molligoda *sannas*, which was given by the last King of Kandy, to the Adigar Molligoda for valuable service rendered in the suppression of a rebellion, is an example of perfect workmanship and finish on copperplate, $19\frac{1}{8}$ in. by $3\frac{3}{4}$ in. by $\frac{1}{16}$ in., smoothed and polished, with neat scalloped border in silver running round the plate, with the royal signmanual inlaid in gold, within an embossed square framing triple fluted, also of gold. But the recipient of the Adippola *sannas* was an adventurer from India, and had rendered no service to the king, except making him some presents. The thinness of the plate and the characters scratched on it do not seem to me inappropriate to his position and the circumstances of the grant, nor inconsistent with its genuineness." (*per* Arunachalam, D. J., in *Adippola Sannas Case*, *supra*).

Questions arising on *Sannas*.

A claim on a *Sannas* often raises important and intricate questions of archæology, history, palæography, textual criticism, and law, apart from the ordinary issues that arise in a land case. See Appendix IV.

Sannas not admissible, unless registered before 1st Feb., 1875.

Under Ordinance 6 of 1866 section 7, no sannas, ola or other instrument bearing date before 1st February, 1840, shall be received in evidence in any civil proceeding in any court of justice for the purpose of creating, transferring or extinguishing any right or obligation, unless such instrument shall have been previously registered. The time for registration was by the Ordinance limited to 31st December, 1867, and afterwards extended by proclamation to 1st February, 1875, after which date no such document is registrable.

For further observations on the decisions under the Ordinances No. 12 of 1840 and No. 1 of 1897, see Appendix III.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 176.

Summary proceeding for ejectment from Crown land.

(1) Any person who has unlawfully entered or taken possession of Crown land may, upon information filed before the District Court and after summary inquiry, be ordered by the court to deliver the land, together with all crops and buildings thereon, to the Crown and to pay the costs of the information, if the court is satisfied

(a) that he has entered on or taken possession of the land without any probable claim or pretence of title, and

(b) that he has not cultivated or otherwise improved the land and held uninterrupted possession of the same for at least five years.

Penalties.

(2) In default of delivery of possession of the land within 14 days of the service of the order upon him, or if further encroachments are made on the land by him, the court may adjudge him to pay a fine not exceeding fifty rupees and to be imprisoned for a period not exceeding 14 days, and shall cause possession of the land to be delivered to the Crown.

Right of ordinary civil action reserved to claimant.

(3) Any person against whom order is made under sub-section 1, may proceed by ordinary course of law to recover possession of the land and compensation for any damage sustained by him.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Ordinance No. 12 of 1840, sections 1-4. A similar and more stringent provision has been made under the Waste Lands Ordinance 1 of 1897 section 22, as amended by Ordinance 1 of 1899. See Article 185, p. 320 *infra*.

Article 177.

Forest, chena, waste and unoccupied lands: Notice to claimants. *Ord. 1 of 1897 § 1 (1) as amended by Ord. 5 of 1900.*

(1) Whenever it shall appear to the Government Agent of a province or Assistant Government Agent of a district that any land within his province or district is forest, chena or waste or unoccupied within the meaning of Article 186, he may by notice declare that such land shall be deemed the property of the Crown, unless it is claimed within three months from the date specified in the notice.

Form of notice. *Ibid. § 1 (1) & (5).*

(2) The notice shall be as near as is material in the forms in the Schedule to the Ordinance No. 1 of 1897, and shall not include more than one land unless such lands be in the same village, nor specify a date earlier than the date of the first publication of the notice in the Government Gazette in terms of the next subsection.

Publication and service of notice. *Ibid. § 1 (2) as amended by Ord. 4 of 1903.*

(3) The notice shall be published in the English, Sinhalese and Tamil languages in the Government Gazette, and advertized by beat of tom-tom on or near the land at such places and times as the Government Agent or Assistant Government Agent may think fit, and copies of the notice shall be posted on or near the land and on the walls of the courts and kachcheries of the province ; and a copy of the notice shall be served on any person whom the Government Agent

Ibid. § 1 (4).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Ibid. § 1 (4).

Ibid. § 1 (3).

or Assistant Government Agent may have reason to think interested in the land, by delivering the notice to him or by posting it to his address at his last known place of abode; and the notice shall also, if the land is more than 10 acres in extent, be published at least once in two newspapers published in the Island.

Proof of notice.

(3) The production of a copy of the Government Gazette purporting to contain the notice shall be

Ibid. § 1 (5).

(*a*) *prima facie* evidence that the notice has been duly made and published, and

Ibid. § 15A.

(*b*) conclusive evidence of that fact against any person who has appeared and made a claim under the next Article, or has appeared in pursuance of the notice issued under Article 180.

Where no claim made, land declared property of the Crown.

Ibid. § 2 (1) and (3) *as amended by Ord.* 1 of 1899.

(4) If no claim shall be made within three months from the date specified in the notice, or within a further period of six months if the person interested in the land be absent from the Island and was so at the date of the first publication of the notice in the Government Gazette, the Government Agent or Assistant Government Agent shall make an order declaring that the land is the property of the Crown.

Order, how far conclusive.

Ibid. § 2 (2).

(5) The order shall be published in the Government Gazette and shall be final and conclusive subject to the provisions of Articles 183 and 184; and the Government Gazette containing the order shall, subject as aforesaid, be received in all courts of law in this Island as conclusive proof that the land mentioned in the order was at the date of the order the property of the Crown.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Object of the Ord. 1 of 1897.

This gives the substance of sections 1 and 2 of the Ordinance No. 1 of 1897 (as amended by 1 of 1899, 5 of 1900 and 4 of 1903), which was enacted "to make special provision for the speedy adjudication of claims to forest, chena, waste and unoccupied lands" and has been the subject of much debate and judicial decision and of frequent amendment. I have noted in the margin of the Article references to the corresponding provisions of the Ordinances. Reference should in every case be made to the Ordinances themselves. They are printed in the Appendix for convenience of reference, with the Ordinance No. 12 of 1840 and other allied Ordinances.

Need of the legislation explained by Governor Ridgeway.

The Governor Sir West Ridgeway thus explained the object of the law on the second reading of the bill in the Legislative Council (*Ceylon Hansard*, 1896-7, p. 121) and afterwards in his Address to the Legislative Council (*ibid*, 1901-2, p. xx.). He referred to the evidence that had accumulated upon his attention from the Surveyor General, the Government Agents, and others, that owing to encroachments Crown forests, on which the prosperity of the Island so much depended, were disappearing and large tracts of Crown land were the subject of demoralizing warfare between the villagers and the officers of the Crown; the reason was that of late years the increased value of land had induced villagers to sell to speculators parcels of forest to which they had no title whatever, or over which they in common with the whole village had right of user, but which were the property of the Crown; in one province the title to a hundred thousand acres of village land, including not only Crown forest but even the home-steads and gardens of villagers, had passed within six months into the hands of speculators or middlemen who roamed about the country, purses in hand, tempting ignorant men to sell for ridiculously small sums, sometimes a few cents per acre, not only their own ancestral lands, but Crown forests which did not belong to them; the wasteful and ruinous system of chena cultivation was also on the increase. This system could not be ordinarily dealt with under the ordinary law, and there was no way of effecting speedy or even amicable settlements of the unfortunate disputes between the Crown and the people. "I was convinced" said Sir West Ridgeway, "of the growing necessity

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Governor Ridgeway on the object of the legislation.

for this legislation and the necessity in the interests of posterity of preventing the further squandering of the capital of this Island and the destruction of the rich heritage which we ought to hand down to those who come hereafter and also the waste of that fund from which public works can only be constructed. Our object is amicable—our chief object in this legislation is to bring about an amicable settlement. It will be an instruction to the Government Agent and to the Assistant Government Agent to effect an amicable settlement if possible, even at a loss to the Crown. We have no intention of demanding our pound of flesh. We do not wish to stand too strongly on our rights. We do not intend to press too harshly upon the claimant. If a claimant can show a fairly good claim to any land, he is more likely to get an equitable settlement from the Government Agent or the Assistant Government Agent than from a court of law. That is the great object that we have in view, namely, to bring about an amicable settlement and prevent litigation. All we ask is that the claimants should come forward, should come out into the open, should emerge from their hiding places and say, "We claim this land, and this is why we claim it." When they do that, I promise that they shall receive generous treatment. As I said before, all we seek is the prompt adjudication, the inexpensive adjudication of these claims which are a grievous sore in the Island, which is spreading gradually and which will have most unfortunate consequences if not dealt with."

Addressing the Legislative Council in 1901, he said: "This promise has been faithfully fulfilled, and the Ordinance has been very generously used and consequently it now works smoothly. The agitation stirred up by reckless speculators in the hope of obtaining an admission of their extravagant claims has died out, and the villagers realize how excellent are the provisions of the Ordinance in supplying a cheap and speedy means of settling the numerous land claims that have so long been a matter of contention. The security of title which has been given to them has increased the value of their lands and stimulated their efforts towards beneficial cultivation and permanent improvements. How carefully and liberally the settlements have been made is shown by the fact that all the cases this year, which in default of an amicable settlement were referred to the ordinary civil District

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Courts, have been decided in favour of the Crown, the claimants in no case obtaining better terms from the Court than from the Special Officer."

The Special Officer here referred to was the officer specially appointed under § 28 of the Ordinance 1 of 1897, as the head of the Waste Lands Ordinance Department, to call for claims and effect amicable settlements and, failing such settlement, to refer them to the District Court.

The provisions of the Ordinance place claimants against the Crown under some disadvantage, a circumstance which may account in some measure for their failure in court.

Claimants against the Crown, position of.

"The question whether or not the lands under reference are of the kind contemplated by the Ordinance No. 1 of 1897," it was said in one of these cases, "is not a mere academic question, but is one of very serious importance to the plaintiffs and to every other subject of His Majesty. For the provisions of the Ordinance are, as Bonser, C. J., said in *Dias v. The Assistant Government Agent, Matara* (3 N. L. R. 175), of a stringent nature and their consequences perilous to the subject. As the result of that judgment fresh legislation was resorted to and some technical objections which he might have taken advantage of can no longer be taken, the position of the Crown being thus strengthened.

"Among the perilous consequences that still remain may be mentioned that if no claim is preferred to the Government Agent or the Assistant Government Agent, within three months or, in the case of a person absent from the Island, six months from the date of the issue of notice in regard to a land, the land is deemed the property of the Crown, and the order of the Government Agent or the Assistant Government Agent declaring it to be such property is final and conclusive. If a claim is preferred, it is to be inquired into by the Government Agent or the Assistant Government Agent, and if not admitted by him, he must refer the matter to the Court, and on that reference the claimant is to be deemed the plaintiff and the Government Agent or the Assistant Government Agent the defendant. Having once appeared in court, the claimant cannot withdraw from the proceedings.

"The result, therefore, of a notice under the Ordinance is that the claimant is altogether shut out without the power of appeal to any Court, or is forced

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

into the position of a plaintiff instead of being in the more favourable position of a defendant. By the operation of section 29 he is also denied the benefit of that presumption of right which every system of jurisprudence, on principles of justice and public policy, gives to a party in possession of a property, and which is embodied in the maxim *Melior est conditio possidentis.* Moreover, after the issue of the notice by the Government Agent or the Assistant Government Agent no person may enter the land or exercise any proprietary right over it under pain of three months' rigorous imprisonment.

"In the present case (the *Adippola Sannas* case referred to above) the prohibition has already extended for over two years. To forbid a man for a long period to make any sort of use of, or even to enter, lands over which he and his family may possibly have been accustomed to exercise, however fitfully, acts of possession, unless it is declared judicially not to belong to the Crown, was declared by a late Governor, Lord Stanmore, in his letter to the Secretary of State published in the Parliamentary Paper of June 1899, to be 'in itself unjust and impolitic and to reverse what ought in such cases to be the order of proceeding. What custom, tradition, and common repute assign to the landholder should be deemed his till it is proved not to be so, even though the land may be in forest or may have been left uncultivated.'

"No doubt these stringent provisions of the law are justified by the greatness of the evil against which they are aimed—the wholesale appropriation of Crown land by speculators claiming title on purchase from villagers who had no title, and the wanton devastation of Crown forests, the safeguarding of which is a duty the Government owes to the present generation and to posterity. But all the more necessary is it to take care that this exceptional law is limited to the cases for which the Legislature has expressly made it, and that by inadvertence or by laxity of interpretation the Courts do not allow it to be used to the detriment of honest claims" (*per* Arunachalam, D. J., in the *Adippola Sannas Case.*)

The decisions under this Ordinance are numerous. Some of them have been referred to under the last Article, others will be found in Appendix III. The tendency of recent decisions has been to make the opinion of the Government Agent recorded in the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

notice under the Article conclusive evidence as to the description of the land. • See Appendix III. for further observations on the decisions.

History of Land Settlement in Ceylon.

The Settlement Officer, Mr. J. G. Fraser, gives the following account of the history of the Department in his Administration Report for 1905 :—

"It was in 1897 that the Waste Lands Ordinance (No. 1 of that year) was passed to make special provision for the speedy adjudication of claims to forest, chena, waste and unoccupied lands. To give effect to the Ordinance a Special Officer (Mr. J. P. Lewis) was appointed (under § 28) in the Southern Province to exercise the functions vested in the Government Agent or his Assistant, whilst in the other provinces the work was entrusted to the revenue officers. The reason for the introduction of the Ordinance was to enable the Government to cope with the enormous encroachments which were being made on the Crown land held by it in trust for the community. The Ordinance provided a simple procedure for the discovery and investigation of claims and a legal basis for the conclusion of binding amicable settlements between the claimants and the Crown.

"The operation of the Ordinance was at first confined to isolated claims shown on preliminary plans and Waste Lands Ordinance surveys. But, as the work progressed, and the initial opposition was overcome and the rights of the Crown vindicated afresh, it was decided to use the block survey preliminary plans as the basis of the undertaking and settle all claims to waste lands village by village. About the same time the office of the Special Officer was established at Galle and the clerical staff increased. The Province of Uva was also added to his charge in respect of Waste Lands Ordinance proceedings.

"As the villages were completed, village reports were brought out which gave statistics of the settlements effected and also depicted them clearly on a settlement plan. In each of these village settlement plans a certain area was left uncoloured. This represented the land that could not, through reason of its being cultivated, be brought under the operation of the Waste Lands Ordinance, and the settlement of these areas was handed over to the respective revenue officers. Such village reports are termed in this report interim reports. When the whole area has been dealt with, they are styled final reports.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

History of Land Settlement.

"After some experience on these lines it was found that the rate of progress made by the revenue officers in converting the interim reports into final reports was extremely slow, and it was decided that the Special Officer under the Waste Lands Ordinance should be given the additional title of Settlement Officer and the powers of a revenue officer (under the Ordinance No. 12 of 1840 and the regulations of Government) with regard to cultivated lands, and be entrusted with the settlement of all lands whatsoever coming within the block survey preliminary plans issued to him. The Land Settlement Department was accordingly constituted in 1903 with its headquarters at Hill House, Mutwal, Colombo. Mr. H. O. Fox was appointed Assistant Settlement Officer, and a clerical staff was carefully selected which after some training should be able to supervise the junior additional staff to be taken on as the work progressed. Settlement work in the North-Central Province was also started. By the end of 1904 the Department had taken over the block survey plans of the North-Western Province as well, and work was progressing on a systematic basis. The results of 1905 have been still more satisfactory than in previous years, and there can be no doubt that land settlement has now become a practical factor in the progress of the Island.

"As the block survey preliminary plans of the Southern Province, North-Western Province, North-Central Province, and of the Province of Uva are issued to the Department by the Surveyor General, the settlement of the whole area appearing therein is taken up village by village. Personal inspection of the lands in each village by the Settlement Officers is the fundamental characteristic of the system of settlement. At this inspection it is decided whether the lands in question are to be admitted to be private, or brought under the Waste Lands Ordinance, or advertised for sale or settlement. Copious notes are also made of all particulars that can be ascertained of the past history of the lands and of their present nature, value, &c. When action has been taken according to the decision arrived at at the inspection, a final report embodying the results in a settlement sheet, and accompanied by a coloured plan showing the settlements, is prepared and issued to the revenue officers for their future guidance.

"Incidentally to the settlement of such villages it was frequently found necessary to hold sales of lots that

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

could not be dealt with under the Waste Lands Ordinance, and also to have such lots re-surveyed and sub-divided in order to admit of their being sold. The sales referred to were held in the vicinity of the villages, and the re-surveys were made by the surveyors attached to the Land Settlement Department. The manner in which these sales were held and the rapidity of the re-survey operations gave such satisfaction, that requests were soon made to the Settlement Officers by would-be applicants to purchase Crown lands to accept their applications and bring the lands forward for sale. Government having sanctioned this procedure, the Settlement Officers have now, for some time past, been not only completely settling all disputes between the Crown and the subject regarding the lands in a village, but also pushing the survey and sale of Crown lands applied for to them during the period occupied by such settlement."

Work is now being carried on in the Southern, North Central, North Western, Uva and Sabaragamuwa provinces by the Settlement Officer aided by eight Assistants. The whole extent settled up to the end of 1908 was 1,434,042 acres.

ARTICLE 178.

Inquiry into claims.

(1) If a claim is made to the land within the prescribed period, the Government Agent or Assistant Government Agent shall inquire into the claim and call upon the claimant to produce evidence of the claim.

If claimant in default or claim withdrawn, land declared property of the Crown.

(2) If the claimant fails to appear or produce the evidence or withdraws the claim, the Government Agent or Assistant Government Agent shall make an order declaring the land to be the property of the Crown, which order shall, on publication in the Gazette, have the effect of the order under sub-section 5 of the last Article.

Admission of claim or agreement with claimant.

(3) If the claimant appears and produces evidence, the Government Agent or Assistant Government Agent may after inquiry admit

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the whole or part of the claim or enter into a written agreement, signed by the Government Agent or Assistant Government Agent and the claimant, for the admission or rejection of the whole or part of the claim, or for the purchase of the whole or part of the land, and shall embody such admission or agreement in an order.

Order embodying it conclusive on publication in Gazette.

(4) The order, on being published in the Government Gazette and (if it refers to a land more than 10 acres in extent) being consented to by the Governor, shall be final and conclusive, and the Government Gazette containing the order shall be conclusive proof of the admission or agreement.

Ordinance 1 of 1897 (as amended by Ordinance 1 of 1899 and 5 of 1900), sections 3 and 4.

ARTICLE 179.

Disputed claims, reference of, to District Judge or Commissioner.

If the claim is not admitted by the Government Agent or Assistant Government Agent, nor an agreement entered into with the claimant, he shall

(*a*) refer the claim, or so much of it as is in dispute, to the District Judge of the district or to the Commissioner appointed by the Governor for the investigation and trial of such references, and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*b*) in the reference shall state in writing under his hand

(i) the situation, the name if any, the boundaries and extent of the land in dispute, and

(ii) the names of the claimants and of any other person whom he has reason to think interested in such land..

Comment.

Ordinance No. 1 of 1897, sections 5 and 6.

See the emphatic language of Governor Sir West Ridgeway quoted under Article 177, p. 308, as to the importance of effecting an amicable settlement if possible. It is of the essence of the proceedings under the Ordinance that an attempt should be made to enter into an agreement with the claimants; and only when that attempt has failed, can the Government Agent or Assistant Government Agent (if he does not admit the claim) set the District Court in motion by referring the claim to it for hearing and disposal.

Article 180.

Procedure in court on reference.

(1) The Commissioner or District Judge shall call on the persons named in the reference for a written statement of their claim, in which statement the Government Agent or Assistant Government Agent shall be named as the party defendant on behalf of the Crown.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Procedure, when no claim.

(2) If no claim is made, the Commissioner or District Judge shall cause to be affixed on the land a notice to the effect that, if the persons interested do not, on or before a day to be therein mentioned, appear before him and state their claims, the land will be adjudicated to be the property of the Crown.

Land declared the property of the Crown.

(3) If on the day named, no person appears in pursuance of the notice, the land shall be adjudicated the property of the Crown; and from such adjudication there shall be no appeal.

No appeal.

Ordinance 1 of 1897, sections 7 and 8.

Article 181.

Hearing of reference.

(1) If a claim is stated, a day shall be fixed, and due notice given to the parties, for their appearance and for the hearing of the reference.

Passing of order subject to appeal to Supreme Court.

(2) On the hearing of the reference and after the examination of such evidence, oral and documentary, as may be produced and after making any further inquiry that may appear necessary, the Commissioner or Judge shall pass such order as he may consider just and proper, which order shall be subject to appeal to the Supreme Court.

Comment.

Ordinance 1 of 1897, sections 15, 16, 17 and 18.

The following observations as to the procedure were made by the Court in a case tried under the Ordinance:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"The case has thus been carried on under difficulties and inconveniences which can hardly be said to have been favourable to a speedy adjudication. Yet this was the avowed object of the Waste Lands Ordinance. Its preamble begins: 'Whereas it is expedient to make special provision for the speedy adjudication of claims to forest, chena, waste, and unoccupied lands.' In its anxiety to attain this end, the Legislature made the procedure as summary as possible. There is no provision for an answer being filed by the Crown or for issues being framed. Under section 15, as soon as a written statement of claim is presented, the judge is to fix a day for the appearance of the parties and their witnesses and for the hearing of the reference, and on that day he is to examine them and inspect their documents and pass such order in the case as he may consider just and proper. Proceedings under this Ordinance are to have precedence of all other business in the courts, unless special circumstances of urgency in any particular call, in the opinion of the judge, for a relaxation of the rule (section 14). Subject to these and other special provisions, the proceedings are to be regulated as far as can be by the Civil Procedure Code (section 13). The Supreme Court has held (*Byrde* v. *Daundasekara*, 6 N. L. R. 129) that the intention of the Ordinance was that inquiries under it should be certain, expeditious, and inexpensive, and were not to be in the nature of formal actions. The Crown Counsel, Mr. C. M. Fernando, who has had much experience of cases under the Ordinance, and who conducted this case for the Crown, tells me that an answer is never filed by the Crown, and that the Supreme Court decision which I have cited has confirmed and sanctioned the practice.

Procedure, observations on.

"I do not think that the Supreme Court intended to lay down a hard and fast rule forbidding in every case the observance of the ordinary procedure of actions. It is specially stated in one part of the judgment that the law 'gives a very considerable discretion to the District Judge who is entrusted with the inquiry, as to the way in which it should be conducted;' and the Supreme Court, while not approving of the way in which the discretion had been exercised by the judge in that case, expressly declined to interfere with his discretion. The procedure in each case must, it seems to me, be judged according to its own circumstances, the governing consideration in all proceedings under the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Procedure, observations on.

Ordinance being (as the Supreme Court said in *Aberajendra* v. *Government Agent, Central Province*, 6 N. L. R. 352) what would promote the speedy adjudication of claims. A summary procedure may be appropriate and convenient in the case of simple, petty claims under the Ordinance. But cases such as the present, in which the title to over a thousand acres of land is involved, and important and intricate questions of history, archaeology, palæography, textual criticism, and law, not to speak of the ordinary issues of fact that arise in a land case, are raised, cannot be dealt with effectively in that way. In the Partition Ordinance, No. 10 of 1863, as in the Waste Lands Ordinance, no distinct provision is made for the filing of an answer; but as a matter of fact in all contested cases answers are filed. The summary procedure followed in this case has involved the parties and witnesses in needless expense and inconvenience and impeded its speedy adjudication, the short and easy cut proving, as it not infrequently does, the long and laborious route. This was eminently a case in which the object of the Legislature would have been best attained if the discretion vested in the District Judge by the law had been exercised by his insisting on the observance of the ordinary formalities of actions as to the filing of an answer and the framing of issues before the day of trial, so that the parties might have come on that day knowing clearly on what matters of fact and law they were at variance, and prepared each with evidence and authorities in support of his contentions" (*per* Arunachalam D. J. in the *Adippola Sannas Case*, *supra*).

Article 182.

Irregularities in notices cured after appearance of claimant.

(1) After a reference has been made to Court under Article 179, no irregularity in the making, posting or publishing of the notice under Article 177 shall be pleaded by any claimant who has made a claim before the Government Agent or Assistant Government Agent under Article 178 or has

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

appeared before the Commissioner or Judge in pursuance of the notice issued under Article 180.

Ordinance 1 of 1897 (as amended by Ordinance of 1900), section 15A.

Article 183.

(1) No claim to any land or to compensation or damages in respect of any land declared to be the property of the Crown under the provisions of the Articles 177, 178, 180 and 181 shall be received after one year has expired from the date of the declaration.

Limitation of time for preferring claim.

(2) If claim be preferred within one year to the Commissioner or Judge, and the failure to prefer the claim within the period limited under Article 177 be satisfactorily explained to him, the claim shall be entertained and dealt with as a claim made within such period.

Provision for claim preferred within that time.

Ordinance No. 1 of 1897, section 20.

Article 184.

(1) If the land, to which a claim is established in the opinion of the Commissioner or Judge, shall have been sold, he shall order the claimant to receive from the Crown by way of compensation a sum equal to the price at which the land was sold by public auction or otherwise; and the amount so

If claim established and land sold, compensation to be awarded.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

awarded shall be in full satisfaction of the claim and shall bar any future claim on his part.

If land not sold, claimant to be placed in possession.

(2) If the land shall not have been sold but shall have been otherwise dealt with on account of the Crown, the order shall be that the claimant shall be placed in the possession of the land.

(3) The Governor may, on proof to his satisfaction of a claim to a land which has been dealt with under the provisions of the Articles 177 to 185, and notwithstanding that the claim was not preferred within due time, award the claimant such compensation as the Governor may deem proper.

Ordinance No. 1 of 1897 (as amended by Ordinance 1 of 1899), sections 21 and 26.

Article 185.

Prohibition of building, clearing, &c., pending investigation.

(1) After the date of the Government Gazette containing the first publication of the notice prescribed in Article 177 no person shall, without the written consent of the Government Agent or Assistant Government Agent, enter the land specified in the notice to clear or plant the land or to build thereon or to open, work, or use any mine thereon, or to exercise any right of possession, occupation or ownership, until the land has been declared not to be the property of the Crown.

Summary ejectment from Crown lands by order of court.

(2) Any person who has acted in contravention of the last subsection may, upon the information of the Government Agent

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

or Assistant Government Agent filed before the District Court, be ordered by the court, after summary inquiry, to deliver possession of the land, together with all crops, buildings, minerals and other property thereon to the Crown.

Penalties.

(3) In default of his complying with the order within seven days of the service thereof, or in case the land is entered upon by him or his servants or assigns contrary to or in evasion of the order, he shall be liable to imprisonment, simple or rigorous, for six months or to a fine of one thousand rupees, and to a further order to execute a bond, with or without sureties, to abstain from entering the land personally or by his servants or assigns.

Limit of time of prohibition.

(4) The prohibition imposed by subsection 1 shall cease in any case in which a reference under Article 179 has not been made within six months from the date of a claimant having preferred his claim.

Compensation for loss arising from prohibition.

(5) If the claim be upheld by the Commissioner or District Judge or by the Supreme Court in appeal, the Governor in Executive Council may award such amount of compensation as he may determine for the pecuniary loss, if any, sustained by the claimant by reason of the prohibition.

Ordinance 1 of 1897 (as amended by 1 of 1899), sections 22 and 23.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 186.

Presumption as to forest and waste, chena, unoccupied land, &c.

For the purposes of the Ordinance 1 of 1897

(*a*) All forest, waste, unoccupied, or uncultivated lands, and all chenas and other lands which can be only cultivated after intervals of several years, shall be presumed to be the property of the Crown until the contrary thereof be proved.

Occupation of part of land.

(*b*) The occupation by any person of one or more portions or parcels of land shall not be taken as creating a presumption of ownership against the Crown in his favour for any greater extent of land than that actually occupied by him.

Meaning of "unoccupied."

(*c*) The term "unoccupied land" includes uncultivated land and all land which at the time of the passing of this Ordinance was not in the actual occupation of any person or persons, and also all lands which shall not have been in the uninterrupted occupation of some person or persons for a period exceeding five years next before notice given by the Government Agent or Assistant Government Agent under Article 177 in respect of the same.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*d*) "Land" means an allotment of land the boundaries of which have been defined and delineated by survey.

Meaning of "land."

Comment.

Ordinance 1 of 1897 sections 24 and 30, as amended by Ord. 1 of 1899 § 9. See comment on Articles 175 & 177, pages 296 *et seq.* and 307 *et seq.*

Possession by Village Communities

Communal possession by village communities was the rule in olden times in Ceylon, but has ceased in the greater part of Ceylon under the vicissitudes of European rule and the operation of statutory law and administrative requirements. For an account of such possession see the judgment of the District Court in the *Adippola Sannas Case*, extracts from which appear in the Appendix IV.

Lawrie J. in 4 N. L. R. 135 said: "In many parts of Ceylon there are traces of the old communal system.....but communal property is not (I think) recognized by our law." When the objection was taken that the Waste Lands Ordinance was destructive of communal rights, Sir West Ridgeway in a despatch to the Secretary of State said: "Communal property has ceased to exist . . . Most thoroughly do I agree with Lord Stanmore that it is essential that a village should have a user over the adjoining forest, grazing for his cattle, access to water, &c. . . . . It has become necessary to provide for these wants; and this is one of the principal ends which will be attained by the present Ordinance."

The Supreme Court in the *Adippola Sannas Case* was averse to admitting communal possession in proof against the claim of the Crown. The fact that a certain number of families, composed of an indefinite number of persons claiming to be the descendants of the grantee on an alleged *sannas*, have lived for many years on the land which is the subject of the alleged grant, and that individual members of these families have for upwards of thirty years cultivated such portions of the land as they chose and at such times and intervals as were found to be convenient, is insufficient to give rise to prescriptive rights in the absence of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

evidence of any individual members of these families and their predecessors in title having been in possession of any particular allotment of land actually or constructively during the prescriptive period: per *Pereira* A.P.J., 1905, 8 N.L.R. 265.

Article 187.

Abandoned lands, resumption by Crown.

(1) When any land which has been alienated by the Crown in this island appears to the Government Agent of the province in which the land is situated to have been abandoned by the owner for eight years or upwards and the owner or any person lawfully claiming under him cannot be ascertained after diligent inquiry by the Government Agent, he may, with the sanction of the Governor, declare, by a notice published in the English, Sinhalese and Tamil languages in the *Government Gazette* at least six times and in any two local newspapers and posted on the land, that, if within the period (not less than 12 months) specified in the notice the land is not claimed by or on behalf of a person able to establish a title thereto, the land shall be resumed by the Crown.

Notice to owners.

If no claim made, land resumed by Crown.

(2) If no claim is made, the Government Agent shall report the fact with the proceedings taken by him to the Governor, and the Governor in Executive Council may order that such land be resumed by the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Crown; and the same shall be resumed by, and become the property of, the Crown free from all encumbrances.

Procedure when claim made.

(3) If a claim is made, it shall be inquired into by the Government Agent and the proceedings and his finding shall be reported by him to the Governor; and if the Governor in Executive Council is satisfied that a *prima facie* right to the land has been established, further proceedings shall cease.

Doubtful claims referred to District Court.

(4) If the Governor in Executive Council shall entertain any doubt as to such right, the Governor shall refer the claim to the District Court for adjudication, and the court shall after notice to the claimant and the Attorney General and after hearing such evidence as may be adduced by them or as the court may call for, make such order as the court may deem just, subject to appeal to the Supreme Court.

If claim not established, land resumed by Crown.

(5) If the District Court or the Supreme Court in appeal should hold the claimant to have established his right, all further proceedings shall cease. But if the decision be that the claimant has not established his right, the Governor in Executive Council may order the land to be resumed by the Crown, and the land shall thereupon be vested in, and become the property of, the Crown free from all encumbrance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Proof of resumption.

(6) The order of resumption made under subsection 2 or subsection 5 shall be published in the *Government Gazette* and posted on the land, and the production of the *Gazette* containing the notification shall be evidence of the resumption in all legal proceedings.

Appraised value payable to owner within 30 years.

(7) Every land so resumed shall be appraised by a person or persons appointed by the Governor, and the appraised value shall be recorded in the office of the Government Agent; and if within 30 years from the date of the notification of the resumption in the *Government Gazette*, any person establishes to the satisfaction of the Governor in Executive Council that he is entitled to be paid such appraised value or any part thereof, the same shall be paid to him by the Colonial Treasurer.

Comment.

This gives the substance of sections 1 to 9 of the Land Resumption Ordinance No. 4 of 1887, "relating to lands alienated by the Crown which are abandoned by the owners thereof." The principle of the Ordinance is that the Crown shall be entitled to resume what it originally transferred to another, if he or any one claiming under him is unascertainable. This is an application of the rule (p. 220 *supra*) that lands granted by the Crown revert to it as *ultimus hæres* on the failure of heirs or assigns of the grantee. The Ordinance was specially directed against squatters and trespassers and designed to prevent them from acquiring an indefeasible title by prescription. With this object the term of abandonment is limited to eight years. See the *Ceylon Hansard*, 1886-87, pp. ii, 7, 26 to 36, 110.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 188.

Forest Ordinance 1907.

In the Forest Ordinance, 1907, and in rules made thereunder, unless there is something repugnant in the subject or context,

Meaning of "Forest."

(1) "Forest" means all land at the disposal of the Crown.

"Land at the disposal of the Crown."

(2) "Land at the disposal of the Crown" includes—

(i) All forest, waste, chena, uncultivated, or unoccupied land, unless proof is adduced to the satisfaction of the court that some person—

(*a*) has acquired, by some lawful means, a valid title thereto; or

(*b*) has acquired a right thereto as against the Crown by the issue to him of any certificate of no claim by the Crown under the Ordinance No. 12 of 1840 or No. 1 of 1844; or

(*c*) is entitled to possess the same under a written grant or lease made by or on behalf of the British, Dutch, or native Governments, and duly registered in accordance with law.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(ii) All lands resumed by the Crown under the provisions of "The Land Resumption Ordinance, 1887," and all lands which have been declared to be the property of the Crown by an order passed under "The Waste Lands Ordinances, 1897 to 1903," or to which the Crown is otherwise lawfully entitled.

"Reserved forest."

(3) "Reserved forest" means and includes—

(*a*) A forest and every part of a forest declared to be a reserved forest under the provisions of section 5 of the Ordinance No. 16 of 1907, or the corresponding provisions in any Ordinance hereby repealed or in any enactment to be hereafter enacted for the purpose of defining reserved forest;

(*b*) Stream reservations and reservations on the banks of rivers;

(*c*) Road reservations;

(*d*) Plantations, forest depots, and chenas planted with forest trees.

Comment.

Forest administration and legislation in Ceylon.

The first attempt at forest administration in Ceylon was made in 1873 by the Governor Sir William Gregory. Upon the recommendation of the then Auditor General Mr. John Douglas, foresters were appointed to the Eastern, Northern and Southern provinces and worked under the Government Agents but maintaining a somewhat distinct organization.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Forest administration and legislation in Ceylon.

The existing Forest laws are of comparatively recent date, having had their origin since 1883 when Mr. F. D' A. Vincent of the Indian Forest Service, who was lent by the Indian Government for the purpose, made an exhaustive report on the conservation and administration of Crown forests in Ceylon (Sessional Paper 43 of 1882). The result of the report was the passing of the Forest Ordinance 10 of 1885.

Its administration was at first entrusted to Colonel Clarke, the Surveyor General, who organized a department, an imperfect one, in 1887. The department was organised on its present lines by Mr. A. F. Broun of the Indian Forest Service, who administered the department first as Deputy Conservator of Forests from 1888 to 1890 and then as Conservator of Forests till his retirement in 1901. In 1899 changes were introduced as the result of the report of a Committee appointed to give effect to the recommendations of Mr. F. C. Fisher (Sessional Papers 29 of 1898 and 2 of 1899); and again in 1905 on the lines of the recommendations of Mr. Pigot, the dual control by the Conservator and Government Agents being abolished and all forest areas brought under the control of the Conservator.

Ordinance 16 of 1907.

The Ordinance 10 of 1885 was amended by the Ordinances 1 of 1892 and 20 of 1906, which have all now been consolidated and replaced by the Ordinance 16 of 1907. The principal changes effected by the new Ordinance are:—

(*a*) the abolition of the system, under which Forest Settlement Officers, in areas selected for reservation, settled rights and privileges, and the utilizing for the purpose the procedure established under the Waste Lands Ordinance;

(*b*) the transfer to the Conservator of Forests of duties previously exercised by Government Agents;

(*c*) the transfer from the Government Agents to the Governor in Executive Council of the power of making forest regulations;

(*d*) the correction of the schedules of trees declared to be the property of the Crown, and of reserved trees;

(*e*) the revision of many of the sections on the lines of modern forest legislation.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

See the *Ceylon Hansard*, 1906-7, pp. 95, 110, 129, and the Ceylon Manual, 1910, pp. 119 *et seq.*

This Article gives some of the definitions in section 3 of the Ordinance 16 of 1907. The following Articles give briefly some of the principal provisions, but in every case reference should be made to the Ordinance itself.

Article 189.

Proclamation of reserved forest.

When a land

(*a*) has been resumed by the Crown under the provisions of "The Land Resumption Ordinance, 1887;" or

(*b*) has been declared to be the property of the Crown by an order passed under "The Waste Lands Ordinances, 1897 to 1903;" or

(*c*) has been acquired by the Crown for public purposes under the provisions of "The Land Acquisition Ordinance, 1876;"

the Governor may, by proclamation in the *Government Gazette*, declare the land or any part thereof to be a reserved forest, within the local limits and from the date to be specified in the proclamation.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

Comment.

Ordinance No. 16 of 1907, section 5. See Article 187 for resumption of land by the Crown; Articles 177 *et seq.* for the Waste Lands Ordinances; and Article 195 *infra* for the Land Acquisition Ordinance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Acts prohibited in reserved forests.

The following acts are prohibited by section 8 in a reserved forest—

(*a*) to trespass, or pasture cattle, or permit cattle to trespass; or

(*b*) to cause any damage by negligence in felling any tree, or cutting or dragging any timber; or

(*c*) to wilfully strip off the bark or leaves from, or otherwise damage, any tree; or

(*d*) in contravention of any rules made by the Governor in Executive Council in that behalf, to hunt, shoot, fish, poison water, or set traps or snares or guns, or construct or use ambushes or use any explosive substance; or

(*e*) to make any fresh clearing; or

(*f*) to set fire to a reserved forest or, in contravention of any rules made by the Governor in Executive Council, to kindle any fire, or to leave any fire burning in such manner as to endanger the reserved forest or any part thereof; or

(*g*) to kindle, keep, or carry any fire except at such seasons and in such manner as a forest officer, specially empowered in this behalf, may from time to time notify; or

(*h*) to fell, girdle, lop, tap, or burn any tree; or

(*i*) to quarry stone, burn lime or charcoal, or collect, subject to any manufacturing process, or remove, any forest produce; or

(*j*) to clear or break up any land for cultivation or any other purpose; or

(*k*) to damage, alter, or remove any wall, ditch, embankment, fence, hedge, or railing.

Penalties.

A person is liable, under section 9, on conviction for each of the offences specified in the subsections (*a*) (*b*) (*c*) (*d*) to a fine which may extend to fifty rupees, or, when the damage resulting from his offence amounts to more than twenty-five rupees, to double the amount of such damage; and for each of the offences specified in subsections (*e*) to (*k*) to imprisonment for a period of six months or to a fine of five hundred rupees, or to both in addition to such compensation for damage done to the forest as the court may direct to be paid, such compensation not to exceed the amount of fine which the court has power to impose.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 190.

Constitution of village forests.

(1) The Governor may, by proclamation in the *Government Gazette*, constitute any portion of forest, within the local limits to be specified in the proclamation, a village forest for the benefit of any village community or group of village communities, and may in like manner vary or cancel any such proclamation.

Scheduled trees property of the Crown.

(2) All trees enumerated in schedule II. of the Forest Ordinance, 1907, in a village forest shall be deemed to be the property of the Crown.

Comment.

Ordinance No. 16 of 1907, sections 14 and 15.

Prohibited acts in village forest.

It is prohibited in a village forest to cut, mark, lop, girdle, or injure by fire or otherwise any such trees without the permission of a forest officer empowered to grant such permission.

Power to make rules for forests, etc.

Section 10 authorizes the Governor in Executive Council to make regulations for the management of reserved forests, and section 16 of village forests; section 21, to make rules respecting other forests; section 24 to make rules respecting the transit of forest produce by land or water.

Burden of proof in prosecution.

Sections 22 and 25 prescribe the penalties for breaches of rules under sections 21 and 24 respectively. In a prosecution under section 21 of the Forest Ordinance 1907 the complainant is not bound to prove that the forest is "not included in a reserved or village forest"; these words constitute an exception within the meaning of section 105 of the Evidence Ordinance, and if the person accused seeks to bring himself within the exception, the burden of proof is upon him. *Mudaliyar of Pitigal Korale North* v. *Kiri Banda*, 1909, 1 Current L. R. 213, by the Collective Court overruling earlier decisions. Where a person is charged under section 25 with removing timber without permit, it is incumbent on the prosecutor to prove that the locality is one in which a permit is necessary. *Kachy* v. *Cooray*, *ibid.* 47.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 191.

Questions of title under the Forest Ordinance, how decided.

(1) If in any prosecution or proceeding under the Forest Ordinance, 1907, any question shall arise as to the title to the land in respect of which any such prosecution or proceeding shall be taken, the court or officer having jurisdiction to entertain and adjudicate upon any such prosecution or proceeding shall, for the purposes of the said prosecution or proceeding, have jurisdiction to try and determine any such question of title.

Decision of no effect in civil suit as to title.

(2) The judgment or decision of such court or officer on any such question shall not be received as evidence of title or pleaded in bar in any civil suit or proceeding in which the title to the land in question may be put in issue.

Judgment against the Crown in civil suit, effect of.

(3) In the event of judgment being entered in any suit or proceeding instituted against the Crown decreeing the title to any land reserved under the Ordinance or under any Ordinance thereby repealed to be vested in the person instituting such suit or proceeding, such land shall cease to be reserved from the date of such decree.

Forest Ordinance No. 16 of 1907, section 4.

Article 192.

Drift timber, etc., presumed to be the property of the Crown.

(*a*) All unclaimed timber found adrift, beached, stranded or sunk;

(*b*) all timber bearing marks which have not been registered under regulations made

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

under section 24 of the Forest Ordinance 1907;

(*c*) all timber which has been super-marked, or on which the marks have been obliterated, altered, or defaced by fire or otherwise; and

(*d*) in such areas as the Governor directs, all unmarked or unstamped timber—

shall be deemed to be the property of the Crown, unless and until any person establishes his right thereto before the forest officer empowered to inquire into claims, or, if the claim be rejected, in a civil action to be instituted within one month from the date of rejection.

Comment.

Ordinance 16 of 1907, sections 30 *et seq.*

Inquiry into claims.

Sections 31 to 34 empower the forest officer to call for and inquire into claims to such timber, to accept or reject them with right reserved in the latter case to the claimant to institute a civil action within one month to recover possession; and if property is unclaimed or if no action brought, the property vests in the Crown (section 34).

Article 193.

Presumption that timber or forest produce belongs to the Crown.

When in proceedings under the Forest Ordinance, 1907, or in consequence of anything done under this Ordinance, a question arises as to whether any timber or forest produce is the property of the Crown, such timber or produce shall be presumed to be the property of the Crown until the contrary is proved.

Ordinance 16 of 1907, section 52.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 194.

Crown not liable for loss or damage.

The Crown shall not be responsible for any loss or damage which may occur in respect of any timber while at a station established under a regulation made under section 24 of the Forest Ordinance, 1907, or while detained elsewhere for the purposes of the Ordinance, or in respect of any timber collected under section 30; and no forest officer shall be responsible for any such loss or damage unless he causes the same negligently, maliciously or fraudulently.

Ordinance No. 16 of 1907, section 68.

ARTICLE 195.

Acquisition of land for public purpose.

Order of Governor to Surveyor-General. *Ord. 3 of 1876* §4.

(1) Whenever it appears to the Governor that a land is likely to be needed for a public purpose, he may direct the Surveyor General or other officer to examine the land and report whether it is fitted for the purpose.

Order to Government Agent. *Ibid.* §4.

(2) Upon the receipt of the report, the Governor with the advice of the Executive Council may direct the Government Agent of the province where the land is situated to take order for the acquisition of the land.

Government Agent's notice to claimants. *Ibid.* §7.

(3) The Government Agent shall, by notice published in the Government Gazette and posted on the land in the English, Sinhalese, and Tamil languages, call on all persons

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

interested in the land to appear, at a specified place and date not earlier than 21 days after the publication of the notice, and to state the nature, the amount and particulars of their claims to compensation for such interest.

Compensation to be determined by G. A. *Ibid.* §8.

(4) He shall after due inquiry determine the amount of compensation, taking into consideration

Matters to be considered. *Ibid.* §§9, 21.

(*a*) the market value of the land at the time of awarding compensation;

(*b*) the damage (if any) sustained by the claimant by reason of severing the land from his own land;

(*c*) the damage (if any) sustained by him by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner, or his earnings; and

(*d*) if in consequence of the acquisition he is compelled to change his residence, the reasonable expenses (if any) incidental to such change;

and shall tender the amount of compensation so determined to the claimants who attend the inquiry.

Award where parties agree. *Ibid.* §10.

(5) If the Government Agent and the claimant agree as to the amount of compensation, the agreement shall be recorded and signed by them, and the Government Agent shall make his award accordingly.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to the District Court.
Ibid. §11.

(6) If they do not agree, or if the person interested does not attend, or if any question arise respecting the title to the land or any rights and interests therein between two or more persons, or if the Government Agent considers that further inquiry as to the nature of the claim should be made by the District Court, the Government Agent shall refer the matter to the determination of the court.

Order to take possession of land.
Ibid. §12 (1) *as amended by Ord. 13 of 1905.*

(7) At any time after the Government Agent has made an award under subsection 5 or a reference to the court under subsection 6, and has notified the same to the Governor, the Governor may direct that the land be taken possession of by some officer on behalf of the Crown.

Case of urgency.
Ibid. §12 (2) *as amended by Ord. 18 of 1904.*

(8) In case of urgency, whenever the Governor with the advice of the Executive Council so directs, the Government Agent may take possession of a land needed for a public purpose on the expiration of 21 days from the publication of the notice under subsection 3, though he has made no award or reference as aforesaid.

Case of urgency, connected with railway accident.
Ibid. §12 (3).

(9) Whenever owing to any slip or other accident happening or being apprehended to any cutting, embankment or other work connected with any railway constructed or being constructed by or on behalf of the Crown, it becomes necessary to acquire immediate possession of any land for the maintenance

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of traffic or for repairing or preventing the accident, the Government Agent may immediately after the notice under subsection 3 and with the previous sanction of the Governor take possession of the land.

Vesting of land in the Crown. *Ibid.* §12 (*1, 2, 3*).

(10) The Government Agent or the officer mentioned in subsection 7 shall sign a certificate that he has taken possession on behalf of the Crown, under the provisions of the Land Acquisition Ordinance 1876, of the land, describing its situation and boundaries and annexing a survey thereof; and the said land shall thereupon vest absolutely in the Crown free from all encumbrances.

Comment.

The right of property consists in the free use, enjoyment and disposal of it, subject only to the laws of the land and to any rights that others may have in it. So great is the regard for private property that the law will not authorize the least violation of it. Even where the object proposed to be effected by the invasion or appropriation of private property is for the general good of the community, it cannot be accomplished except on the condition of giving the owner an indemnification and equivalent for the injury thereby sustained by him.

Expropriation under Roman and Roman-Dutch law.

This principle of expropriation was recognized by the Roman law (Dig. 6. 1. 15. 2; 8. 4. 13. 1; 8. 6. 14. 1; Cod. 7. 13. 2; 8. 11. 9) and was frequently acted on in Holland under the Roman-Dutch law (Grot. 2. 32. 7) not merely by the State, but by the Dykereeves and Heemraden in connexion with the making and repairing of dykes, and also by towns in furtherance of public works. According to Voet (1. 4. 7) an estate may be wholly or partly taken away by Government from a private person when necessary for the public good, sufficient compensation being paid therefor; if public roads are wasted away by the swiftness of a river or by a chasm,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the nearest neighbour is bound, on receiving remuneration, to allow a road through his property; and so may buildings of private persons and their lands be taken for public use, on the owners being paid their value, for the purpose of building walls, widening ditches, making ducts, making or repairing mounds, etc.

Land Acquisition Ordinances.

It is on this principle that the Ordinance No. 3 of 1876 (as amended by the Ordinances Nos. 6 of 1877, 3 of 1883, 18 of 1904 and 13 of 1905) is based. It makes provision for the acquisition of land for public purposes and for determining the amount of compensation to be paid therefor. This Article gives the substance of the provisions relating to the acquisition. Reference should be made to the Ordinance itself. For the decisions thereon see Pereira's Laws of Ceylon, II. pp. 219—237.

When under § 4 (subsec. 1 of the Article) the Governor declares that the land appears to him "likely to be needed for a public purpose," it is conclusive evidence that the land is likely to be so needed, and the declaration cannot be challenged.

The term "Government Agent" in this Article includes the Assistant Government Agent of the district in which the land is situated.

Subsec. 4 of the Article (corresponding to sec. 21 of the Ordinance) states the matters to be taken into consideration by the Government Agent (and later by the District Court) in determining the amount of compensation. Section 22 of the Ordinance specifies the matters that should not be taken into consideration.

The tender of compensation under section 8 (corresponding to subsec. 4 of the Article) is a condition precedent to any reference to court under subsec. 6, and should be averred in the libel of reference. The court decides the reference with the aid of assessors as to the amount of compensation (sections 14 *et seq.*).

Article 196.

Right of Crown to *restitutio in integrum.*

Subject to the provisions of Articles 198 and 199, the Crown is entitled to relief by way of *restitutio in integrum* on the same grounds as a minor.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Nature of *restitutio in integrum*.

Restitutio in integrum is a relief replacing the party in his original state before the contract, and it cancels the obligation against which the remedy is sought (Van der L. 1. 18. 10).

The Crown relieved like a minor.

The Crown is on a like footing to minors, for this purpose. *Respublica minorum jure uti solet adeoque auxilium restitutionis implorare potest.* Cod. 2. 54. 4. *Rem publicam ut pupillum extra ordinem juvare moris est.* Cod. 11. 30. 3. Voet says (4. 4. 55): "In the matter of restitution the fisc, the church, townships are not to be distinguished from minors, so that on whatever grounds and against whatever obligations minors are granted restitution, on the same grounds the fisc, the church, the poor, townships, etc., are granted restitution. For, the general principle prevails that the property of all these, equally with that of minors, has to be administered by others, and the negligence of the administrators should not in equity be allowed to prejudice the interests of those who, not being 'persons' in the proper sense, cannot administer their own property. Rescripts are extant regarding the extraordinary relief of townships and public property as if they were wards. Cod. 2. 54. 4; 11. 30. 3. Nor is there any reason why the same should not be observed in the case of the fisc. For it is certain that in other legal matters the privileges of minors and the fisc are not only equal, but the privileges of the fisc are even greater. They enjoy equal rights in that *mora* occurs *ex re* (*i. e.* delay in performance of an obligation gives cause of action, without previous demand); and a legal hypothec is given on the property of the administrator. Cod. 2. 40. 3; Dig. 22. 117. 5. The rights of the fisc are greater, because it has a legal hypothec on the property of those with whom the fisc has contracted (Cod. 8. 14. 2; 7. 73. 2; Dig. 49. 46. 3), and could before Justinian's time claim within 3 years restitution against a decree, whereas only one year was allowed to minors (Cod. 10. 9). Moreover, the fisc is preferred to the minor (when in competition) for taxes."

Where resemblance fails.

There are, however, points in which the resemblance between the fisc and minors fails, *e. g.*, the Crown would not be relieved like a minor against prescriptive occupation of land which the Crown has the power of alienating; but in respect of land which it would be illegal for the Crown to alienate, there could be no prescription. See *Collector of Customs* v. *Cape*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Central Railway Co., 6 Rep. Cape S. C. 407. Hence the exception in Article 198 as to prescriptive possession of land. See Articles 200 and 201 for the preference of Crown debts.

Procedure as to restitution, in Holland.

In Holland restitution used to be sought from the Supreme Government in whose stead the Supreme Court acted, with *committimus* to the daily judge of the applicant. Proceedings had to be commenced within four years of the act complained against; although the remedy was, for good reasons, allowed even after that time (V. L. 4. 42. 3).

On what grounds relief granted.

Van der Linden says that this remedy was by virtue of letters patent issued by the Court of Justice (mandament of relief or civil petition) addressed to the judge of the domicil who, after a previous suit at law and proper enquiry into the circumstances of the case, afforded this relief, provided there were good grounds, which by law were limited to fear, violence, fraud, minority, absence, excusable error, and prejudice in above half the value of the thing (*enormis laesio*); and further, such equitable grounds as might justify the reduction or cancellation of the contract (V. L. 1. 18. 10; Voet 4. 1. 26).

Parties restored to former state.

One party to a contract was thus restored to the same position which he had occupied before contracting the obligation, provided he restored the other party also to his previous position. This included the reciprocal restoration of fruits and profits enjoyed and compensation for damage. The remedy was obtained from the Sovereign by an application for the purpose (*mandament van relief*). The relief was effectual against all who had profited by the obligation (Grot. 3. 48. 4).

Restitution not granted, if no equity;

Unless there was natural equity in an application for restitution which induced the granting of the remedy and showed the cause of the respondent to be an unjust one, restitution was not granted (Voet 4. 1. 1).

or if injury slight;

Restitution was not usually granted if the injury suffered was only slight. The question as to the gravity of the injury was left to the discretion of the judge (Voet 4. 1. 11).

or if other remedy available.

Nor was restitution granted, if any other remedy was available to the petitioner, unless restitution was the more effectual remedy (Voet 4. 1. 13. 14. See *Carlill* v. *Rawter*, 1 Tamb. 18). Restitution was not granted, except as a matter of extra caution, where the applicant was *ipso jure* protected, as for example, where a contract was in law invalid (Voet 4. 1. 13. 14). The remedy was, as a rule, allowed to be sought only within

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Remedy prescribed in four years.

four years of the cause of complaint or the attainment of majority by the party injured, and this period was allowed to run, although the person against whom relief was sought was absent from the country, provided he had left a "procurator" therein (Voet 4. 1. 15 *et seq.*; Grot. 3. 48. 13).

Fear as ground for restitution.

By fear is meant fear such as fear of death, great pain, illegal imprisonment of one's self or family, etc. (Grot. 3. 48. 6).

Fraud.

Fraud is wicked deceit practised for the purpose of defrauding a person. This remedy does not hold good where the obligation has been on both sides induced by fraud, for then it is null and void *ab initio* (Grot. 3. 48. 7).

How far remedy applicable to minors.

The remedy does not apply where contracts are entered into by minors without the assistance of their guardians, for these are null and void. It applies to those entered into with the assistance of their guardians, or which are contracted by the guardians alone (Grot. 3. 48. 10).

Proof of loss sustained by minor.

It is necessary that the minor should be shown to have suffered some loss, either by having lost something which he possessed (as by donating, selling or by other means), or by having omitted to acquire that which it was possible for him to get (as by repudiating an inheritance or legacy), or by subjecting himself to a burden which he might have avoided (as by standing surety for another, or accepting a burdensome inheritance). In cases of doubt such loss must not be presumed, but must be proved by the person alleging it; but where the transaction is one in its very nature injurious to the minor (such as a suretyship, donation, loan), the burden of proof is on the person making the claim (Voet, 4. 4. 13). On proof of such transactions restitution is granted to minors on account of judicial as well as of extra-judicial transactions (*ibid.* 14).

Laesio enormis, relief on ground of.

Relief may be claimed from obligations on the ground of either party being damnified to the extent of more than half (*laesio enormis*). By this, obligations are rendered invalid not wholly but in part, because it is at the option of the opposite party to abandon the contract altogether or to make good the deficiency (Grot. 3. 52. 1).

In what contracts claimed.

This relief may be claimed in cases of purchase and sale, letting and hiring, compromise, division of property and all other kinds of contracts, except sales in execution or sales which are directed by last will to be made upon certain terms, or which are clearly accompanied by an intention to make a donation (Grot. 3. 52. 2).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Value to be considered.

The value to be considered here is the value at the date of the contract (Grot. 3. 52. 3).

Minor's right to restitution, with and without *laesio enormis*.

Minors, even though damnified to a less extent than half, have a right to *restitutio in integrum*. If, however, the time for that relief has elapsed, they may have recourse to relief on the ground of *laesio enormis* where they are damnified to the necessary extent (Grot. 3. 52. 4).

The law of Holland, in general, afforded equitable relief by means of *restitutio in integrum* in cases barred by the rigour of law (V. d. K. 796).

Although in transactions which are *ipso jure* void, such, for instance, as have been contracted in fraud or fear, it is usual for the sake of greater security to apply for *restitutio in integrum*, yet this was not absolutely necessary. Upon proof of *laesio* the defendant should be absolved even without relief (V. d. K. 877).

Prescription of right to relief.

The right to relief on the ground of fraud or fear was, under the Roman-Dutch law, not prescribed by the lapse of four years, but was perpetual, that is, endured for thirty years (V. d. K. 881). The same may be said of relief on the ground of minority where the minor had suffered enormous wrong (V. d. K. 900). According to the correct rule under the Roman law, the remedy in these cases was to be by action on the contract itself; but it had become the practice in the Dutch courts to proceed by way of petition for restitution (V.d. K. 901).

Article 197.

No laches imputable to the Crown.

No laches or negligence is imputable to the Crown.

Comment.

Reason for the rule.

This rule is said by English lawyers to arise out of the doctrine of the King's perfection (see page 214 *supra*), and by the Roman and Roman-Dutch lawyers from the fact that the Fisc is as it were a minor. See under last Article. The Supreme Court of the United States in *The United States* vs. *Kirkpatrick*, 9 Wheaton 720, explained it thus: "The general principle is that laches is not imputable to the Government; and the maxim is founded not in the notion of extraordinary prerogative but upon a great public policy. The

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Government can transact its business only through its agents; and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not save the public from serious losses if the doctrine of laches can be applied to its transactions." A similar reason is assigned by Voet 4. 4. 55, cited under last Article. The next Article gives a deduction from this rule.

Article 198.

Prescription against the Crown not allowed.

Lapse of time cannot be pleaded in bar of the claim of the Crown except

Exceptions

(*a*) where otherwise prescribed by statute, or

(*b*) as provided in the next Article in regard to land.

Comment.

Reason for the rule.

This follows from the last Article. The maxim is *nullum tempus occurrit regi*. No delay in resorting to his remedy is held to bar the King's right, because (according to the Roman lawyers) the Fisc is a minor, or (according to English lawyers) because the law intends that the King is always busied for the public good, and therefore has not leisure to assert his right within the time limited to subjects. (Finch L. 82; Co. Litt. 90.) Therefore not only civil proceedings but criminal prosecutions were not barred by lapse of time.

Exceptions under English law.

But this has been modified by statute; for example, under the Crown Suits Act, 1769, (as amended by the Crown Suits Act, 1861) the Crown is barred from its civil rights after a lapse of sixty years; under the Municipal Corporations Act, 1882, (re-enacting the provisions of 32 Geo. 3. c. 58.) the Crown is barred in informations for usurping corporate offices or franchises after six years, or in *quo warranto* against municipal corporations after the lapse of one year; under the Treason Act, 1695, an indictment for treason (except an attempt to assassinate the King) is barred after 3 years, Stephen II. 563. A grant from the Crown is presumed

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

after a long continued possession by the subject without interference from the Crown. 8 Campbell's Ruling Cases, 171.

In Ceylon, under section 444 of the Criminal Procedure Code, prosecutions for offences other than murder or treason are barred by the lapse of twenty years from the date of the commission of the offence. In regard to land suits, see next Article.

Under Ceylon law.

Article 199.

Where a person has been in continuous possession of a land or immovable property for a third of a century without interference from the Crown, such possession bars the claim of the Crown.

Prescription against the Crown in land suits.

Comment.

The law of prescription affecting the Crown in regard to land suits is the Roman-Dutch law, under which a person who has been in continuous possession of a land without interference from the Crown for a third of a century can maintain title to the land against the Crown, Grot. 2. 7. 9; Van Leeuwen, 2. 8. 5; Voet 44. 3. 11; D. C. Colombo 1240, Vanderstraaten Rep. 83 (1870). The period under the Civil law was 40 years, and in the English law is 60 years (9 Geo. III c. 16; 24 and 25, Vic. c. 62).

For the masterly and learned judgment of Berwick D. J. in D. C. Colombo 1240, affirmed in appeal, see Appendix VII.

Article 200.

(1) Debts due to the Crown by any person have preference of payment as in this Article mentioned over debts due by him to any

Crown debtors: preference and tacit hypothec of the Crown.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

other person; and the Crown has in respect of such debts a tacit hypothec over the property of the debtor.

Public officers and accountants.

(2) Land and other immovable property belonging to any Government Agent, Collector of Customs, Government farmer or renter, or other officer employed in the collection, custody or expenditure of public money, stores or other property, or to any other public accountant, are liable for the payment of all arrears or debts and all fines, forfeitures and penalties due from him to the Crown, as if the land or other property had been specially mortgaged by him to the Crown on the day he first became such officer or accountant.

Other debtors.

(3) Debts due to the Crown from any other person have from the accruing thereof preference of payment over specialties or other debts subsequently contracted by him to any other person.

Comment.

Preference of Crown, under English and Roman law.

The preference which the Crown enjoys in respect of its debts would be said by English lawyers to result from the King's prerogative of pre-eminence. See pages 211, 212 *supra*. Where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being *detur digniori*; and the remedy being (in the case of debts of record due to the Crown) by "writ of extent," under which both the lands and the goods of the debtor may be taken at once in order to compel the payment of the debt. Broom, Leg. Max. 69; Chitty, Prerog. 290;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Rex v. *Cotton*, 7 Campbell, R. C. 181 ; *Giles* v. *Grover* (H. L. 1832), 1 Cl. and Fin. 72, 9 Bing. 128, 2 Moo. and Sc. 197 ; Halsbury L. of E., vi. 493, x. 14. Under the Roman and Roman-Dutch law the reason for the preference was said to be that the Fisc was in the privileged position of a minor. Voet 4. 4. 55, cited under Article 196, page 340 *supra*.

Tacit hypothec under Roman and Roman-Dutch law.

Under the Roman law the Fisc had a tacit hypothec on the property of every person who had entered into a contract with the Fisc. *Fiscus semper habet jus pignoris.* Dig. 49. 14. 46. 3 ; *Certum est ejus qui cum fisco contrahit bona obligari, quamvis id non exprimatur.* Cod. 8. 14. 2. In Holland, according to Voet 20. 2. 8, the Fisc had a legal hypothec over the property of its administrators,—*i.e.* according to V. L. 4. 13. 10, persons who had control over public revenues or, according to V. D. K. 420, its officers in general for any debt due from them,—over the property of those with whom the Fisc had contracted, and over the property of citizens who owed taxes. Farmers of the public revenue had also a hypothec for the taxes and imports farmed by them, provided the claim was made within six months from the expiry of the farming contract. The Fisc has no hypothec over the property of delinquents for fines and penalties (Voet 20. 2. 9); nor, when succeeding to the place of a private creditor, has it a legal hypothec in respect of the antecedent period (*ibid.* 20. 2. 10). See also Grotius 2. 48. 15 and 3 Burge, 315.

Ordinance 14 of 1843.

In Ceylon the preference of the Crown has been the subject of special legislation, *viz.*, Ordinance No. 14 of 1843 "for providing for the better security and recovery of debts due to the Crown." Subsection 2 of the Article gives the substance of section 4 of the Ordinance, and subsection 3 that of section 5. The whole Ordinance is printed at the end of the Appendix II.

Procedure under the Ordinance.

A summary procedure is prescribed by the Ordinance for the recovery of Crown debts. Under section 2 the Government Agent or his assistant or other person authorized by the Government Agent is empowered to seize and take into custody the debtor's property upon his own knowledge of default of payment by the debtor or on receiving notice of the debt having accrued. Section 3 requires a libel to be filed in court within seven days after the seizure, together with a certificate of the property seized, whereupon the court is to issue a warrant to the Fiscal to sequester

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the property. The subsequent proceedings are to be regulated by rules framed therefor by the Supreme Court. No such rules have been framed. Actions under the Ordinance appear to be very rare. Probably the procedure in sections 646 to 648 of the Civil Procedure will be adopted.

As to the person who is to institute actions for the Crown, see Article 206 *infra*.

Rights of Crown against its officers.

Under section 4 it has been held that the claims of the Crown against the property of its officers are preferent to those of a special mortgagee and vendor who held the land in mortgage for the balance purchase amount, and that sureties to the Crown paying the debt of the principal are entitled to the rights of the Crown without cession of action (*Saibo Dore* v. *Bawa*, 3 Lor. 319; Jos. and Bev. 61); that the claim of the Crown against its officers dates from the date of the defaulting officer's first appointment, and is preferential to a creditor's mortgage subsequent to that date (Gren. 1873, p. 26); and that the joint estate of husband and wife is liable for the debts, under this section, of the husband to the Crown (*Queen's Advocate* v. *Sivagamipulle*, 6 S. C. C. 46).

Against other debtors.

Under section 5 it has been held that the Crown as creditor of an insolvent estate has a preferential right over other creditors in respect of debts due on duties, taxes or tribute (Ramanathan, 1820-33, p. 158); that the Government possesses a general hypothec over the property of its debtors and has a right to prevent all alienations of such property (Marsh. Judgment 532; Austin 28; Morg. Dig. 56); but that this right does not commence until the debt has actually accrued due, except in an extreme case, as when a person is endeavouring to alienate his property obviously with the fraudulent intention of defeating a debt about to become due; that rent reserved to the Crown by lease constitutes a Crown debt within the scope of section 5 of the Ordinance; that the Crown's legal hypothec over the debtor's property attaches from the date of the lease and not from the date when the particular instalment of rent fell into arrear in respect of which a breach of the lease was committed (*Attorney General* v. *Rajapaksa*, 7 S. C. C. 139); and that an arrack renter is a Crown debtor under section 5 of Ordinance 14 of 1843 from the date of the purchase of the rent, and the Crown has a preferential claim on his property over all subsequent special mortgagees (Vand. 89; Creasy 136).

Hypothec, and when it accrues.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

No preference of Crown debt under the Kandyan law.

Crown debts had no preference under the Kandyan law. *Subadar Sawel* v. *Surawirage Don Hendrick, late Wibadda Lekama*, 1829, Judicial Commissioner, Kandy (Sir John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom*, p. 240 of the M. S. copy in the library of the Royal Asiatic Society, Ceylon Branch). In this case plaintiff lent the defendant a sum of money upon the mortgage of a house during the period the latter held the responsible situation of a Wibadda Lekama. Plaintiff obtained a decree and subsequently writ of execution against the defendant's effects, and the mortgaged house was sold; whereupon the Revenue Commissioner on behalf of Government preferred a claim against the defendant for 5,961 parrahs and $2\frac{1}{2}$ seers of paddy and asked that the amount realized by the writ be kept in deposit pending the disposal of the claim of the Crown against the defendant, if the court held that the debt of the Crown took precedence over other debts under the Kandyan law.

The Judicial Commissioner (J. Downing) under date 22nd December, 1829, replied as follows:—

"In reply to your letter of the 10th instant, I have the honour to state, that by the Kandyan law it does not appear that the Crown takes precedence of all other creditors. Besides, in the case alluded to, the property sold under the writ of execution is formally mortgaged to the plaintiff for the debt claimed, which of course precludes any other claimants participating in the proceeds of the sale until the mortgagee's claim is discharged.

"Before replying to the question, whether by the Kandyan law, the Crown has the preference of other creditors, the Judicial Commissioner consulted the Second Adigar and other Chiefs on the subject; and thereupon Dehigama Senior Diyawadana Nileme stated that a certain Moorman called Kaloo Lekama borrowed 3,000 *ridies* from the Treasury in the reign of king Kirtisree. He stipulated to trade with the money and to pay into the Treasury a certain rate of interest per annum. Two years elapsed, and no interest being paid, Angammena Adigar, who was also one of the two Wannaku Nilemes of the Royal Treasury, sent to demand payment, but the debtor avowing his inability to satisfy the claim, was threatened with prosecution that his failure would be reported to the King. This report was, however, deferred being made for a day or two, as the King happened to be then absent at

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

No preference of Crown debt under Kandyan law.

Gampola. In the interval one Mawla Meddema Mohandiram to whom the said Kaloo Lekama owed 300 *ridies* having received intimation of the affairs, invited the debtor to his house on some pretence, and then inhibited him by *Welekma**. The Adigar hearing of this reported the circumstances to the King, who declared that as the other creditor had anticipated him by first securing the debtor's person, his debt should be discharged before the King could bring him to account; and as the debtor himself was unable to pay Mowla Mohandiram, the King directed that that sum should be paid from the Treasury, and the debtor being released from his thrall, be brought up to the palace. This being done, the debtor was taken into custody on account of the claim of the Crown, and part of his debt exacted from him and the rest remitted, not however before the debtor had undergone severe chastisement for imposition, inasmuch as he stipulated to perform what he afterwards failed to effect, viz: to trade with the King's money as a prudent merchant and realize a certain profit thereon."

Quære, whether the non-preference of Crown debts under the Kandyan law has been affected by the Ordinance 14 of 1843.

Article 201.

Dealings with property of Crown debtor in fraud of the Crown, void and punishable.

(1) All transfers, mortgages, suits, judgments, executions of any property belonging to a Crown debtor, which are executed by fraud or collusion and with intent to delay, hinder or defraud the Crown of its debts, are void.

Welekma or inhibition of debtor.

* This was one of the singular modes resorted to by creditors and thus described by Sir John D'Oyly. "The creditor on meeting his debtor in the street stops him abruptly and, drawing a circular line around him on the ground with a stick, or sometimes without this ceremony, sits down beside him and forbids him by the King's command to move from the spot without paying his money. The debtor is obliged to sit himself also, and in respect of the King's name neither can stir, till some other person, approaching and interfering, engage to be answerable for the debt; or for the person in presence of witnesses to call both before the proper Chief to have the case investigated and settled. This is called *Welekme damanawa* or placing under inhibition (*dharna*)",—a practice derived from the Hindus. (See the Code of Manu, ch. viii., 48-50, and Elphinstone's History of India, Bk. I., ch. III. 2.)

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(2) The parties to such dealings who are cognizant of the fraud or collusion are liable to one year's imprisonment and to a fine of the amount of one year's value of the immovable property and the whole value of the movable property.

Ordinance 14 of 1843, section 8.

ARTICLE 202.

Crown grants, construction of.

Grants by the Crown, except grants made for valuable consideration, are construed strictly against the grantee and in favour of the Crown, and pass nothing by implication.

Comment.

Rule of construction in ordinary deeds;

"It is a maxim of the law that every man's grant shall be taken most strongly against himself" (Co. Litt. 183 *a*). This rule, which is well recognized in the Roman law (Dig. 2. 14. 39; 34. 5. 26; 45. 1. 99; 50. 17. 172), and in the Roman-Dutch law (Voet 18. 1. 27; Grot. 3. 15. 9; Van der L. 1. 14. 4), is usually expressed in the maxim *verba fortius accipiuntur contra proferentem*, and applies in cases of doubt when other rules of construction fail. The reason given by Blackstone is that men would always affect ambiguous and intricate expressions provided they were afterwards at liberty to put their construction upon them, and by this rule all manner of deceit in a grant is avoided.

In Crown grants.

But the maxim is reversed in the case of grants from the Crown. Such grants (whether of lands, honors, liberties, franchises, &c.), are construed most strictly against the grantee and most beneficially for the Crown. Broom, Leg. Max. 571, 583; 2 Blackstone Com. 21st ed. 380. See also Voet 1. 4. 1. §§ 15, 16, 17. "It is established on the best authority that in construing grants from the Crown a different rule of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Rule of construction.

construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor and in favour of the grantee in order to give full effect to the grant. But in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment, in order to give effect to the plain and undoubted intention of the grant; and in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown:" *per* Cockburn C. J. in *Feather* v. *R.*, 6 B. & S., 283, S. C. 35 L. J. Q. B. 204 & 12 L. T. N. S. 114.

See also 8 Campbell's Ruling Cases, 205,231; Washburn, 3 Real Prop. 190.

Reason for the rule.

The Crown holds public lands and rights as trustee for the public and therefore no alienation should be presumed unless clearly expressed. The rule is founded in wisdom. All experience teaches that public rights are yielded to public interests with sufficient alacrity.

Exception to rule.

The rule does not apply to grants for valuable consideration, which should be construed liberally in favour of the grantee. 1 Steph. Com. 421; 8 Camp. R. C. 232.

Article 203.

Crown grant, title on.

(1) A Crown grant confers no title on the grantee, unless the land granted belongs to the Crown at the date of the grant.

Warranty of title.

(2) In the absence of an express covenant, the Crown is not bound to warrant and defend the grant.

Comment.

The trend of decisions is in favour of this proposition, which in spite of doubts cast on it may be said to be generally accepted.

No implied warranty.

Though under the Roman-Dutch law there is as between ordinary persons an implied warranty on the part of the vendor against the eviction of the purchaser,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

a purchaser from the Crown has no such warranty; in the absence of express warranty he must be taken to have purchased at his own risk. *Fernando* v. *Queen's Advocate*, 1872, Ramanathan 57, *per* Creasy C.J. and Temple and Stewart J. J. The Crown is not bound to warrant and defend its sales. Ramanathan, 1877 p. 317, *per* Clarence A. C. J. and Dias and Lawrie J. J.

No title passed unless Crown had it at time of grant.

A Crown grant is unavailing to pass title, unless the land granted be, at the date of the grant, land belonging to and at the disposal of the Crown. *Wimalasekara* v. *Silva*, 1897, 3 N. L. R. 61 (*per* Lawrie A. C. J. and Browne A. J.). Under our law there is no more sanctity attaching to a Crown grant than the presumption accorded to it under Ordinance No. 12 of 1840, and a person who claims title to a parcel of land is not precluded from instituting an action *rei vindicatio* in respect of it merely by reason of the Crown having made a grant of such parcel to a third party (*ibid*, *per Browne* A. J.). A sale of land by the Crown and the issue of a Crown grant to the purchaser do not of themselves raise a presumption that the land was one over which the Crown had disposing power. *Saibo* v. *Andris*, 1898, 3 N. L. R. 218 (*per* Lawrie J.). In an action *rei vindicatio* by a person deriving title from a grantee under the Crown, the plaintiff must prove some entry on, or exercise of right over, the land by his vendors, in addition to the bare fact of its being included in the Crown plan attached to the grant. *Rodrigo* v. *Livera*, 1896, 2 N. L. R. 139 (*per* Withers and Lawrie J. J.).

Query of Bonser, C. J.

In *Casipillai* v. *Ramanatar*, 1896, 2 N.L.R. 23, the point was raised that the Crown grant conferred an indefeasible title. Bonser C. J. thought it unnecessary to decide the point. In *Siman* v. *Johannis*, 1898, 4N.L.R. 343, he expressed the opinion: "It is very inconvenient that we should go behind the Crown grant. It seems to me that the rule of the Civil law, that a purchaser from the Government acquired by the grant a good title and was in the words of the rescript of the Emperor Zeno *statim securus*, was based on sound policy and tended to establish title and to diminish litigation." The point however, was not actually decided. In *Saibo* v. *Andris* (3 N.L.R. 218) decided two months later, Bonser C.J. agreed with the ruling of Lawrie J. (*supra*).

Crown title indefeasible under Roman and R.-D. law.

Remedy against Crown.

Under the rescript of the Emperor Zeno quoted by Bonser C. J., the claimant prejudiced by the Crown grant had his remedy by action against the Crown for

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

damages within four years (Inst. 2. 6. 14). The indefeasibility of the Crown title and the right of the claimant to sue the Crown were fully acknowledged by the Roman-Dutch law. Voet 6. 1. 23; 49. 14. 2; 18. 4. 8; 21. 2. 5; 41. 3. 21. Groenewegen 49. 14. 5. Hollandsche Const. 4. 128.

Justice Thomson in his Institutes of Ceylon (II. 509) held this to be the law in his time (1860), "It (*rei vindicatio*) does not lie against those who have purchased from the Crown;" and quotes as his authority Voet. 6. 1. 23. In 1891 Clarence, J. considered the point to be an open one (*Sella Naidè* v. *Christie*, 2 C. L. R. 45).

Silva v. *Abaran*, ruling in.

The question was definitely raised in *Silva* v. *Abaran*, 1904, C. R. Galle 2636, and the Commissioner Mr. G. A. Baumgartner in a learned judgment (which is given in the Appendix VIII) held that "a grant by the Crown confers absolute *dominium* on the grantee and supersedes all other title existing at the date of the grant, unless such title has been derived from the Crown itself, and the remedy of any person claiming to have had, at the date of the grant better title than the Crown, is by action for damages against the Crown." This judgment was affirmed in appeal by Moncreiff A. C. J., 7 N. L. R. 330.

Dissent of Layard, C. J.

In *Ismail* v. *Andris*, 1905, 4 Tambyah 103, Layard C. J. expressly dissented from this judgment, and said that in his experience of thirty years at the bar he could find no record of any judgment that a Crown grant in this Island confers an indefeasible title; he remitted the case to the lower court to be proceeded with on its merits and said that the plaintiff might, if so advised after decision by that court, arrange for the point of law to be brought before the Collective Court. In a later case *Amarasuriya* v. *Andris de Silva*, 1905. 4 Tamb. 102, Layard C. J. attributed the judgment in 7 N. L. R. 330 to inadvertence.

In *Suppar* v. *Kanapatipulle*, 1905, 5 Tamb. 70 Wendt and Grenier J. J. held that a person claiming under a Crown grant must establish the Crown's title to the land conveyed by the grant.

Common law not alterable by judicial decision.

It is desirable that the question should be finally adjudicated on by the Collective Court. If, as contended in Mr. Baumgartner's judgment (Appendix VIII), the principle of the Roman-Dutch law, that a Crown grant conveyed absolute *dominium*, formed part of the law in force when Ceylon passed from the Dutch to the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

British rule and therefore of our Common law, then the current of decisions to the contrary avails little, for the Common law cannot be altered by mere judicial decision, but only by legislative enactment, and the authority of any judicial decision to the contrary would be overruled at any time, however remote, by a competent court (*per* Lord Esher, M. R., *Cochrane* v. *Moore*, 1890, 25 Q. B. 74).

Crown grant is subject to right of possessor to half improved value, Ord. 12 of 1840, sec. 8.

Where a person has been in uninterrupted possession of land belonging to the Crown for not less than ten years or more than thirty years, such person acquires under section 8 of the Ordinance 12 of 1840 a permanent interest in the property; and he cannot be ejected therefrom, unless the land is required for public purposes or for the use of His Majesty; and the Crown cannot by selling the land to a third party deprive the possessor of the benefit given to him by that section. *Podda* v. *Pabuli*, 1906, 8 N. L. R. 358, *per* Grenier, A. J. citing with approval Wendt J. (D.C. Colombo 15126): "The right which a possessor, an improver of land, acquires under section 8 of Ordinance No. 12 of 1840 is something greater and higher than that of the holder of an agreement to convey. He has possessed and improved the land, and that would under the Common law entitle him to retain possession as against the owner until he was paid the full value of his improvements. The Ordinance substitutes for that right the right to claim half the improved value of the land, and the full value of all buildings, if the Crown desires to turn the possessors out on the ground that it requires the land for public purposes or for the use of His Majesty. If the land is not so required the possessor cannot be turned out, but is entitled to a grant of the land on paying half its improved value. Now, it cannot be contended that if a man has entered upon and improved my land under the circumstances entitling him to the *jus retentionis*, I could defeat his right by merely transferring the land to another, and that this other could obtain ejectment against him without compensating him for the improvement to the land." See also the opinion of Bonser C. J. in *Casipillai* v. *Ramanatar*, 1897, 2 N. L. R. 33.

Possession against Crown.

Possession, as defined in Ord. 22 of 1871 § 3, of Crown land for fifteen years prior to alienation thereof by the Crown cannot avail as a plea in bar to a claim to such land by a purchaser from the Crown. *ibid.* Where there are ample marks of occupation and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

cultivation—*e.g.*, stone fences dividing lots, eighty bearing palmyrah trees and an ancient temple—the presumption created in favour of the Crown by the Ord. 12 of 1840 does not arise. *Suppar* v. *Kanapatipullai* 1905, 5 Tamb. 70. A Crown grantee to have the relief of a possessory decree must establish undisturbed possession. *ibid.*

Erroneous re-grant of land.

For the case of erroneous re-grant of land, whereof boundaries were not defined except by the second grantee and he has been in possession for three or less than three years, see Ord. 1 of 1844, sections 4 and 5, and the abstract of the Ordinance in Appendix II. Where a person has been in possession from two to five years or more than five years of uncultivated land belonging to another, see sections 6 and 7 of the Ordinance in Appendix II.

For actions against the Crown see Article 207.

Article 204.

Liability of Crown to a statute.

(1) The Crown is not bound by a statute, unless it appears on the face of the statute by express words or necessary implication that the Crown should be bound by it.

(2) The Crown may claim the benefit of the provision of any statute.

Comment.

Crown reached only by express words or necessary implication.

Broom's Legal Maxims, pp. 73 to 76; 8 Campbell's Ruling Cases, 201. This arises from the King's prerogative of preeminence: p. 211 *supra*. There is no power or authority capable of binding the Sovereign save only the Sovereign himself in Parliament, and then only by express mention or clear implication. The general business of the legislative power is to establish laws for individuals, not for the Sovereign. At all events, the Crown is not reached except by express words or by necessary implication, in any case where it would be ousted of any existing prerogative or interest. It would be of most mischievous consequence to the public, if this strength were liable to be curtailed without its own express consent by constructions and implications

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

of the subject. But where a statute is expressly made for the preservation of public rights and suppression of public wrongs, and does not interfere with the established rights of the Crown, it is binding as well upon the ruler as upon the subject (2 Stephen, Com. 430, 572).

"Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed or the language used, that the Government was itself in contemplation of the legislature before a court of law would be authorised to put such an interpretation upon any statute. In general, Acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases, the reasoning applicable to them applies very differently and often with contrary force to the Government itself. It appears to me therefore a safe rule, founded in the principles of the Common law, that the general words of a statute ought not to include the Government or affect its rights unless that construction be clear and indisputable on the text of the act:" *per* Justice Story, *U. S.* v. *Hoar*, 2 Mason 311; 8 Camp. R. C. 203.

Reason for the rule.

This principle has been accepted in Ceylon by judicial decision. Austin 129; Ramanathan (1843-55) 47,144: where it was held that the Crown is not bound by Ordinance unless expressly stated. The principle has now been embodied in statutory enactment. Section 14 of the Interpretation Ordinance No. 21 of 1901: "No enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby."

Rule embodied in Ordinance 21 of 1901 § 14.

The extent of the prerogative of the Crown and its exemption from statute law and the law of estoppel in Ceylon, were considered in *Munasinha* v. *Assistant Government Agent of Puttalam*, 1910, 2 Cur. L. R. 138. In this case, which was under the Waste Lands Ordinance, proceedings had terminated in a decree, entered of consent, whereby a commission was issued to a surveyor to survey and report upon the nature of the land, and it was ordered that such lot as should be found by him to be of a certain nature should be adjudged the property of the plaintiff on their paying ten rupees per acre. The surveyor having died, a report purporting to be a return to the commission, was subsequently forwarded to the court by the Surveyor-

Estoppel of Crown: § 115 Evidence Act.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

General. No objection was taken to the return by the defendant, the Assistant Government Agent, but the plaintiffs were called upon to deposit the money for certain lots in accordance with the decree, which the plaintiffs did. After certain correspondence as to whether or not the plaintiffs were entitled to Crown grants in respect of these lots, the defendant moved for an investigation and adjudication by the court as to what lots shown in the plan should be declared the property of the Crown and what those of the plaintiffs. It was then contended that the surveyor's return was faulty and was no proper return to the commission. The District Judge, upholding this contention, issued a new commission to another surveyor.

Held, *per* Middleton J. and Wood-Renton J., reversing the judgment of Hutchinson C. J. and Grenier A. J., that the defendant was not estopped by his action in calling upon the plaintiffs to pay the price of the lots from questioning the validity of the return; *per* Grenier A. J. (dissenting) that the defendant was estopped by conduct from questioning the return; *per* Wood-Renton J. and Grenier A. J., that the Crown is bound by the rule of estoppel in section 115 of the Ceylon Evidence Act No. 14 of 1895.

Distress for rent, are Crown goods liable?

The chattels of the Crown on land occupied by a subject are privileged from distress for rent: *Secretary of State for War* v. *Wynne*, 1905, 2 K. B. 845. The reason is that goods called goods of the Crown are held by the Crown for the public advantage—for the benefit of the whole country—and many of those goods are by their very nature (as in this case a horse left by the War Office authorities with the defendant's tenant) held for the defence of the country by the Crown (*per* Darling, J. *ibid.* 851). Even when the Crown is tenant and owes the rent, Crown property is privileged from distress (*per* Lord Alverstone, C. J. *ibid*, 849). I am not aware of any ruling in Ceylon, or of any authority in the Roman-Dutch law.

ARTICLE 205.

Taxation of Crown property.

Property owned and occupied by the Crown is exempt from taxation, unless rendered liable either by express words or necessary implication.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

This is a deduction from the last Article. See *Hornsey Urban District Council* v. *Hennell*, 1902, 2 K.B. 73, 80; 7 Halsbury L. of E. 118; also local decision in *Horsfall* v. *Q.A.*, 5 S. C. C. 101, Wendt 144, where Crown property was held not liable to be taxed for municipal purposes, unless the Crown prerogative was divested by statute in express terms or by necessary implication.

An express exemption of particular classes of Crown property in a statute is not in itself sufficient to raise the implication that such property only is exempt and that other property not falling within the exception is bound, such clauses being inserted merely *ex majori cautela*. A general clause in an Act of Parliament saving the rights of the Crown will not suffice, it seems, to preserve the rights of the Crown, if repugnant to the body of the Act, at any rate when rights shared by the Crown in common with the public are concerned. 7 Halsbury, 118-121.

Article 206.

Actions by the Crown.

(1) All actions by the Crown should be instituted by the Attorney General.

(2) In a Court of Requests a person appointed in writing in that behalf by the Attorney General, or by the Crown Counsel or Government Agent or Assistant Government Agent or Collector of Customs within whose jurisdiction the court is situate, may institute an action for and in the name of the Crown.

Civil Procedure Code §§ 456 & 25 (*d*).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ARTICLE 207.

Actions against the Crown.

(1) The Crown may be sued

(*a*) in an action *rei vindicatio* for the recovery of land ;

(*b*) in an action for the recovery of money due *ex contractu ;*

(*c*) in an action arising *ex delicto*,

(i) under the Ceylon Railway Ordinance, 1902, section 18, for loss or injury caused by the negligence or misconduct of the agents or servants of the Crown to any goods carried by the Ceylon Government Railway, or

(ii) under the Ceylon Postal Ordinance, 1908, sections 8 and 34, for the loss, misdelivery or delay of or damage to any postal article; and

(*d*) (possibly) in other actions arising *ex delicto* from the negligence or misconduct of the servants of the Crown.

Attorney General to be named defendant.

(2) The action should be instituted against His Majesty's Attorney General for Ceylon.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Procedure by Petition of Right in England.

This Article is an exception to the principle of the absolute perfection and impeccability of the Sovereign and his consequent immunity from action; see pp. 212, 213 *supra*. In the English law an exception is allowed only in the case of (*a*) and (*b*); and the procedure is by Petition of Right (p. 212 *supra*). *In re Peering*, 8 Camp. R. C. 267; 3 Br. and H. Com. 382; 10 Halsbury, L. of E. 30; and Petitions of Right Act, 1860. The petition is addressed to the King and should set forth with clearness the suppliant's claim and the facts entitling him to relief, and concludes with a general prayer that it may be endorsed "Let right be done" or with a special prayer. The petition is left with the Home Secretary for submission to the King, who may grant or refuse his fiat at his pleasure. Until the fiat is granted, no court can entertain the petition. If the fiat is granted, proceedings are had in the division of the High Court in which the petition is intituled or in such other court as the Lord Chancellor directs.

Procedure in Ceylon.

Actions *rei vindicatio* and *ex contractu* prerogative of immunity waived in Ceylon. *Fraser* v. *Q. A.*

Jayawardena v. *Q. A.*

In Ceylon, as the Supreme Court (*per* Creasy, C. J.) held in *Fraser* vs. *Queen's Advocate*, 1868, Ramanathan, Reports 1863-68, p. 316, the Crown had by its declarations of the royal will waived its prerogative of immunity from action on obligations arising out of contract, and permitted its subjects in this island to retain the old right given by the Roman-Dutch law to sue the Advocate of the Fiscal, styled afterwards the Queen's Advocate and now the Attorney General. In *Jayawardena* v. *Fernando and the Queen's Advocate*, 1881, 4 S. C. C. 77, the Supreme Court (*per* Cayley, C. J.) said the petition of right was unknown in Ceylon, and the practice adopted here of suing the Crown in the name of the Queen's Advocate, both in real actions for the recovery of specific property and in actions for the recovery of moneys due *ex contractu*, had prevailed here for a long series of years and been recognized by a long series of decisions of the Supreme Court; the proper mode was to sue the Queen's Advocate as representing the Crown, the Crown having in Ceylon waived, in respect of this mode of procedure, its prerogative of immunity from action; the matter, however, is one of procedure mainly, as no execution can issue in such an action either against the property of the Crown or the Queen's Advocate, and the satisfaction of the judgment would be matter of grace only.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Satisfaction of judgment matter of grace.

Though the judgment cannot thus be enforced, the subject has the right to have it ascertained by a court of justice that he has a debt which the Government ought to pay, and to have the benefit of the strong moral pressure that there would be on the Government to provide for the payment of the debt thus ascertained. Such a suitor would thus be much in the position of a subject in England, who on a petition of right has obtained a judgment in his favour and can only obtain the fruits of his judgment by the grace of the Crown and the assistance of Parliament.

Siman Appu v. *Q. A.*, *per* Privy Council.

In *Siman Appu et al* v. *Queen's Advocate*, 1884, 9 App. Cas. 571, the Privy Council said that no authority had been shown them for holding that the Roman-Dutch law empowered the subject to sue the Crown; they held, however, that under the British rule a very extensive practice of suing the Crown had sprung up and been recognised by the legislature in Ceylon by provision made for such suits at least 28 years previously and that such suits were now incorporated into the law of the land.

Statutory provision for suing the Crown.

The reference here was to the Ordinance 11 of 1868 section 117 (repeating the provision of section 1 of Ordinance 7 of 1856) which provided that "all suits instituted by any private party against the Queen's Advocate, wherein the amount or value in dispute exceeds £10, shall, unless the Queen's Advocate consents to forego such right, be instituted and prosecuted in the District Court held at the principal town of the province in which the act shall have been done"—a provision which clearly contemplated the existence of an undoubted right to sue the Crown, and made provision for the more convenient exercise of the right.

Civil Pro. Code, sections 456, etc.

The Civil Procedure Code now provides that all actions against the Crown shall be instituted against the Attorney General (sec. 456); that the original summons should be served on him, and other processes on him or the Crown Counsel (sec. 457); that no action shall be instituted except after a month's notice in writing (sec. 461); and that no writ against person or property shall be issued against the Attorney General (sec. 462).

Sandford v. *Waring*, *per* Bonser, C. J.

In *Sandford* v. *Waring*, 1896, 2 N. L. R. 361, Bonser, C. J., referring to the judgment of the Privy Council, pointed out that there was ample authority in the Roman-Dutch law for the proposition that it was open to the subject to sue the Government of the United Provinces through its officers. Voet 6. 1. 23 and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

18. 4. 8, and Hollandsche Consultationen, Bk. IV. 128, clearly recognize the right to sue the Fisc in respect of land. In *Le Mesurier* v. *Attorney General*, 1898, 3 N. L. R. 227, the same judge said: "The Roman-Dutch law allowed persons who had a claim against the Government to sue it as of right (*non petita venia*) through its officer, the Advocate Fiscal ..... For some time after the cession the office of the Advocate Fiscal continued under the English Government. Subsequently in 1834 the title of the officer was changed to King's Advocate, and more lately, in 1884, to Attorney General, but the change was merely in name. The present Attorney General is the lineal successor of the Advocate Fiscal as representing the local Fisc or Treasury."

Fisc sued in Holland through Advocate Fiscal.

Le Mesurier vs. *A. G.*

Attorney General the lineal successor of the Advocate Fiscal.

As regards actions *ex delicto* the immunity of the Crown from action has been affected by the fact that the Ceylon Government has become the largest carrier in the island by reason of its owning the railways (and till recently steamships) and the Postal and Telegraph service. By the Ordinance 9 of 1902, section 18 (which re-enacts the provisions of section 13 of Ordinance 10 of 1865 and of section 16 of Ordinance 28 of 1885) the Government is liable for loss or injury to articles received for transport by railway and duly booked and paid for, if such loss or injury be due to the negligence or misconduct of its servants.*

Actions *ex delicto*.

Liability of Crown under Railway Ordinance, 1885.

This is in pursuance of the general principle applicable to the common carrier. "A common carrier is bound safely to carry and deliver the goods which he receives in that capacity, and he is answerable as an insurer for all loss of or injury to such goods while in his custody (fair wear and tear excepted), unless such loss or injury is caused by the act of God or by the King's enemies or by a defect in the thing carried or by the negligence of the owner of the goods." (Jenks' Digest of English Civil law, Book II, Part II, Contract, section 562.)

Liability of common carrier.

For the liability of the Crown and its officers under the Postal Ordinance for loss, misdelivery, delay of, or damage to any postal article, see Article 166, sub-sections 2 and 3, p. 276. Neither the Crown nor its officers incur any liability in respect of money orders and postal orders

Liability of Crown under Postal and Telegraph Ordinance.

* In *Ceylon Co. Ltd.* v. *Queen's Advocate* (Ramanathan, 1872-6, p. 157) it was held that proof of default or neglect of *any particular person* was not necessary.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*ibid*, sub-section 4, p. 277). In respect of telegraphic messages see Art. 167, sub-sec. 5, p. 281. For the general principle as to the liability of Crown Officers, see Articles 211 and 212 *infra*.

No liability for other delicts.

It has been repeatedly held that claims arising out of delicts other than those provided for by statute cannot be maintained. *Hendrick* v. *Queen's Advocate*, 1881, 4 S. C. C. 76; *Newman* v. *Queen's Advocate*, 1884, 6 S. C. C. 29; *Velanagedara Appuhami* v. *Queen's Advocate*, 1884, 6 S. C. C. 72; and this view met with the approval of the Privy Council in *Siman Appu* v. *Queen's Advocate* (*supra*).

Query by Bonser, C. J. *Siman Appu* v. *Q. A.*

But in *Sandford* v. *Waring*, 1896, 2 N. L. R. 361, Bonser, C. J., said: "It seems to have been taken for granted in *Siman Appu* v. *Queen's Advocate*, 1884, 9 App. Cases, 586, that an action for tort would not lie against the Crown represented by the local Government of this Island, on the ground that the English law with respect to the immunity of the Crown from being sued in such actions extends to this Island. I am not prepared, as at present advised, to assent to this proposition. The more recent case of *Farrell* v. *Bowman* (12 App. Cases, 197) shows that at the present day even in colonies in which the English Common law prevails there is a strong tendency to make the local Government liable for the acts, even tortious, of their servants, whenever the local enactments can be reasonably construed to create or recognize such a liability. I desire to leave this question open for further consideration."

Le Mesurier v. *A. G. per* Bonser, C. J.

Subsequently in his judgment in the case of *Le Mesurier* v. *the Attorney General*, 1898, 3 N. L. R. 227, his Lordship said: "The Roman-Dutch law allowed persons who had a claim against the Government to sue it as of right (*non petita venia*) through its officer, the Advocate Fiscal (the lineal predecessor of the Attorney General), and I may observe in passing that it does not appear that any distinction was made between actions of tort and other actions. The rule of the English law that the Crown cannot be sued in tort depends on the maxim which appears to be peculiar to that law, *Rex non potest peccare*, 'The King can do no wrong'. I am not aware of any authority for the proposition that the Government of the United Provinces ever claimed the attribute of impeccability."

If the question was again presented to the Privy Council, they would very probably agree with the opinion

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of Bonser, C. J. and reverse the view expressed by them in *Siman Appu* v. *Queen's Advocate.* The Privy Council, though a final Court of Appeal, (unlike the House of Lords) does not consider itself precluded from advising the King to reverse a judgment previously given (Anson, Law and Custom of the Constitution, Part II, p. 472). But until such reversal takes place, Bonser C. J.'s view cannot be deemed law. I have, therefore, while inserting it in sub-section (*d*) of the Article, added "possibly."

Attorney General to be named as defendant.

As regards the naming of the Attorney General as party in actions by or against the Crown, *the Queen* v. *Fernando*, 1882, 5 S. C. C. 67, was an action for breach of contract entered by the defendant with a Government Agent, and the libel was entitled "*Our Sovereign Lady the Queen* v. *M. A. Fernando*, and purported to be a statement made by the Queen's Advocate as informant. The District Court refused to enter up judgment by default on the ground that the action was not properly intituled. The Supreme Court declined to interfere with the refusal. In *Jayawardana* v. *Fernando*, 1881, 4 S. C. C. 77, 133, which was an action on a contract with a Government Agent acting on behalf of the Government, the plaintiff sued the Queen's Advocate as representing the Crown. For reasons already quoted at p. 361 the suit was held to be right. *Le Mesurier* v. *Attorney General*, 1898, 3 N. L. R. 227, was an action for damages for the wrongful dismissal of a public servant and was brought against the Attorney General, who was sued not in his private capacity but as representing the "Government of Ceylon." The Court below dismissed the action on the ground that the Attorney General represented the Crown and not the "Government of Ceylon." The Supreme Court held that the action was rightly brought against the defendant in accordance with section 456 of the Civil Procedure Code cited above, p. 362.

Le Mesurier vs. *Attorney General.*

No action lies against officer holding land for Crown.

In *Sandford* v. *Waring*, 1896, 2 N. L. R. 361, it was held that land in the possession of the Crown cannot be recovered in a suit against the servant of the Crown who is in temporary occupation of it as such servant,—he is only a *nudus detentor;* property can only be effectually recovered by the owner in an action against the wrongful possessor, *i.e.* the person who occupies the property either himself or by his agent, with the *animus domini*,—in this case, the Crown ; an action against a *nudus detentor* must be dismissed as

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

soon as he discloses the name of the person on whose behalf he detained the property (Voet 6. 1. 22); the only way by which a subject can recover his land which he alleges to be in wrongful possession of the local Government of the Island is by action against the Attorney General of this Island.

ARTICLE 208.

Crown appointments, tenure of; no right of action for dismissal.

A servant of the Crown holds his office during its pleasure, and his dismissal gives no right of action against the Crown, whatever may have been the terms on which he was originally appointed, unless otherwise specially provided by statute.

Comment.

8 Campbell R. C. 233; *In re Tufnell*, 1876, 3 Ch. D. 164-177; *Grant* v. *Secretary of State for India*, 1877, 2 C. P. D. 445-464; *Shenton* v. *Smith*, 1895, A. C. 229; *Young* v. *Adams*, 1898, A. C. 469; *Fraser* v. *Queen's Advocate*, Ramanathan, 1863, 316.

High Court Judges in England removable only on address of both Houses of Parliament;

In Ceylon, removable by Governor in Executive Council.

The exception stated in the Article has reference to the Judges of the High Court in England who are removable only upon the address of both Houses of Parliament, according to the Act of Settlement, 12 & 13 Will. III. c. 2, section 3, and does not apply to Ceylon or other colony, where the judges may be suspended from office by the Governor in Executive Council, the suspension being reported to the Secretary of State in order that the King may with the advice of the Privy Council confirm or disallow the suspension. (Royal Charter of 1833, section 8, and the Courts Ordinance No. 1 of 1889, section 11).

In re Tufnell (*supra*) and *Grant* v. *Secretary of State for India* (*supra*) were decisions in regard to military appointments; the other cases in regard to civil appointments.

Shenton v. *Smith*, 1895, A. C. 229 was a suit by a dismissed medical officer against the Government of West Australia. The Privy Council in the course of its judgment said:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"Unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by law suit but by an appeal of an official or political kind. Neither principle nor authority has been adduced to show that in the employment and dismissal of public servants a Colonial Government stands on a different footing from the Home Government. The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government can insist on holding office till removed according to the process laid down by Colonial regulations. Any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors to whom it may be able to justify its action in any particular case."

Removal from office gives no right of action.

Shenton v. *Smith*, *per* Privy Council.

According to the Colonial Regulations (Colonial Office List, 1910, pp. 635 *et seq.*), appointments to public offices are made by authority of His Majesty, and such offices, as a rule, are held during His Majesty's pleasure, but in some few cases are held during good behaviour (Reg. 27). Appointments to public offices are made by letter signed by the Governor or written by his direction, except in the case of Judges of the Supreme Court who are appointed in His Majesty's name by an instrument under the public seal of the Colony (R. 28). Holders of patent offices may be removed from such offices by the Governor and Council under the second section of the Act 22 Geo. 3, c. 75, but care must be taken that the officer is heard after being apprised of the charge against him; and it is convenient that the course prescribed in case of suspension should be pursued in any proceedings for removal; against any such removal an appeal lies to His Majesty in Council, which should be prosecuted like any other appeal (R. 49). Every other public officer holds office subject to the pleasure of the Crown, and the pleasure of the Crown that he should no longer hold it may be signified through the

Colonial Regulations.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Secretary of State, in which case no special formalities are required (R. 50). Before an officer is dismissed or suspended, he must be given full opportunity of exculpating himself. The procedure is set forth in Regulations 51 to 73.

Compliance with regulations not essential.

With regard to the regulations as to suspension, it was held by the Privy Council in *Shenton* v. *Smith* (*supra*) that they were mere directions given by the Crown to the Colonial Government for general guidance, and do not constitute a contract between the Crown and its servants; persons removed from office by the Government without complying with those regulations have no legal remedy.

Fraser v. Queen's Advocate.

In *Fraser* v. *Queen's Advocate*, Ramanathan, 1863, 321, Creasy C. J. said: "It never can be supposed that, by thus directing a mode in which charges against an officer for misconduct are to be enquired into by the Governor and Executive Council, the Crown intended to divest itself of the power of treating the officer as holding during pleasure only. There are many cases in which it may be most desirable and important to remove an officer, though he has committed no absolute offence, and though he has shown no absolute physical or mental incapacity for going through the duties of his office with literal exactness and with perfunctory, though unsatisfactory, completeness. But the exigencies of the place or time may demand the immediate presence of an officer of superior tact or energy, or capacity, with reference to the special sphere of action. We put one possible or probable case; many others may readily be imagined. If an officer under any such circumstances is directed to leave his office, he may have a moral claim to receive fair and generous treatment by some other office being offered to him. But he cannot have any legal right to retain the office, which he received on the terms of holding it during pleasure, when it pleases the Crown or the authorized ministers of the Crown to suspend or remove him."

Article 209.

Colonial Governor, powers of.

The Governor of a Colony has not a delegation of the whole royal authority; his powers are limited by the express terms of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the Commission and instructions issued to him by the Crown.

Comment.

For the amended letters patent of June 16, 1875, constituting the office of Governor of Ceylon and defining his powers, and the Royal instructions of February 19, 1907, now in force and further defining his powers, see the Ceylon Manual, 1910, pp. 45 *et seq.*

Governor's appointment and limit of his powers.

The King is represented in each colony by a Governor, who is appointed by Commission, and who is limited as to his powers by the letters patent which constitute his office, and by the instructions which inform him in detail of the manner in which his duties are to be fulfilled.

In *Fabrigas* v. *Mostyn*, 1841, 3 Moore P. C. C. 465, Lord Mansfield was reported to have said that "the Governor of a Colony is in the nature of a Viceroy, and therefore locally during his government no civil or criminal action will lie against him." This dictum was expressly overruled by the Privy Council in the case of *Hill* v. *Bigge*, 1841, 3 Moore, P. C. C. 476, in which Lord Brougham said:—"If it be said that the Governor of a Colony is quasi-sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his Commission and being only the officer to execute the specific powers with which that commission clothes him."

Hill v. *Bigge*. Lord Brougham on the limit of the Governor's powers.

This was quoted with approval and followed by the Privy Council in *Musgrave* v. *Pulido*, 1879, 5 App. Cas. 111, where it was held that the Governor of a Colony cannot in ordinary cases be regarded as a Viceroy, nor can it be assumed that he possesses general Sovereign powers. His authority is derived from his Commission and limited to the powers thereby expressly or impliedly entrusted to him. See also the observations of Wood Renton J. in *R.* v. *Arnolis*, 1908, 11 N. L. R, 267.

Musgrave v. *Pulido*.

The Governor's powers are not, therefore, unlimited, as are those of the Crown (except so far as derogated from its own powers or surrendered into the hands of a local legislature); every case in which the Governor's powers are called in question involves the construction and strict application of the Commission and instructions issued to him by the Crown.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The chief executive powers of a colonial Governor are these (Anson, Law and Custom of the Constitution, II. p. 276.):—

Governor's chief executive powers.

(1) He may pardon or respite criminals convicted in colonial courts, or even by a court martial after consulting the officer in command; and he may remit fines and penalties due to the Crown.

(2) He issues warrants for the expenditure of public money.

(3) He convokes and prorogues legislative assemblies, and dissolves those that are liable to dissolution.

(4) His assent is necessary to Bills passed by colonial legislatures.

In Crown colonies.

(5) In Crown colonies he initiates legislation, and

(6) appoints to vacant offices, absolutely, or provisionally on the approval of the Crown, according to the tenor of his letters patent or instructions or the terms of local law, and can suspend or dismiss the holders of office subject to regulations.

Governor's discretion absolute within his instructions.

(7) In the self-governing colonies the powers of the Governor are nominally wider than in the Crown colonies, where the duties of the Governor are precisely set forth in his instructions. But within the range of those instructions the Governor of a Crown colony acts with independence. He is given certain limited powers to use at his discretion.

Article 210.

Governor's legal liability.

(1) The Governor can be sued in the Courts of the Colony in the ordinary forms of procedure, whether the cause of action springs from liabilities incurred by him in his private or in his public capacity.

(2) He is not liable if the act complained of was within the scope of his lawful authority.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Under the Roman law.

The doctrine of the inviolability of officers of State was recognized by the civil law, Dig. 2, 4, 2. "*In jus vocari non oportet, neque consulem, neque prefectum, neque praetorem, neque proconsulem, neque caeteros magistratus, qui imperium habent, qui coercere aliquem possunt et jubere in carcerem duci.* This was, however, subject to limitation in the case of a Governor of a Colony. The officer, under the Roman law, nearest answering to our Governors of Colonies, was the President or *Praeses*, who was sent into the provinces directly under the control of the Emperor, and though the *Præses* could not be sued in any court of law, if he was vested with jurisdiction, and had a coercive and punitive power during the time of their office, yet at its expiration he might be sued, and he was obliged to remain fifty days in the city or province over which he presided, after the expiration of his office, to enable the provincials to prefer any claim or complaints against him. Dig. 1, 18, 1 and 6; 5, 1, 48; Cod. 1. 49. 1. Grotius confines the question of the non-liability of kings to such as are entrusted with legislative power, and distinguishes between the acts done by a person having such authority in his legislative or in his private capacity: in the latter there is no exemption. 2 Rutherforth's Inst. 263-4.

Under English law.

The matter, however, so far as it concerns British colonies like Ceylon, is one of English Constitutional law and to be decided in the main by English precedents. Under that law the Governor, though he represents the Crown, has none of the legal irresponsibility of the Sovereign within the compass of his delegated and limited sovereignty.

Hill v. *Bigge*, *per* Lord Brougham: Governor may be sued in Courts of his own government.

A Governor may be sued in the courts of his own Government (*Hill* v. *Bigge*, 1841, 3 Moo, P. C. C. 465; *Musgrave* v. *Pulido*, 1879, 5 App. Cas. 107). In the former case a Governor's freedom from arrest on civil process issued by the courts of his own Government was urged as an argument against his liability to be sued in those courts. Lord Brougham, however, pointed out that the liability to be taken in execution was not the necessary consequence of a person's liability to have a judgment against him, the privilege from legal process then still existing in certain persons not protecting them from suits. His Lordship held that a Governor does not even represent the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Sovereign generally, having only the functions delegated to him by the terms of his Commission, and being only the officer to execute the specific powers with which that Commission clothes him, and under the Commission usually issued by the Crown he cannot claim, as a personal privilege, exemption from liability to be sued in the courts of his Colony.

Unlike Viceroy of Ireland.

The colonial Governor differs herein from the Lord-Lieutenant of Ireland, against whom no action can be maintained in Ireland, while Viceroy of that kingdom, for acts done in his official capacity. *Luby* v. *Wodehouse*, 1865, 17 Irish Rep. C. L. R. 618; *Sullivan* v. *Earl Spencer*, Irish Rep. 6 C. L. 177.

Liability for acts done as Governor.

When questions arise as to the limits of a colonial Governor's liability civil or criminal, whether in the colonial Courts or in the Courts of this country, for acts done in his capacity of Governor, the following questions have to be answered:—

Points for consideration.

1. Whether apart from his position of Governor *any* liability has arisen? This is a matter of general law, except in so far as the position of Governor may involve greater responsibility, and consequently justify more prompt measures for the repression of violence or disorder likely to lead to violence. (*Phillips* v. *Eyre*, 1870 L. R., 6 Q. B. 15, 16.) See pp. 375 to 378 *infra*.

2. If a liability has been shown to exist, were the acts complained of done by the Governor of the Colony *as Governor?* This is matter of fact.

3. If so done, were they *Acts of State*, that is, acts covered by the powers assigned to the Governor?

Liability depends on his legal powers.

It is not enough that the acts shall be such as the King, through his ministers, might lawfully do; it must be ascertained by reference to the letters patent and instructions with which the Governor of a Crown colony is furnished, or to the executive powers conferred by imperial or colonial law upon a Governor in a self-governing colony, whether the acts done are justified by the powers conferred. (*Cameron* v. *Kyte*, 1835, 3 Knapp, 332.) If they are, the Governor is protected; he is a servant of the Crown, doing that which the King might do by his servants, and has commissioned him to do if required. If the acts done are outside the powers conferred, the fact that the Governor assumed to do them *as Governor*, will not protect him from their legal consequences.

Not on his position as Governor.

Musgrave v. *Pulido*, 1879, 5 App. Ca. 111. "Let it be granted that for acts of power done by a Governor

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

under and within the limits of his commission, he is protected, because in doing them he is a servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise, it must necessarily be within the province of municipal courts to determine the true character of the acts done by the Governor, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete and the courts can take no further cognizance of it" (Judgment of the Privy Council, *per* Sir Montague E. Smith).

Musgrave v. *Pulido*: when liable and when not.

It must be understood that 'acts of State' as between Sovereign and subject must be acts such as the Sovereign can lawfully do. If one should allege of an act complained of that, though unlawful in itself, it is a matter of State policy or necessity, the answer is, in the words of Lord Camden, that 'the common law does not understand that kind of reasoning'. *Entick* v. *Carrington*, 1765, 19 State Trials, 1030.

Acts of State.

The powers of the Governor with regard to proclamations issued by him were fully discussed in the important case of *Sprigg* vs. *Sigcau*, 1897, 66. L. J. P. C. 44. In that case the petitioner was the late Paramount Chief of Pondoland East, and applied for an order for his liberation from custody. His detention was justified on the ground that it had been authorised by the Proclamation of the Cape Governor, published in due form on June 11th, 1895. The Proclamation purported to be issued by virtue of the Cape Acts annexing the territory of Pondoland. The Pondoland Annexation Act was passed in 1894, after the petitioner had duly ceded his territory to Her Majesty Queen Victoria. The 2nd section of the Act enacted that the said territory should be "subject to such laws, statutes, and ordinances as have already been proclaimed by the High Commissioner, and such as, after annexation to the Colony, the Governor shall from time to time, by proclamation declare to be in force in such territory." The Proclamation, under which the petitioner's imprisonment was sought to be justified, in effect ordered his arrest without a judicial warrant, and condemned

Governor's powers with regard to proclamations; arrest and detention of proclaimed persons without trial. *Sprigg* v. *Sigcau*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and sentenced him without a trial. It recites that, after previous acts of disobedience to the lawful orders of the Colonial Government, it has recently been reported to the Governor, that the petitioner 'has now refused to permit a duly authorised officer of the Government to discharge his lawful duty,' that his presence in East Pondoland is dangerous to public safety and good order in that country, and that it is expedient to make provision for his arrest and for his detention in some suitable place. It then proceeds to proclaim and declare that the petitioner 'has by his acts in disregard and defiance of the law rendered himself liable to arrest,' and to authorise the Chief Magistrate of Griqualand East to arrest and detain the petitioner in such safe place as may be by the Governor from time to time determined.

Under these circumstances, it was laid down by the Judicial Committee of the Privy Council (*per* Lord Watson), "that the character of the document (*i.e.*, the Proclamation) is, on the face of it, abundantly clear. It is an edict dealing with matters administrative, judicial, legislative, and executive, in terms which are beyond the competency of any authority except an irresponsible Sovereign, or a supreme and unfettered Legislature, or some person or body to whom their functions have been lawfully delegated. If the Governor and High Commissioner of the Cape Colony could be shown to have occupied one or other of these positions, a court of law would be compelled, however unwillingly, to respect his Proclamation. If he did not, then his dictatorial edict was simply an invasion of the individual rights and liberty of a British subject . . . . . The legislative authority delegated to the Governor by the Pondoland Annexation Act is very cautiously expressed, and is very limited in its scope. There is not a word in the Act to suggest that it was intended to make the Governor a dictator, or even to clothe him with the full legislative powers of the Cape Parliament."

Criminal liability of Governor for oppression.

The Act known as the Governor's Act (11 & 12 Will. 3, c. 12) enacted that "if any Governor, Lieutenant-Governor, or Commander-in-Chief of any Plantation or Colony within His Majesty's dominions beyond the seas shall . . . . . be guilty of oppressing any of His Majesty's subjects beyond the seas within their respective commands, or shall be guilty of any other crime or offence contrary to the laws of this realm or in force within their respective Governments or commands,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

such oppressions, crimes, or offences shall be inquired of, heard, and determined in His Majesty's Court of King's Bench in England, or before such Commissioners and in such county as shall be assigned by His Majesty's Commission." This Act was extended by 42 Geo. III., c. 85, to all persons employed in His Majesty's service in any civil or military capacity out of Great Britain, guilty of any crime, misdemeanour, or offence in the execution or under colour or in the exercise of any such employment. This latter Act only provided for trial in the King's Bench in England, and not before Commissioners; and it has been held not to extend to felonies (*R. v. Shawe*, 5 M. & S. 403).

Queen v. *Eyre*.

These two statutes of William III. and George IV. received discussion in *Queen* v. *Eyre*, 1868, L. R. 3 Q. B. 487, where a *mandamus* to a metropolitan police magistrate was applied for, directing him to hear the evidence in certain charges preferred against the defendant, and to proceed therein according to law. The defendant had been Governor of Jamaica in 1865, and he having returned to England and being within the jurisdiction of the magistrate, application was made for warrants or summonses charging him with having, while Governor of Jamaica, illegally proclaimed martial law, and with certain other misdemeanours committed as Governor of the Island. On argument, the Queen's Bench decided that an offence under the statutes above mentioned was an offence committed on land beyond the seas, for which an indictment might legally be preferred in any place in England, within section 2 of 11 and 12 Vict. c. 42; that that section and the other enactments of the same statute as to preliminary proceedings before any magistrate in whose jurisdiction the accused might be, applied to charges under the other two statutes; and that the Court of Queen's Bench, where the trial is by them directed to be had, was included in the term "next court of oyer and terminer" in section 20 of the statute of Victoria.

Governor triable by Queen's Bench.

Effect of Act of Indemnity

In *Philips* v. *Eyre*, 1870, L. R. 6 Q. B., 14-17, the powers of a Governor in suppressing riot and rebellion and the effect of an Act of Indemnity passed by a Colonial legislature were decided. This was an action against the Governor of Jamaica for assault and false imprisonment, and the defendant pleaded that the acts complained of were done in order to suppress a rebellion and were covered by the Act of Indemnity subsequently passed by the local legislation and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

assented to by the Crown. The plea was sustained, and it was held that the Act, though retrospective, had effect so as to prevent an action from being brought in England, and was not repugnant (so far as it related to civil proceedings) to 11 and 12 Will. 3. c. 12., within the meaning of 28 and 29 Vict. c. 63. Willes J. in delivering the judgment of the Court of Exchequer said:—

Phillips v. *Eyre.*

"It was agreed at the bar that, for the purposes of this argument, the decision ought to turn upon the Colonial Act, and numerous objections were urged against its validity and effect. Before discussing these objections in detail it may be convenient to consider generally the condition of the governor of a colony and other subjects of Her Majesty there in a case of open rebellion. To a certain extent their duty is clear to do their best and utmost in suppressing the rebellion. Even as to tumultuous assemblies and riots of a dangerous character, though not approaching to actual rebellion, Tindal, C.J., in his charge to the Bristol grand jury on the special commission upon the occasion of the riots in 1832, there, in accordance with many authorities, stated the law as to private citizens. (5 C. & P. 263)

Power of private individual in case of riot: *per* Tindal C. J.

"'In the first place, by the common law every private individual may lawfully endeavour, of his own authority and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he may see coming up from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the judges in the reign of Queen Elizabeth in a case called the *Case of Arms* (see *Rex* v. *Inhabitants of Wigan*), although the judges add that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs or other ministers of the king in doing this. It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was committed, or could not be prevented without recourse to arms; and, at all events,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law.'

Powers of Governor in cases of riot and rebellion: *per* Willes J.

"This perilous duty, shared by the governor with all the Queen's subjects, whether civil or military, is in a special degree incumbent upon him as being entrusted with the powers of Government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in a case of open rebellion are heightened by the consideration that the existence of law itself is threatened by the force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace, is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences. Whether the proper, as distinguished from the legal, course has been pursued by the governor in so great a crisis, it is not within the province of a court of law to pronounce. Nor are we called upon to offer any judicial opinion as to the lawfulness or propriety of what was done in the present case, apart from the validity and legalizing effect of the colonial Act. It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled unless he shrinks from the discharge of paramount duty to exercise *de facto* powers which the legislature could assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an Act of Indemnity and oblivion. There may not be time to appeal to the legislature for special powers. The governor may have, upon his own responsibility, acting upon the best advice and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

information he can procure at the moment, to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communication between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous. The very efficiency of his measures may diminish the estimate of the danger with which he had to cope, and the danger once passed, every measure he has adopted may be challenged as violent and oppressive, and he and every one who advised him, or acted under his authority, may be called upon, in action at the suit of individuals dissatisfied with his conduct, to establish the necessity or regularity of every act in detail by evidence which it may be against public policy to disclose. The bare litigation to which he and those who acted under his authority may be exposed, even if defeated by proving the lawfulness of what was done, may be harrasing and ruinous. Under these and like circumstances it seems to me plainly within the competence of the legislature, which could have authorized by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done, or, in the language of the law under consideration, to enact that they shall be 'made and declared lawful and confirmed.' Such is the effect of the Act of Indemnity in question, which follows the example of similar legislation in the mother country and in other dominions and colonies of the Crown."

Act of Indemnity.

In an action for libel by a Governor, he cannot be compelled to produce copies of despatches, reports, and other communications that have passed between himself, as Governor, and His Majesty's Secretary of State for the Colonies, or between himself, as Governor, and a Royal Commissioner appointed to inquire into the affairs of the Colony, or between the Secretary of State and that Commissioner, such documents having been acquired and held by him in his capacity of Governor of one of His Majesty's colonies (*Hennessy* v. *Wright*, L. R. 21 Q. B. D. 509).

Privileged documents.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Article 211.

Liability of Crown servant for official contract.

Subject to the provisions of any special law, a servant of the Crown is not liable, personally or in his official capacity, upon a contract entered into by him in his official capacity.

Comment.

This rule results from motives of public policy, for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties thinking themselves aggrieved: *per* Dallas C. J., *Gidley* v. *Lord Palmerston* 1822, 3 B. and B. 286, 287; *per* Ashurst J., *Macheath* v. *Haldemund* 1786, I. T. R. 181, 182; Broom's Leg. Max. 830.

Palmer v *Hutchinson.*

This rule was followed in the more recent decision of the Privy Council in *Palmer* v. *Hutchinson* (1881, 6 App. Cas. 619). It was a suit against a Deputy Commissary General for Natal, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as price or hire of wagons and oxen for the carriage of goods, and for damages for illegal acts. The Privy Council held that the action did not lie. "Their Lordships are clearly of opinion that the Deputy Commissary General cannot be sued, either personally or in his official capacity, on a contract entered into by him on behalf of the Commissariat Department. He is not a corporation and he has no property or assets in his official capacity which could be seized or attached in execution of a decree against him in that capacity, and it is clear that no portion of the Government revenue, whether allocated to a special purpose or not, could be seized in execution under it."

Notice of action: Civil Procedure Code § 461.

Under section 461 of the Civil Procedure Code no action shall be instituted against the Attorney General as representing the Crown or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of one month next after notice in writing delivered to the Attorney General or public officer; and the plaint must allege the giving of the notice. For other provisions in respect of actions against public officers, see the Civil Procedure Code, sections 459, 460, 463, 464, 465.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Public Servants Liability Ordinance.

Under the Public Servants Liability Ordinance No. 2 of 1899 public servants in receipt of a salary of Rs. 300 per month or under are exempt from actions upon bonds, promissory notes, etc., or for money lent, or on guarantees.

ARTICLE 212.

Liability *ex delicto* of Crown servants.

Subject to the provisions of any special law,

(1) A servant of the Crown cannot be sued *ex delicto* in his official capacity, nor subjected to a writ of mandamus, injunction or other civil proceeding.

(2) He may be sued *ex delicto* in his private capacity for acts done by him on behalf, or with the authority, of the Crown; and the order of the Crown is no defence to such action.

(3) He is not personally liable for the wrongful acts of his subordinates, unless he has expressly authorized or ratified such acts.

Comment.

As to actions *ex delicto* against the Crown, see Article 207 and comment thereon.

Crown not liable for delict.

The King's legal irresponsibility finds expression in the maxim "The King can do no wrong", which does not mean that the King is above the law, but that the law presumes that he would never willingly infringe its provisions. All actions by which a wrong is done are, by a necessary presumption, outside the scope of authority of the King's service. *Tobin* v. *the Queen* (C. P. 1864), 33 L. J. C. P. 199; *Feather* v. *the Queen* (Q. B. 1865), 6 B. and S. 257; *Windsor &c. Railway Co.* v. *the Queen* 11 App. Cas. 607, 614.

For such a wrong the remedy is an action against the person actually doing the wrong, and the action

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

must be against that person as an individual and not in his character of a servant of the King. *The Queen* v. *the Lords Commissioners of the Treasury* (Q. B. 1872), 1 Campbell's Ruling Cases, 802, in which the rule is thus stated:—

Nor its servants, except personally.

"No action, whether of mandamus or otherwise lies against the servants of the Crown—*e.g.* the Lords of the Treasury or the P. M. G.—nor against persons in their employ, as such public servants."

Queen v *Lords Commissioners of the Treasury.*

In that case, which was for a mandamus upon the Lords Commissioners of the Treasury to cause certain moneys to be paid, Cockburn C. J. said: "We must start with the unquestionable principle that when a duty was to be performed (if I may use the expression) by the Crown, this court cannot affect to have any power to command the Crown. In like manner where the parties are acting as servants of the Crown, they are not amenable to us in the exercise of our prerogative jurisdiction."

Blackburn J. said: "The general principle applicable, not merely to cases of mandamus, but running through the whole law, is that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant so long as he remains in the service of the particular master. To take a familiar instance, if an application were made for a mandamus to the Secretary of a Railway Co. to do something, it would not be granted merely because the railway company, his employers, were under an obligation to do it. Now, it can make no difference that the principal here, the Sovereign, can only be sued by the petition of right and perhaps not at all . . . . . The obligation, such as it is, is upon Her Majesty to be discharged through her servants, so that the servants cannot be proceeded against."

It follows from the personal exemption of the King from being a defendant, that the principle *respondeat superior* is wholly absent in actions of tort against the King's servants, for *ex hypothesi* the King, who is the ultimate superior, cannot be liable.

Order of Crown no defence.

No servant of the Crown may set up as defence to a wrongful act the express orders of the Crown or orders implied by the allegation that what he did was on an act of state. The lawfulness of the act is determinable in a court of law. Every case of this character will be governed by the ruling in *Enteck* v. *Carrington* (19 State Trials, 1030): "With respect

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

to the argument of state necessity or a distinction that has been arrived at between state officers and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction."

Crown servant not liable for act of subordinate.

The principle *respondeat superior* is never extended (except in the special and peculiar case of the master of a ship) to fix a liability upon a superior servant for the act of an inferior one. So in *Lane* v. *Cotton* (K. B. 1701), 1 Lord Raym, 646, it was decided by three judges of the King's Bench, Holt C. J. dissenting, that an action would not lie against the Post-Master-General for the loss of a letter by a subordinate; that the head of a public office under Government, with power to appoint and remove the servants of the office, who are to be paid by and give at his directions security to Government, is not responsible to an individual for a loss which occurred by the default of such servants; the servant who is guilty of the default is. And this case was followed and treated as having established a settled rule of law by Lord Mansfield and his colleagues in *Whitfield* v. *Lord Despencer* (1778), Cowp. 754.

Lane v Cotton

Whitfield v *Lord Despencer.*

Reason for rule.

The principle is that the subordinates of a Crown official are not his servants but equally with him servants of the Crown, and therefore he is not responsible for their acts as employer (*per* Powis J., *Lane* v. *Cotton, supra* p. 650), a principle reiterated by the House of Lords in *Mersey Docks* v. *Gibbs*, 1866, 11 H. L. R. 729, where Lord Wensleydale said: "when a person is acting as a public officer on behalf of Government and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. . . . . The subordinates are servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them."

Mersey Docks v *Gibbs.*

Raleigh v *Goschen, per* Romer J.

The principle as to the immunity of public servants was clearly formulated by Romer J. in *Raleigh* v. *Goschen*, 1898, 1 Ch. 73. That was an action against the Lords of the Admiralty with the object of establishing as against them that they were not entitled to enter upon, or acquire, by way of compulsory purchase certain land, the property of the plaintiffs, in order to erect thereon a Training College for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass. It was held

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

that, though the plaintiffs could sue any of the defendants individually for trespasses committed or threatened by them, they could not sue them as an official body and that as the action was a claim against the defendants in their official capacity, it was misconceived and could not lie; that the alleged authority of an executive department is no justification for a trespass, but only those who commit or in fact authorize the trespass are liable, and the head of the department is not liable for wrongful acts of officials in the department, unless it can be shown that the act complained of was substantially the act of the head of the department himself. Romer J. said: "If any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable), he cannot escape liability for the offence, merely because he acted in obedience to the order of the Executive Government or of any officer of State. . . . . If the trespass had been committed by some subordinate officer of a Government department or of the Crown, by the order of a superior official, that superior official—even if he were the head of a department in which the subordinate official was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of but despite of the fact that he was an officer of State. I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the department, unless it can be shown that the act complained of was substantially the act of himself; in which case he would be liable as an individual, just as a stranger committing the same act would be."

When liable for act of subordinate.

This ruling was cited with approval and followed in the Court of Appeal by Collins M. R. in *Bainbridge* v. *P. M. G.*, 1906, 1 K. B. 178, and on the principle stated in *Lane* v. *Cotton* and *Mersey Docks* v. *Gibbs. (supra.)*

Article 213.

No action shall be instituted against a judge for any act done or words spoken in his judicial capacity within the scope of his jurisdiction, even though such act was done maliciously.

No action against judge for act or speech in judicial capacity.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Comment.

Under Roman law.

In Roman law, a judge was liable as for a *quasi-delict* who made the cause he was called upon to adjudicate his own (Cod. 7, 49), by accepting bribes or otherwise. And in the later Roman law a judge was absolutely privileged in respect of anything said or done by him in the discharge of his judicial functions. No *actio injuriarum* lay against a judge in respect of anything done by him by virtue of his office (Dig. 47, 10, 13, 6). If a judge did anything in the public interest, and in accordance with good morals, even if this resulted in the contumelious treatment of an individual, no *actio injuriarum* lay, for the judge was considered to do the act, not with the intention to injure, but in order to uphold the dignity of the commonwealth (Dig. 47, 10, 33). If, however, a judge acted maliciously, with the intention to injure, and not with the desire to uphold the dignity of his office, or in the honest belief that he was warranted by the facts of the case, he was liable in an action—in the case of a superior judge, only after he had vacated his office, and in the case of an inferior magistrate, during his term of office (Dig. 47, 10, 32).

Under Roman-Dutch law.

In Roman-Dutch law, if a magistrate or judge does an injurious act in his official capacity, in the *bona fide* discharge of his duties, it is conclusively presumed that *animus injuriandi* does not exist (47, 10, 2); for, in the language of Voet, it is competent for judges and magistrates, as a right which pertains to the position they occupy, to correct and rebuke suitors, advocates, attorneys, and other persons in similar positions, if these have in any way been guilty of misconduct; and, says Voet (47, 10, 20), when a judge or magistrate has acted with excessive force against a person who offered resistance to him, or rebuked with excessive severity a person who addressed the court disrespectfully or who misbehaved himself in a similar manner, it must be presumed that he has done so, not with a design to injure, but by virtue of the right which is his by law and which appertains to his distinguished office. In general, it may be said that so strong is the presumption that a judge or magistrate, when doing an act in the discharge of his office, has acted *bona fide*, that even where express malice is proved against him, an *actio injuriarum* will not succeed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Under English law.

In English law, a judge has absolute privilege with regard to any words spoken by him in his judicial capacity, while sitting in his court and engaged in judicial functions (*Scott* v. *Stansfield*, 1868, L. R. 3 Ex. 220; *Anderson* v. *Gorrie*, 1895, 1 Q. B. 668). The reason for the exemption was in the former case stated thus by Kelly, C. B.: "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." The authorities were reviewed and confirmed by the Court of Appeal in *Anderson* v. *Gorrie* (*supra*), where it was held that no action lies against a judge in respect of any act done by him in his judicial capacity, even though he acted maliciously and oppressively, to the prejudice of the plaintiff and the perversion of justice. See also *Bottomley* v. *Brougham*, 1908, 1 K. B. 584.

Reason for the privilege.

To whom the privilege is allowed.

The exemption is not confined to judges of superior courts: it includes, for example, magistrates sitting judicially (*Law* v. *Llewellyn*, 1906, 1 K. B. 487), a Commissioner of Requests (*Bawa* v. *Ashmore*, Wendt, 110), a Coroner and a Court Martial (*Scott* v. *Stansfield*, *supra*, *per* Kelly, C. B.; *Dawkins* v. *Rokeby*, 1873, L. R. 8 Q. B. 263). But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that, at the time of the alleged wrong-doing, some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction), and the act complained of must be of a kind which he had power to do as judge in that matter. A judge with inferior or limited jurisdiction will be liable for a tort committed in excess of his jurisdiction, if he knew or ought to have known that he had no jurisdiction. *Calder* v. *Halket*, 1839, 3 Moo. P. C. 28; *Houlden* v *Smith*, 1850, 14 Q. B. 841. This rule possibly applies also to a judge of a superior court. *Anderson* v. *Gorrie*, (*supra*,) at p. 671, *per* Lord Esher, M. R.

Distinction between superior and inferior courts.

See also Broom's Leg. Max. 87; Pollock on Torts, 116. In the local case of *Bawa* v. *Ashmore* (*supra*) it was held that a commissioner of requests has

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

power to turn out of court any one who obstructs or disturbs the business of the court, even though such person be an advocate or proctor actually engaged in the pending case, and the Commissioner is protected against action, civil or criminal, unless he acted with malice.

Article 214.

Ministerial officers of court, liability of.

Subject to the provisions of any special law, a ministerial officer is not liable to an action for executing the order of a Court or of a magistrate acting judicially, if the order is on the face of it regular and within the jurisdiction of the Court or Magistrate issuing it, and is carried out in a reasonable manner and without exceeding the authority.

Comment.

Immunity under Roman law.

Immunity was granted by the Roman law to persons executing the orders of a judge acting within his jurisdiction. *Qui jussu judicis aliquid facit non videtur dolo malo facere, quia parere necesse est:* Dig. 50. 17. 167. *Factum a judice quod ad officium ejus non pertinet, rectum non est: ibid.* 170.

Under the Roman-Dutch law.

Under the Roman-Dutch law apparitors and judicial messengers, when actually executing the orders of the Courts, were deemed to represent the person of the judges themselves, and assault or injury to them when engaged in the execution of their office was punished with severity, unless they had exceeded their authority or the proper manner of proceeding, when resistance was justifiable. Voet 5. 1. 62; Van Leuwen 5. 5. 10.

Under the English law.

Following the principles of the Roman law, the English Courts have held that when a Court has jurisdiction of the cause and proceeds *inverso ordine* or erroneously, then the party who sues, or the officer or minister who executes according to its tenor, the precept or process of the Court, will not be liable to an action (*Munday* v. *Stubbs*, 10 C. B. 432; *Prentice* v. *Harrison*, 4 Q. B. 852); but when the Court has no

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

jurisdiction of the cause, the whole proceeding is *coram non judice* (*Tenniswood* v. *Pattison*, 3 C. B. 243), and actions will lie against the above mentioned parties without any regard to the precept or process; and in this case it is not necessary to obey one who is not judge of the cause any more than it is to obey a mere stranger, for the rule is *judicium a non suo judice datum nullius est momenti* (*Marshalsea Case*, 1613, 10 Co. Rep. 70).

General principle.

The general principle is that no legal wrong can be done by the regular enforcement of any sentence or process of law nor by the necessary use of force for preserving the peace. An officer is not protected from the ordinary consequences of unwarranted acts, which it rested with himself to avoid, such as using needless violence to secure a prisoner; but he is protected only if he has acted in a manner in itself reasonable and in execution of an apparently regular warrant or order which on the face of it he was bound to obey. This applies only to irregularity in the process of a Court having jurisdiction over the alleged cause: when the Court has no jurisdiction, the proceedings are *coram non judice* and the exemption ceases. Pollock on Torts, 120.

Andrews v. *Marris*.

The general doctrine stated in the Article is illustrated by *Andrews* v. *Marris*, 1841, 1 Q. B. 3. The Commissioners of a Court of Requests had ordered a debt claimed by the plaintiff to be paid by certain instalments, "or execution to issue." The clerk of the Court, on default of payment and on application made to him by the plaintiff, issued (in accordance with the practice of the Court) a precept for execution without the further intervention of the Court. It was held that the Commissioners were required, when acting on such default, to execute judicial powers which could not be delegated; and therefore that the clerk who made such precept was liable in trespass for its execution, though the proceeding was conformable to the practice of the Court, inasmuch as the Court could not institute such a practice. But it was further held that the sergeant who executed the precept and who was the ministerial officer of the Commissioners bound to execute their warrants, having no means whatever of ascertaining whether they issued upon valid judgments or were otherwise sustainable or not, was well defended by it, because the subject matter of the suit was within the general jurisdiction of the Commissioners, and the warrant appeared to have been regularly issued. The

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Court observed that his situation was exactly analogous to that of the sheriff in respect of process from a superior Court; and that it is the well known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must show the judgment in pleading as well as the writ, but for the latter it is enough to show the writ only.

See also *Clark* v. *Woods*, 1848, 2 Ex. 395; *Jelks* v. *Hayward*, 1905, 2 K.B. 460; and Broom, Leg. Max. 94 *et seq.*

Penal Code § 71.

Section 71 of the Ceylon Penal Code provides that "Nothing which is done in pursuance of, or which is warranted by, the judgment or order of a Court of Justice, if done while such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction."

Article 215.

Police Officer's privilege.

A Police officer is exempt from liability in respect of an act done in obedience to a warrant under the hand of a magisterial officer, on the production of the warrant, notwithstanding any defect of jurisdiction in the magisterial officer.

Comment.

Police Ordinance, 1865.

Police Ordinance No. 16 of 1865, section 78. Under section 79 of the Ordinance the action or prosecution must be brought within three months of the commission of the act complained of, and at least one month's notice of action in writing must be given.

Limitation of action.

This is analogous to the provision in the Constables Protection Act (24 Geo. 2, c. 24, section 6), according to which an action cannot be brought against a constable for what he does as constable, after the expiration of six months from the commission of the act, and without making a written demand of a perusal and copy of his warrant six days at least before action is commenced.

For actions against Municipal Officers see section 231 of the Municipal Councils Ordinance 6 of 1910.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX.

1. The Joint Stock Companies Ordinances, 1861 to 1909: *viz.* Ordinance No. 4 of 1861, as amended by the Ordinances No. 9 of 1867; No. 4 and No. 6 of 1888, No. 3 of 1893, No. 2 of 1897, No. 13 of 1905 § 5, No. 17 of 1907 and No. 18 of 1909.
2. The Joint Stock Banking Ordinance, 1897 (No. 2 of 1897).

The principal Ordinance of 1861 is based on the Joint Stock Companies Act (England), 1856 (19 and 20 Vict. cap. 47). This Act ceased to be in force in the United Kingdom in 1862, having been repealed by 25 and 26 Vict. cap. 89 (Companies Act, 1862). There have been numerous Acts passed since, for which see the list at page 90. They have now been all consolidated by the Companies (Consolidation) Act, 1908 (8 Edw. 7. cap. 69), which came into operation on the 1st of April, 1909.

The figures in the inner margin within brackets [ ] indicate the Ordinances and sections amending the principal Ordinance. The amendments themselves are printed in italics.

The figures in the outer margin without brackets indicate the corresponding English Act and section. Thus "1862 § 174" means the 174th section of the Companies Act, 1862; "Consol. § 243" means the 243rd section of the Companies (Consolidation) Act, 1908. The

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

provisions of the Ceylon law sometimes vary considerably from the corresponding provisions of the English law as now in force.

No. 4 of 1861.

An Ordinance to promote the Establishment of Joint Stock Companies, both with unlimited and limited liability.

(*As amended by Ordinances No.* 9 *of* 1867, *No.* 4 *and No.* 6 *of* 1888, *No.* 3 *of* 1893, *No.* 2 *of* 1897, *No.* 13 *of* 1905, *No.* 17 *of* 1907 *and No.* 18 *of* 1909.)

Preamble.

WHEREAS it is expedient to promote the establishment of certain partnerships or joint stock companies, with or without limited liability, and to provide for the due registration of the above :

It is enacted as follows :

Commencement.

1 This Ordinance shall come into operation from the date of the passing thereof.

Short title.

2 This Ordinance may be cited for all purposes as "The Joint Stock Companies' Ordinance, 1861."

Banking and insurance companies exempted.

3 This Ordinance shall not apply to persons associated together for the purposes of banking or insurance.

PART I.

REGISTRATION.

Reference to English Acts.

Registration.

1856 § 106 ; 1862 §§ 174, 12 ; Consol. § 243.

4 The registration of companies shall be conducted as follows; (that is to say)

(1) The Governor may from time to time appoint such registrars, assistant registrars, clerks, and servants as he may think necessary for the registration of companies under this Ordinance, and remove them at pleasure.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(2) The Governor may, with the advice and consent of the Executive Council, make regulations with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid, and may determine the place or places at which offices for the registration of companies are to be established.

(3) There shall be paid to any registrar, assistant registrar, clerk, or servant that may hereafter be employed in the registration of joint stock companies, such salary as the Governor may direct: Provided that it shall be lawful for the Governor to direct the payment to them of fees instead of salary, and to apportion such fees amongst the officers respectively as he may think fit.

(4) There shall be paid to the Registrar of joint stock companies in respect of the several matters mentioned in the table marked A in the schedule hereto the several fees therein specified.

(5) Every person may inspect the documents kept by the Registrar, and may require a copy or extract of any document or part of a document to be certified by the Registrar, and there shall be paid for such inspection and for such certified copy or extract the respective fees specified in the said table A. Such certified copy or extract shall be *prima facie* evidence of the matters therein contained in all legal proceedings whatever.

(6) Excepting in case the Governor shall otherwise direct, all fees authorized by and paid under this Ordinance shall be paid into the public treasury and carried to account as the Governor shall appoint.

(7) Whenever any act is herein directed to be done to or by the Registrar of joint stock companies, such act shall, until a Registrar of joint stock companies shall have been appointed, be done to or by the Registrar of the Supreme Court, who shall until such appointment have the powers and be subject to the liabilities given to and imposed upon the Registrar of joint stock companies.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

PART II.

Constitution and Incorporation of Companies and Associations. Registry.

1856 § 3; 1862 § 6; Consol. § 2.

5 Seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Ordinance in respect of registration and incorporation, procure themselves to be formed into an incorporated company with or without limited liability.

Company formed by memorandum of association and registration.

1856 § 4; 1862 § 4; Consol. § 1.

6 *No company, association, or partnership consisting of more than twenty persons shall, after the passing of this Ordinance, carry on any trade or business having for its object the procurement of gain to the company, association, or partnership, or to the individual members thereof, unless it is registered as a company under "The Joint Stock Companies' Ordinance, 1861," or is incorporated or otherwise legally constituted by some Act of Parliament, Royal Charter, or Letters Patent, or is registered as a company under or by virtue or in pursuance of any Act of Parliament relating to joint stock companies; and if any persons do so carry on business contrary to this provision, every person so acting shall be severally liable for the payment of the whole debts of the company, association, or partnership, and may be sued for the same without the joinder in the suit of any other member of the company, association, or partnership.*

Penalty on unregistered partnerships exceeding a certain number. [§2, 9 *of* 1867]

1856 § 5; 1862 §§ 8 to 10; Consol. §§ 3 to 5.

7 The memorandum of association shall contain the following particulars; (that is to say)

Matters required to be prescribed by memorandum of association.

(1) The name of the proposed company.

(2) The town in which the registered office of the company is to be established.

(3) The objects for which the proposed company is to be established.

(4) The liability of the shareholders, whether it is to be limited or unlimited.

(5) The amount of the nominal capital of the proposed company.

(6) The number of shares into which such capital is to be divided, and the amount of each share, subject to the following restriction:

That in the case of a company formed with limited liability, and hereinafter called a limited company, the word "limited" shall be the last word in the name of the company.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

Prohibition against identity of names in incorporated companies.

[§4,3 *of* 1893]

8 No company shall be incorporated under a name identical with that by which any other company shall have been incorporated, or so nearly resembling the same as to be calculated to deceive; and if any company, through inadvertence or otherwise, is incorporated by a name identical with that by which a company shall have been previously incorporated, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company *shall*, with the sanction of the Governor, change its name; and upon such change being made the Registrar shall enter the new name on the register in the place of the former name; but no such alteration of name shall affect any rights or obligations of the company, or of any member thereof, or render defective any legal proceedings instituted or to be instituted by or against the company; and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

1856 § 6; 1862 § 20; Consol. § 8.

Power of company to change name. (§ 5,3 *of* 1893)

8A *Any company with the sanction of a special resolution of the company passed in manner hereinafter mentioned, and with the approval of the Governor, testified in writing under the hand of the Colonial Secretary or of one of the Assistant Colonial Secretaries, may change its name, and upon such change being made the Registrar shall enter the new name in the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.*

1862 § 13; Consol. § 8

Form of memorandum of association.

9 The memorandum of association shall be in the form marked B in the schedule hereto, or as near thereto as circumstances admit, and it shall, when the company is incorporated, bind the company and the shareholders therein as if there were in such memorandum contained on the part of every shareholder, his heirs, executors, and administrators, a covenant to conform to all the regulations of such memorandum, subject to the provisions of this Ordinance.

1856 § 7; 1862 §§ 8 to 11 and forms A.B.C.D. of Schedule II; Consol. §§ 3 to 5 and 14.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1856 § 8; 1862 §§ 8, 23 Consol. §§ 3, 24.

Shares to be taken by subscribers of memorandum of association.

10 Every subscriber of the memorandum of association shall take one share at least in the company. The number of shares taken by each subscriber shall be set opposite his name in such memorandum of association, and upon the incorporation of the company he shall be entered in the register of shareholders hereinafter mentioned as a shareholder to the extent of the shares he has taken.

1856 § 9; 1862 §§ 14, 15 and Table A of Sched. I; Consol. §§ 10, 11 and Table A of Sched. I.

Special regulations may be prescribed by articles of association.

11 The memorandum of association may be accompanied by, or have annexed thereto or indorsed thereon, articles of association, signed by the subscribers to the memorandum of association, and prescribing regulations for the company; but if no such regulations are prescribed, or so far as the same do not extend to modify the regulations contained in the table marked C in the schedule hereto, such last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company, and shall bind the company and the shareholders therein to the same extent as if they had been inserted in articles of association and such articles had been registered.

1856 § 10; 1862 § 16; Consol. § 14.

Effects of articles of association.

12 The articles of association shall, when the company is incorporated, bind the company and the shareholders therein to the same extent as if there were in such articles contained, on the part of every shareholder, his heirs, executors, and administrators, a covenant to conform to all the regulations of such articles, subject to the provisions of this Ordinance.

1856 § 11; 1862 § 11; Consol. §§ 6, 14.

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

13 The memorandum of association shall bear a stamp of five pounds, and the articles of association shall bear a stamp of one pound. Any person signing a printed copy of the memorandum of association or articles of association shall be deemed to have signed such memorandum and articles respectively, and where the proper stamp has been duly fixed on such memorandum of association or articles of association it shall not be necessary to stamp any printed copy so signed. The execution by any person of the memorandum of association or articles of association shall be attested by one witness at the least, and attestation by one witness shall be sufficient attestation.

1862 § 12; 1867 § 21; Consol. § 41.

Subdivision and consolidation of existing shares. [§ 5. 17 of 1907]

13A (1) *Any company registered under this Ordinance may by special resolution so far modify the conditions contained in its memorandum of association if authorized so to do by its regulations as originally framed, or as altered by special resolution, as—*

Digitized by Noolaham Foundation. noolaham.org | aavanaham.org

Reference to English Acts.

(*a*) *By subdivision of its existing shares or any of them to divide its capital or any part thereof into shares of smaller amount than is fixed by its memorandum of association.*

(*b*) *By consolidation of its existing shares or any of them to divide its capital or any part thereof into shares of larger amount than is fixed by its memorandum of association.*

Provided that in the subdivision or consolidation of the existing shares the proportion between the amount which is paid and the amount, if any, which is unpaid on each share of reduced or increased amount shall be the same as it was in the case of the existing share or shares from which the share of reduced or increased amount is derived.

Special resolution to be embodied in the memorandum of association.

(2) *The statement of the number and amount of the shares into which the capital of the company is divided contained in every copy of the memorandum of association issued after the passing of any such special resolution shall be in accordance with such resolution; and any company which makes default in complying with the provisions of this sub-section shall incur a penalty not exceeding ten rupees for each copy in respect of which such default is made, and every director and manager of the company who knowingly or wilfully authorizes or permits such default shall incur the like penalty.*

How to obtain incorporation. [§ 5, 13 of 1905; § 6, 17 of 107.]

1856 § 12; 1862 § 17; Consol. § 15.

14 *In order to obtain incorporation, the memorandum of association, together with the articles of association (if any), shall be delivered to the Registrar, who shall transmit the same to the Attorney-General for report, and shall upon payment to him of the cost of publication cause the same to be published in the "Government Gazette" in three consecutive numbers. After such publication the Registrar, if the Attorney-General certifies that there is no legal impediment to the incorporation of the company, shall declare the company to be incorporated by endorsing on the memorandum of association a declaration in the form following:*

Whereas the subscribers to this memorandum have done all things to entitle them to incorporation as a company with limited (or *unlimited*, as the case may be) *liability: Now know ye that I, A. B., Registrar of Companies, do, in terms of section* 14 *of "The Joint Stock Companies' Ordinance,* 1861," *as amended by section* 5 *of "The Public Business Ordinance,* 1905," *hereby declare the said subscribers and their successors*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

to be incorporated as the ——— Company (Limited) under the provisions of "The Joint Stock Companies' Ordinance, 1861."

This —— day of ———

(Signed) ———,
Registrar of Companies.

The Registrar shall thereupon register the memorandum of association with the declaration endorsed thereon and the articles of association.

1856 § 13; 1862 § 18; Consol. § 16.

Certificate of incorporation issuable to any party.

15 The Registrar shall, on payment of five shillings, issue a certificate of incorporation of any company to any person applying for the same, and such certificate shall be admissible in evidence.

1856 § 13; 1862 § 18; 1900 § 1; Consol. §§ 16, 17.

Effect of registration.

16 Upon the declaration of incorporation being registered as aforesaid, the subscribers to the memorandum of association, together with such other persons as may from time to time become shareholders in the company, shall thereupon be a body corporate by the name prescribed in the memorandum of association and declaration of incorporation, having a perpetual succession and a common seal, with power to hold lands, but with such pecuniary liability on the part of the shareholders as is hereinafter mentioned. The declaration of incorporation shall be conclusive evidence that all the requisitions of this Ordinance in respect of incorporation have been complied with, and the date of such declaration shall be deemed to be the date of the incorporation of the company.

1856 § 14 and Table B. Art. 64; 1862, Table A, Arts 72, 73; Consol. Table A, Arts 95 to 97.

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

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

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Issue of shares by company.

18 As soon as a certificate of incorporation has been granted, the company may issue certificates of shares to the subscribers to the memorandum of association, and to all other persons to whom shares may be allotted, of such number and amount as may be prescribed by the memorandum of the association, but not of any greater number or amount. The shares so issued shall be movable property, and shall not be of the nature of immovable property, and each share shall be distinguished by its appropriate number.

1856 § 15; 1862 § 22 and Table A. Art. 2; Consol: §§ 22, 92 and Table A. Art. 6.

Register of Shareholders.

Register of shareholders

19 Every company registered under this Ordinance, hereinafter referred to as "the company," shall cause to be kept in one or more books a register of shareholders, and there shall be entered therein the following particulars:

1856 § 16; 1862 § 25; Consol. § 25.

(1) The names, addresses, and occupations, if any, of the shareholders in the company, and the shares held by each of them, distinguishing each share by its number.

(2) The amount paid on the shares of each shareholder.

(3) The date at which the name of any person was entered in the register as a shareholder.

(4) The date at which any person ceased to be a shareholder in respect of any share.

Annual list of shareholders on register.

20 Once at the least in every year a list shall be made of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting of the company, or if there is more than one ordinary general meeting in each year, the first of such ordinary general meetings, is held, are holders of shares in the company; and such list shall state the names, addresses, and occupations of all the persons therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:

1856 § 17; 1862 § 26; 1900 § 19; Consol. § 26.

(1) The amount of the nominal capital of the company and the number of shares into which it is divided.

(2) The number of shares taken from the commencement of the company up to the date of the summary.

(3) The amount of calls made on each share.

(4) The total amount of calls that have been received.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(5) The total amount of calls unpaid.

(6) The total amount of shares forfeited.

The above list and summary shall be contained in a separate part of the register, and shall be in the form marked D in the schedule hereto, or as near thereto as circumstances admit; such list and summary shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy thereof, authenticated by the seal of the company, shall forthwith be forwarded to the Registrar, and any person may inspect and take copies of the same, subject to the regulations under which a person is hereinafter declared to be entitled to inspect and take copies of any documents kept by the Registrar. *The Registrar shall, on receipt of the list and summary, make a record of the receipt thereof, and a fee of two rupees and fifty cents shall be payable in respect of such record.* (§2, 18 of 1909)

1856 § 18; 1862 § 27; Consol. § 25 (2), § 26 (5).

Penalty on company not keeping a proper register.

21 If any company registered under this Ordinance makes default in keeping a register of shareholders or in sending a copy of such list and summary as aforesaid to the Registrar, in compliance with the foregoing rules, such company shall incur a penalty not exceeding five pounds for every day during which such default continues.

And every director or manager of the company who shall knowingly and wilfully authorize or permit a contravention of this section shall incur the like penalty. (§6, 3 of 1893)

1856 § 19; 1862 §§ 30, 23; Consol. §§ 27, 24 (2).

Restrictive definition of shareholder.

22 No notice of any trust, express or implied or constructive, shall be entered on the register, or receivable by the company; and every person who has accepted any share in a company registered under this Ordinance, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him), shall for the purposes of this Ordinance be deemed to be a shareholder.

1856 § 20; 1862, Table A, Arts. 8, 9; Consol. Table A, Arts. 18, 19.

Transfer of shares.

23 The transfer of any share in the company shall be in the form marked E in the schedule hereto, or to the like effect, and shall be executed both by the transferor and transferee. The transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.

1856 § 20; 1862 § 31; Consol. § 23.

Certificate of shares.

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

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Calls a debt to company.

25 The amount of calls for the time being unpaid on any share shall be deemed to be a debt due from the holder of such share to the company.

1856 § 22; 1862 § 16 *ad fin.* and § 75 and Table A, Art. 4; Consol. § 14 (2) and Table A, Art. 12.

Inspection of register.

26 The register and annual list of shareholders, commencing from the incorporation of the company, shall be kept at the registered office of the company hereinafter mentioned. Except when the register is closed as hereinafter mentioned, it shall during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection) be open to the inspection of any shareholder *gratis*, and to the inspection of any other person on the payment of one shilling or such less sum as the company may prescribe for each inspection; and every such shareholder or other person may require a copy of such register, or of any part thereof, on payment of sixpence for every hundred words required to be copied. If such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues.

1856 § 23; 1862 § 32; Consol. § 30.

(§ 7, 3 *of* 1893)

And every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty.

Power to close register.

27 The company may, upon giving notice by advertisement in the *Government Gazette*, close the register of shareholders for any time or times not exceeding on the whole twenty-one days in each year, and the period during which the books are closed shall not be reckoned as part of the time within which a transfer is to be registered.

1856 § 24; 1862 § 33; Consol. § 31

Power of limited company to convert paid up shares into stock.

28 Any limited company may by special resolution convert into stock any shares which have been fully paid up, and upon such conversion being made all the provisions of this Ordinance which require or imply that the capital of the company is divided into shares of any fixed amount, and distinguished by numbers, and which require the company to keep a register of shareholders, or to make an annual list of shareholders in the register, shall cease as to so much of the capital as has been so converted into stock.

1862 §§ 12, 29 and Table A, Arts. 23 to 25; Consol. §§ 41 (c) and 43, and Table A, Arts. 31 to 33.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1862 § 28; Consol. § 42.

Company to give notice of conversion of capital into stock.

29 Any company that has converted any portion of its capital into stock shall give notice of such conversion, specifying the shares so converted, to the Registrar of joint stock companies, within fifteen days from the date of the last of the meetings at which the resolution was passed by which such conversion was authorized, and the Registrar shall forthwith record the fact of such conversion. If such notice is not given within the period aforesaid the company shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues.

1862 § 29; Consol. § 43.

Register of holders of stock.

30 Any company that has converted any portion of its capital into stock shall keep at the registered office of the company a register of the names and addresses of the persons for the time being entitled to such stock, and such register shall be open to inspection in the manner and subject to the penalties in and subject to which the register of shareholders is directed to be kept open.

Remedy for improper entry or omission of entry in the register of stock.

31 If the name of any person is without sufficient cause entered or omitted to be entered in the register of stock of any company, such person, or any holder of stock in the company, may apply to have the register rectified in manner directed by the 32nd section.

1856 § 25; 1862 § 35; Consol § 32.

Remedy for improper entry or omission of entry in register.

32 If the name of any person is without sufficient cause entered or omitted to be entered in the register of shareholders of any company, such person or any shareholder of the company may, by motion in the District Court of Colombo, apply to such court for an order that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion and any damages the party aggrieved may have sustained; and if the company makes default or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay for the amount of damage he may thereby have sustained; and the court may, in any proceeding taken under this clause, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or erased from the register, whether such question arises between two or more holders or alleged holders of shares or stock,

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

or between any holders or alleged holders of shares or stock and the company, and generally the court may in such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register.

Register to be evidence.

33 The register of shareholders shall be evidence of any matters by this Ordinance directed or authorized to be inserted therein. 1856 § 26; 1862 § 37; Consol. § 33.

Copies of memorandum and articles of association to be given to shareholders (§ 8, 3 *of* 1893)

34 Copies of the memorandum of association and articles of association shall be forwarded to every shareholder at his request, on payment of the sum of one shilling for each copy or such less sum as may be prescribed by the company. 1856 § 27; 1862 § 19; Consol. § 18.

And if any company make default in forwarding a copy of the memorandum of association, if any, to a member in pursuance of this section, the company so making default shall for each offence incur a penalty not exceeding ten rupees.

PART III.

Management and Administration of Companies, General.

Registered office of company.

35 The company shall have a registered office, to which all communications and notices may be addressed. If any company registered under this Ordinance carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day on which business is so carried on. 1856 § 28; 1862 § 39; Consol. § 62.

Change of registered office. [§ 4, 17 of 1907.]

35 A (1) *Any company registered under this Ordinance may by special resolution so far modify the conditions contained in its memorandum of association as to remove its registered office from the town mentioned in its memorandum of association as being the town in which its registered office is to be established and establish it within any other town in the Island.*

(2) *The statement of the town in which the registered office of the company is to be established contained in every copy of the memorandum of association issued after the passing of any such special resolution shall be in accordance with such resolution; and any company which makes default in complying with the provisions of this section shall incur a penalty not exceeding ten rupees for each copy in respect of which such default is made, and every*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

director and manager of the company who knowingly or wilfully authorizes or permits such default shall incur the like penalty.

1856 § 40: 1862 § 40: Consol. § 62.

Notice of situation of registered office.

36 Notice of the situation of such registered office and of any change therein shall be given to the Registrar and be recorded by him ; until such notice is given the company shall not be deemed to have complied with the provisions of this Ordinance with respect to having a registered office.

1856 § 30; 1862 § 41; Consol. § 63.

Publication of name by a limited company.

37 Every limited company registered under this Ordinance shall paint or affix, and shall keep painted or affixed, its name in the English, Sinhalese, and Tamil languages on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name in the English language engraven in legible characters on its seal, and shall have its name mentioned in the English language, in legible characters, in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

1856 § 31; 1862 § 42; Consol. § 63.

Penalties on non-publication of name.

38 If any limited company registered under this Ordinance does not paint or affix, and keep painted or affixed, its name in manner aforesaid, it shall be liable to a penalty not exceeding five pounds for not painting or affixing its name, and for every day during which such name is not so kept painted or affixed ; and if any officer of such company, or any person on its behalf, uses any seal purporting to be a seal of the company, whereon its name is not so engraven as aforesaid, or issues or authorizes the issue of any notice, advertisement, or other official publication of such company, or signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty not exceeding fifty pounds, and shall further be personally liable to the holder of any such

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

bill of exchange, promissory note, cheque, or order for money or goods for the amount thereof, unless the same is duly paid by the company.

General meeting of company.

39 A general meeting of the company shall be held once at the least in every year. 1856, Table B, Art. 69; 1862 § 49; Consol. § 64.

What accounts to be kept.

40 The directors shall cause true accounts to be kept of the stock in trade of the company, of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place, and of the credits and liabilities of the company. 1856 § 32; 1862, Table A, Art. 78; Consol. Table A, Art. 103.

Balance sheets to be made out annually and filed with the Registrar.

41 A balance sheet shall be made out and *forwarded to* the Registrar of joint stock companies within twelve months after the incorporation of the company. *Thereafter a balance sheet shall be prepared and forwarded in each year to the Registrar, together with the list of shareholders and summary required by section 20 to be so forwarded.* Such balance sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to table C in the schedule hereto, or as near thereto as circumstances admit. *The Registrar shall, on receipt of the list and summary, make a record of the receipt thereof, and a fee of two rupees and fifty cents shall be payable in respect of such record.* 1856, Table B, Art. 72; 1862, Table A, Art. 81; Consol. Table A, Art 107.

(§ 3, 18 of 1909)

Balance sheet to be signed and certified by the directors.

42 The balance sheet shall be signed by the directors, or any three or more of them, who shall certify at the foot thereof that the same, to the best of their belief, contains a true account of the capital and liabilities and of the property and assets of the company. Consol. § 113 (3). 1856, Table B, Art. 64; 1862, Table A, Art. 73;

No dividend payable except out of profits.

43 No dividend shall be payable except out of the profits arising from the business of the company, including interest on capital. Consol. Table A, Art. 97.

Audit.

44 The accounts of the company shall be examined, and the correctness of the balance sheet ascertained, by one or more auditor or auditors, who shall certify at the foot of such balance sheet that the same, to the best of his or their belief, contains a true account of the capital and liabilities and of the property and assets of the company, or make special report thereon as he or they think necessary. 1856, Table B, Art. 64; 1862, Table A, Arts. 83 to 94; 1900 §§ 21 to 23; Consol. §§ 112, 113.

Inspection of balance sheet and of auditors' report.

45 A copy of every balance sheet and of the report thereon by the auditors shall be open to inspection in the same manner as the register of shareholders kept at such office. Consol. § 113 (3).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1856 § 33; 1862 § 50; Consol. § 13.

Power of company to alter regulations by special resolutions.

46 Any company registered under this Ordinance may in general meeting from time to time, by such special resolution as is hereinafter mentioned, alter and make new provisions in lieu of or in addition to any regulations of the company contained in the articles of association: Provided always that such resolutions so made shall be reported to the Registrar to be registered by him.

1856 § 34; 1862 § 51; Consol. § 69.

Definition of special resolution. (§ 9, 3 *of* 1893)

47 A resolution shall be deemed to be a special resolution of the company whenever the same has been passed by three-fourths in number and value of such shareholders of the company for the time being entitled to vote as may be present in person or by proxy (in cases where, by the regulations of the company, proxies are allowed) at any meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such shareholders for the time being entitled to vote as may be present in person or by proxy at a subsequent meeting of which notice specifying the intention to propose such confirmation has been duly given, and held at an interval of not less than *fourteen days* nor more than *two months* from the date of the meeting at which such special resolution was first passed. Unless a poll is demanded by at least five shareholders, a declaration of the chairman of any such meeting as is mentioned in this section that a special resolution has been carried or confirmed shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same. Notice of any meeting shall for the purposes of this section be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company.

1856 § 35; 1862 § 53; Consol. § 70

Registry of special resolutions.

48 A copy of any special resolution that is passed by any company registered under this Ordinance shall be forwarded to the Registrar and recorded by him; if such copy is not so forwarded within fifteen days from the date of the passing of the resolution, the company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded.

1856 § 36, 1862 § 54; Consol. § 70.

Copies of special resolutions.

49 A copy of any special resolution shall be given to any shareholder on payment of one shilling, or of such less sum as the company may direct.

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Reference to English Acts.

Notice to Registrar of increase of capital.

50. The company, if authorized so to do by its regulations, may increase its nominal capital in manner directed by such regulations, but notice of any increase so made shall be given to the Registrar within fifteen days from the date of the passing of the resolution by which such increase has been authorized, and the Registrar shall forthwith record the amount of such increase. If such notice is not given within the period aforesaid, the company shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues. 1856 § 37; 1862 § 34; Consol. § 44.

Prohibition against carrying on business with less than seven shareholders.

51. If any company registered under this Ordinance carries on business when the number of its shareholders is less than seven for a period of six months after the number has been so reduced, then every person who is a shareholder in such company during the time that it so carries on business after such period of six months shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same without the joinder in the suit of any other shareholder. 1856 § 39; 1862 § 48; Consol. § 115.

Evidence of proceedings of meetings.

52. The company shall cause minutes of all resolutions and proceedings of general meetings of the company to be duly entered in books to be from time to time provided for the purpose, and any such minutes as aforesaid, if signed by any person purporting to be the chairman of such meeting, shall be receivable in evidence in all legal proceedings, and until the contrary is proved every general meeting in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened. 1856 § 40; 1862 § 67; Consol. § 71.

Legal Instruments of Company. Contracts.

Contracts how made.

53. Contracts on behalf of any company registered under this Ordinance may be made as follows; (that is to say) 1856 § 41; 1867 § 37; Consol. § 76.

(1) Any contract which would be by law required to be in writing may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged.

(2) Any contract which would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.

(3) Any contract which would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged.

Deeds and other Instruments.

1856 § 42; 1862 § 55; Consol. § 78.

Execution of deeds abroad.

54. Any company registered under this Ordinance may, by instrument or writing under their common seal, empower any person, either generally or in respect of any specified matters, as their attorney to execute deeds on their behalf in any place; and every deed signed by such attorney on behalf of the company shall be binding on the company to the same extent as if it were under the common seal of the company.

1856 § 43; 1862 § 47; Consol. § 77.

Promissory notes or bills of exchange.

55. A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company registered under this Ordinance if made, accepted, or indorsed in the name of the company by any person acting under the express authority of the company.

1856 § 44.

Mortgages registered under this Ordinance.

56. In any mortgage made by any company registered under this Ordinance there shall be implied the following covenants (unless words expressly negativing such implication are contained therein); that is to say, a covenant on the part of the company to pay the money thereby secured, and interest thereon, at the time and rate therein mentioned, a covenant that they have power to mortgage the property and that the same is free from incumbrances, and such mortgage may be in the form marked F in the schedule hereto annexed, or as near thereto as circumstances admit.

1856 § 46.

Conveyances registered under this Ordinance.

57. In any conveyance made by any company registered under this Ordinance there shall be implied (unless words expressly negativing such implication are contained therein) the following covenants on the part of the company; (that is to say)

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

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

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

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

Examination of Affairs of Company.

Examination of affairs of company by inspectors appointed by the Governor.

58. Upon the application of one-third in number and value of the shareholders of any limited company registered under this Ordinance, the Governor, with the advice and consent of the Executive Council, may appoint one or more competent inspectors to examine into the affairs of the company, and to report thereon in such manner as the Governor, with the advice aforesaid, directs. 1856 § 58; 1862 § 56; Consol. § 109.

Power of inspectors.

59. It shall be the duty of all officers and agents of the company to produce, for the examination of the inspectors, all books and documents in their custody or power. Any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any such book or document, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence. 1856 § 49, 1862 § 58; Consol. § 109.

Result of examination how dealt with.

60. Upon the conclusion of the examination the inspectors shall report their opinion to the Governor, who shall direct the same to be forwarded to the Registrar. 1856 § 50; 1862 § 59; Consol. § 109.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

All expenses of and incidental to any such examination as aforesaid shall be defrayed by the shareholders upon whose application the inspectors were appointed.

1856 § 51; 1862 § 60: Consol. § 110.

Power of company to appoint inspectors.

61. Any company, whether limited or unlimited, registered under this Ordinance, may in general meeting appoint inspectors for the purpose of examining into the affairs of the company. The inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Governor, with this exception, that instead of making their report to the Governor they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties, in case of any refusal to produce any book or document to such inspectors, or to answer any question, as they would have incurred if such inspectors had been appointed by the Governor. All expenses of and incidental to any examination to be made by the inspectors so appointed shall be defrayed by the company.

1856 § 52; 1862 § 61; Consol. § 111.

Report of inspectors to be evidence.

62. A copy of the report of any inspectors appointed under this Ordinance, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible as evidence in any legal proceeding.

Notices.

1856 § 53; 1862 § 62; Consol. § 116.

Service of notice on company and Registrar. [§10, 3 of 1893.]

63. *Any summons or notice requiring to be served upon the company may, except in cases where a particular mode of service is directed, be served by leaving the same with any director, secretary, or other principal officer of the company at their registered office, or by sending it through the post by letter addressed to such company, and any notice to the Registrar may be served by sending it to him through the post by letter, or by delivering it to him, or by leaving it for him at his office.*

1856 § 54; 1862 § 63.

Rules as to notices by letter.

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

1856 § 55; 1862 § 64; Consol. § 117.

Authentication of notices of company.

65. Any summons, notices, writ, or proceeding requiring authentication by the company may be signed by any director, secretary, or other authorized officer of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

Security for Costs.

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

66. When a limited company is party to any suit, the judge, if it be proved to his satisfaction that there is reason to believe that if their opponent be successful the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and (if the limited company be plaintiff) he may stay all proceedings until such security be given, or (if the limited company be defendant) he may refuse to admit the defence, and after the expiration of a stated time to be named by him to enable the company to furnish such security may, on their still failing to give security, treat the case as an undefended one. 1862 § 69; Consol. § 278

PART IV.

Winding up. Preliminary.

Application of Part IV. of Ordinance.

67. The provisions of this Ordinance relating to the winding up of companies shall apply to all companies registered under this Ordinance and not to any other companies. 1856 § 59.

Definition of "the court."

68. The expression "the court," as used in this Ordinance, shall mean the District Court having jurisdiction in the place in which the registered office of the company is situate; and any court to which jurisdiction is given by this Ordinance shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it in pursuance of this Ordinance as it has in relation to other matters within the jurisdiction of such court respectively. 1856 § 60; 1862 § 81; 1890 § 1; Consol. § 131.

Liability of present shareholders in respect of debts.

69. In the event of any company being wound up by the court or voluntarily, the existing shareholders shall be liable to contribute to the assets of the company to an amount sufficient to pay the debts and liabilities of the company, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company is limited no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him, and his proportion of the costs, charges, and expenses. 1856 § 61; 1862 § 38; Consol. § 123.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

1856 § 62; 1862 § 38; Consol. § 123.

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

70. In the event of any company, other than a limited company, being wound up by the court or voluntarily, any person who has ceased to be a shareholder within the period of three years prior to the commencement of the winding up shall be deemed, for the purposes of contribution towards payment of the debts of the company, and the costs, charges, and expenses of winding up the same, to be an existing shareholder, and shall have in all respects the same rights and be subject to the same liabilities to creditors as if he had not so ceased to be a shareholder, with this exception, that he shall not be liable in respect of any debt of the company contracted after the time at which he ceased to be a shareholder.

1856 § 63: 1862 § 38; Consol. § 123.

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

71. In the event of any limited company being wound up by the court or voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding up, shall be deemed for th purposes of contribution towards payment of the debts of the company, and the costs, charges, and expenses of winding up the same, to be an existing holder of such share or shares, and shall have in all respects the same rights and be subject to the same liabilities to creditors as if he had not so ceased to be a shareholder, with this exception, that he shall not be liable in respect of any debt of the company contracted after the time at which he ceased to be a shareholder.

1856 § 64; 1862 §§ 84, 130; Consol. §§ 139, 183.

Commencement of winding up of company defined.

72. The winding up shall, if the company is wound up by the court, be deemed to commence at the time of the presentation of such petition as is hereinafter required to be presented to the court, and if the company is wound up voluntarily, be deemed to commence at the time of the passing of the resolution authorizing such winding up.

1856 § 65; 1862 §§ 38, 74 to 78; Consol. §§ 123 to 128.

Definition of "contributory" and legal character of his liability.

73. Any existing or former shareholder upon whom calls are authorized to be made by the fourth part of this Ordinance is hereinafter called "a contributory," and the representatives of any deceased contributory shall be liable in a due course of administration to the same extent as such contributory would be liable under the fourth part of this Ordinance if alive.

1856 § 66.

Rights of contributories between themselves.

74. For the purpose of ascertaining the liability of existing and former shareholders as between themselves, the following rules shall be adopted in the absence of any express contract to the contrary; (that is to say)

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Reference to English Acts.

(1) In the case of a company other than a limited company, every transferee of shares shall, in a degree proportioned to the shares transferred, indemnify the transferor against all existing and future debts of the company.

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

Winding up by Court.

Circumstances under which company may be wound up by court.

1856 § 67; 1862 § 79; Consol. § 129.

75. A company may be wound up by the court under the following circumstances; (that is to say)

(1) Whenever the company in general meeting has passed a special resolution requiring the company to be wound up by the court:

(2) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:

(3) Whenever the shareholders are reduced in number to less than seven:

(4) Whenever the company is unable to pay its debts:

(5) Whenever three-fourths of the capital of the company have been lost or become unavailable.

Company when deemed unable to pay its debts.

1856 § 68; 1862 § 80; Consol. § 130.

76. A company shall be deemed to be unable to pay its debts:

(1) Whenever a creditor to whom the company is indebted in a sum exceeding fifty pounds has served due notice on the company, by leaving at their registered office a demand under his hand requiring the company to pay the sum so due, and the company have for the space of three weeks succeeding the service of such demand neglected to pay such sum or to secure or compound for the same to the satisfaction of the creditor:

(2) Whenever satisfaction of a judgment, decree, or order of any court in favour of any creditor in any suit or other legal proceeding cannot be obtained within ten days.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

1856 § 69; 1862 § 82; Consol. § 137. **Application for winding up to be by petition.**

77. Any application for the winding up of a company shall be by petition, and there shall be filed or lodged at the time when such petition is presented an affidavit verifying the same. Such petition may, in cases where the company is unable to pay its debts, be presented either by a creditor or a contributory, but where any other ground is alleged for winding up the company, a contributory alone is entitled to present the petition.

1856 § 70; 1862 §§ 85 to 91; Consol. §§ 140, 141. **Course to be pursued by a court on petition by a creditor.**

78. Upon the hearing of any petition presented by a creditor the court may dismiss such petition, with or without costs to be paid by the petitioner; or it may make an order directing the company on a day to be named in the order to pay or secure payment to the creditor of all monies that may be proved due to him, together with such costs as the court may direct; or the court may, if it so thinks fit, on the hearing of such petition, make an order for winding up the company in the first instance, or such other order as it deems just.

1856 § 71 and 140, 141. **Order for winding up company on creditor's petition.**

79. If at the expiration of the time named in such order such payment is not made, or security given, the court may thereupon make an order or decree for winding up the company.

1856 § 72 and 140, 141. **Course to be pursued by court on petition of contributory.**

80. Upon the hearing of a petition presented by a contributory the court may dismiss such petition, with or without costs to be paid by the petitioner, or it may make an order or decree directing the company to be wound up, or such other order or decree as it deems just.

1856 § 73; 1862 §§ 87, 88; Consol. §§ 142, 143. **Effect of the order for winding up company.**

81. After the date of such order or decree for winding up the company all suits and actions against the company shall, if the court so orders, be stayed; no director or other officer of the company shall without the sanction of the court dispose of any of the property or effects of the company, and no transfer of any shares shall be valid without the sanction of the court. A copy of such order or decree shall forthwith be reported by the company to the Registrar, who shall make a minute thereof in his books relating to the company.

1856 § 75; 1862 § 98; Consol. § 163. **Collection and application of assets.**

82. As soon as may be after making an order or decree for winding up the company the court shall cause the assets of the company to be collected, and applied in discharge of its liabilities, in a due course of administration.

1856 § 76; 1862 § 164; Consol. § 210. **Fraudulent preference.**

83. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

property as would, if made or done by any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of any creditor of such trader, shall, if made or done by or against any company registered under this Ordinance, be deemed, in the event of an order being made for winding up such company, to have been made or done by way of undue or fraudulent preference of such credit of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding up a company shall be deemed to correspond with the filing of a petition for adjudication of insolvency in the case of an individual trader, and any conveyance or assignment made by any company registered under this Ordinance of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

Reference to English Acts.

Power of court to examine persons suspected of having property of company.

84. Before or after an order for winding up the company has been made, any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company, may be compelled to give evidence and to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the court requisite to the full disclosure of any of the matters which the court thinks necessary to be inquired into for the purpose of winding up the company, in the same manner as a witness may be compelled to give evidence and to produce documents in any action or suit depending in such court.

1856 § 77; 1862 § 115; Consol. § 174.

Penalty on falsification of books.

85. If any director, officer, or contributory of any company registered under this Ordinance destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to defraud the creditors or contributories of such company, or any of them, every person so offending shall be deemed to be guilty of an offence, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

1856 § 79; 1862 § 166; Consol. § 216.

86. Where an order has been made for winding up a company under the fourth part of this Ordinance,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

1862 § 118. Consol. § 176.

Power to arrest shareholder about to abscond or to remove or conceal any of his property.

if upon the application of the official liquidator it appears to the court having jurisdiction in the matter of such winding up that there is probable cause for believing that any contributory to such company is about to quit the island, or otherwise abscond or conceal himself, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, the court may, by warrant directed to such person or persons as it thinks fit, cause such contributory to be arrested, and his books, papers, monies, securities for monies, goods, and chattels to be seized, and him and them to be safely kept until such time as the court may order. Any contributory who has been arrested, or whose goods or chattels have been seized under any such warrant as aforesaid, may, at any time after such arrest or seizure, apply to the court that issued the warrant to discharge him from custody, or to direct the delivery to him of any books, papers, monies, securities for money, goods, or chattels that may have been seized, and the court may order his discharge, or the release of his goods, upon such terms and subject to such conditions as it deems fit.

1856 § 80.

Attachments, sequestrations, and executions within three months of petition.

87. If any attachment, sequestration, or execution is issued against any company, by virtue whereof the property and effects of the company, or any of them, may be attached, sequestered, or taken in execution at any time within three months next before the filing or presentation of the petition for winding up the company, such attachment, sequestration, or taking in execution shall be void in favour of the liquidators of the company, as against the attaching, sequestrating, or execution creditor, whether the same has been completely executed or not; except that such creditor shall, if the attachment, sequestration, or execution would have been valid but for this provision, be entitled to receive out of any money already realized his costs of suit, and of the attachment, sequestration, or execution, or to proceed with the attachment, sequestration, or execution for the purpose of realizing such costs; but on satisfaction of such costs, or on tender of the amount by the liquidators to the creditor, it shall be lawful for the liquidators to recover the property so attached, sequestered, and taken in execution, and the proceeds of such property or the residue thereof, as the case may be. If property seized upon such attachment, sequestration, or execution shall

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

have already been sold, the proceeds shall be paid to the liquidators, less the costs of suit and of the attachment, sequestration, or execution.

Reference to English Acts.

Books of company to be evidence.

88. All books, accounts, and documents of the company, and of the liquidators hereinafter mentioned, shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters therein contained and purporting to be therein recorded.

1856 § 81; 1862 § 154; Consol. § 220.

Power of court to make calls.

89. The court may, at any time after making an order or decree for winding up a company and either before or after it has ascertained the sufficiency of the assets of the company or the debts in respect of which the several classes of contributories are liable, make calls on all or any of the contributories to the extent of their liability for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company and the costs of winding it up; and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same, and every such call shall be deemed a debt due to the company.

1856 § 82; 1862 § 102; Consol. § 166.

Recovery of calls.

90. Upon such calls being made the official liquidator or liquidators shall proceed immediately to collect the same, and shall monthly, or oftener, report to the court the names of defaulters, together with the amounts remaining unpaid of the calls made upon them respectively, and thereupon the said court shall order the payment of such calls or any of them within such time or times, and upon such notice or demand by advertisements or otherwise, as the said court may think fit; and in case any contributory, whether subject to the ordinary civil jurisdiction of the court or not, shall neglect to pay any part of the call within the time fixed by the court for the payment thereof, and shall not within such time show to the court sufficient cause for the non-payment thereof, the said court may make an order upon such contributory for the payment of the amount due upon the call, and such order shall have the force and effect of a decree or judgment of the court, and may be executed accordingly.

Calls may be made upon former shareholders in respect of shares.

91. The court may at any time make calls upon any former holder of a share who is liable under section 70 or 71 of this Ordinance in respect of such share, as well as upon the existing holder of that share; but any payment made or obtained from any contributory

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

in respect of a share shall operate for the benefit of every other contributory in respect of such share.

1856 § 83; 1862 § 103; Consol. § 167.

Payment of money into the bank.

92. All monies received under the direction of the court on account of the sale or conversion of any of the assets of the company, or in respect of calls made on any contributories, or of any other matter, with the exception of such balance, if any, as the official liquidators may, with the sanction of the court, retain in their hands for the payment of current expenses, shall be paid into one of the banks as the court may direct; and no money standing to such account shall be drawn except upon cheques signed in such manner as the court directs.

1856 § 84; 1862 § 85; Consol. § 140.

Power of the court to grant injunction or interdict.

93. The court may, at any time after the presentation of a petition for winding up a company, and either before or after making an order for winding up the same, upon the application of any creditor or contributory of such company, restrain further proceedings in any suit against the company, or appoint a receiver of the estate and effects of the company; it may also, by notice or advertisement, require all creditors to present and prove their claims within a certain time, or be precluded from the benefit of any distribution which may be made before such claim is proved.

1856 § 85; 1862 § 89; Consol. § 144.

Power of court to stay proceedings.

94. The court may, at any time after an order has been made for winding up a company, upon the application of any creditor or contributory of the company, and upon proof to the satisfaction of the court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit.

1856 § 86; 1862 § 109; Consol. § 170.

Power of court to adjust rights of contributories.

95. As soon as the creditors are satisfied the court shall proceed to adjust the rights of the contributories amongst themselves, and to distribute any surplus that may remain amongst the parties entitled thereto; and for the purposes of such adjustment it may make calls on the contributories to the extent of their liability for the payment of such sums as it deems necessary; and it may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same. Nothing in this section shall preclude any former shareholder entitled to indemnity under section 74 of this Ordinance from enforcing such indemnity by due course of law.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

Power of court to order costs.

96. The court may make such order as to the priority and payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company as it thinks just. 1862 § 110; Consol. § 171.

Official Liquidators.

Appointment of official liquidators.

97. For the purpose of conducting the proceedings in winding up a company and assisting the court therein, there shall be appointed a person or persons to be called an official liquidator or official liquidators, and such appointment shall be made as follows, that is to say: 1856 § 88; 1862 § 92; Consol. § 149.

(1) The court having jurisdiction may, after requiring due security, should the court deem such security necessary, appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidators; it may from time to time remove any person or persons so appointed, and fill up any vacancy occasioned by such removal, or by the death or resignation of any such appointee or appointees; if one person only is appointed, he shall have all the powers hereby given to several liquidators; if more persons than one are appointed, the court shall declare whether any act hereby required or authorized to be done by the official liquidators may be done by all or any one or more of such persons:

(2) The court having jurisdiction shall, in the appointment of an official liquidator or official liquidators, consult the interest of both the creditors and contributories, and hear such creditors or contributories as it thinks fit to hear with respect to such appointment. It may, unless both the creditors and contributories concur in the appointment of a single liquidator, appoint one or more liquidator or liquidators to act on behalf of each of such parties. It may declare that in case of difference any act may be done by a majority of liquidators, or it may require the liquidators in all cases of difference to apply to the court. It may do anything hereby authorized to be done, either upon the first appointment

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

of a liquidator or at any subsequent stage of the winding up; but notwithstanding anything herein contained it shall not be obligatory on the court to appoint more than one liquidator.

1856 § 89; 1862 § 94; Consol. §§ 149, 150.

98. The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators of the particular company in respect of which he or they is or are appointed, and not by his or their individual name or names; he or they shall take into his or their custody all the property and effects of the company, and shall perform such duties in reference to the winding up of the company as may be imposed by the court.

Style and duties of official liquidators.

1856 § 90; 1862 § 95; Consol. § 157.

99. The official liquidator or liquidators shall have power with the sanction of the court to do the following things:

Powers of official liquidators.

To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company:

To carry on the business of the company, so far as may be necessary for the beneficial winding up of the same:

To sell the immovable and movable property of the company by public or private contract, with power, if they think fit, to transfer the whole thereof to any person or company, or to sell the same in parcels:

To execute in the name and on behalf of the company all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:

To refer disputes to arbitration, and compromise any debts or claims. Such power of compromising debts and claims shall be deemed to extend to the compromise of any calls or debts due from any contributory or alleged contributory to the company on receipt of a smaller sum in lieu of a greater, or upon such terms as may be agreed upon, with power to the liquidators to take any security for any calls or debts so due, and to give effectual discharges on completion of such compromise: Provided that no such compromise shall be made by any official liquidator without giving such notice to creditors, and subject to such conditions as to obtaining the consent of creditors, or any portion of them, as the court

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

may direct, and that no such compromise shall be made by the liquidators appointed on the voluntary winding up of a company except with the sanction of a special resolution:

To prove, claim, rank, and draw a dividend in the matter of the bankruptcy or insolvency or sequestration of any contributory for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance in the matter of insolvency or sequestration as a separate debt due from such insolvent, and rateably with the other separate creditors:

To draw, accept, make, and indorse any bill of exchange or promissory note, and also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money; and the drawing, accepting, making, or indorsing of every such bill of exchange or promissory note as aforesaid, on behalf of the company, shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or indorsed by such company in the course of carrying on the business thereof:

To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Appointment of clerks to assist official liquidators.

100. The official liquidators may, with the approval of the court, appoint such clerks or officers as may be necessary to assist them in the performance of their duties. There shall be paid to such agent, clerks, and officers such remuneration, by way of fees or otherwise, as may be allowed by the court. 1856 § 91; 1862 § 97; Consol. § 151 (1).

Remuneration of official liquidator.

101. There shall be paid to the official liquidators such salary or remuneration by way of percentage or otherwise as the court directs. 1856 § 92; 1862 § 93; Consol. § 149(8).

Dissolution of company.

102. When the affairs of the company have been completely wound up, the court shall make an order declaring the company to be dissolved from the date of such order, and the company shall be dissolved accordingly. 1856 § 93; 1862 § 111; Consol. § 172.

Registrar to make minute of dissolution of company.

103. Any order so made shall be reported by the official liquidators to the Registrar, who shall make a minute accordingly in his books of the dissolution of such company. 1856 § 94; 1862 § 112; Consol. § 172.

104. The Judges of the Supreme Court may, as often as circumstances require, make such rules concerning

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

1856 § 95.

the mode of proceeding to be had for winding up a company, and the fees to be paid to advocates and proctors in respect thereof, as may from time to time seem necessary; but until such rules are made the general practice of the court, including its practice in insolvency cases, shall, so far as the same is applicable to and not inconsistent with this Ordinance, apply to all proceedings for winding up a company, and official liquidators shall be considered as occupying in all respects the place of an assignee.

Power of the Judges of the Supreme Court to make rules.

Voluntary Winding up of the Company.

1856 § 102; 1862 § 129; Consol. §§ 69, 182.

105 A company may be wound up voluntarily—

(1) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved:

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

Circumstances under which company may be wound up voluntarily.

1862 § 131; Consol. § 184.

Whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof, but its corporate state and all its corporate powers shall, notwithstanding any provision to the contrary in its articles of association, continue until the affairs of the company are wound up.

Effect of voluntary winding up on status of company.

1856 § 103; 1862 § 132; Consol. § 185.

106. Notice of any special resolution to wind up a company voluntarily shall be given in the *Government Gazette*.

Notice of resolution to wind up voluntarily.

1856 § 104; 1862 § 133; Consol. § 186.

107. The following consequences shall ensue upon the voluntary winding up of a company:

(1) The property of the company shall be applied in satisfaction of its liabilities, and subject thereto, and, unless it be otherwise provided by the articles of association, be distributed amongst the shareholders in proportion to their shares:

(2) Liquidators may be appointed for the purpose of winding up the affairs of the company and distributing the property:

Consequences of voluntary winding up.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(3) The company in general meeting may appoint such person or persons as it thinks fit to be a liquidator or liquidators, and may fix the remuneration to be paid to them:

(4) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him:

(5) When several liquidators are appointed, every power hereby given may be exercised by any two of them:

(6) The liquidators may, at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, or the debts in respect of which the several classes of contributories are liable, call on all or any of the contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts of the company and the costs of winding it up; and they may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same:

(7) The liquidators shall have all powers hereinbefore vested in official liquidators, and may exercise the same without the intervention of the court:

(8) All books, papers, and documents in the hands of the liquidators shall, at all reasonable times, be open to the inspection of the shareholders.

(9) When the creditors are satisfied the liquidators shall proceed to adjust the rights of the contributories amongst themselves; and for the purposes of such adjustment they may make calls on all contributories to the extent of their liability for any sums they may deem necessary, and they may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same:

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

1862 § 142; Consol. § 195.

(10) As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding up has been conducted, and the property of the company disposed of; and such account, with the vouchers thereof, shall be laid before such person or persons as may be appointed by the company to inspect the same; and upon such inspection being concluded the liquidators shall proceed to call a general meeting of the shareholders for the purpose of considering such account; but no such meeting shall be deemed to be duly held unless one month's previous notice, specifying the time, place, and object of such meeting, has been published in the *Government Gazette*.

1862 § 143; Consol. § 195.

(11 Such general meeting shall not enter upon any business except the consideration of the account; but the meeting may proceed to the consideration thereof notwithstanding the quorum required by any regulation of the company to be present at general meetings is not present thereat, and if on consideration the meeting is of opinion that the affairs of the company have been fairly wound up they shall pass a resolution to that effect, and thereupon the liquidators shall publish a notice of such resolution in the *Government Gazette*, and shall also make a return to the Registrar of such resolution, and on the expiration of one month from the date of the registration of such return the company shall be deemed to be dissolved:

1862 § 139 Consol. § 194.

(12) If within one year after the passing of the resolution for winding up the affairs of the company such affairs are not wound up, the liquidators shall immediately thereafter make up an account showing the state of the affairs, and the progress which has been made in winding up down to that date; and they shall add thereto a report stating the reason why the winding up has not been completed, and a general meeting shall be called to consider the same, and so on from year to year until the winding up of the affairs of the company is completed.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

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

108. All costs, charges and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims. 1856 § 104; 1862 § 144; Consol. § 196.

Saving of rights of creditors.

109. The voluntary winding up of a company shall not prejudice the right of any creditor of such company to institute proceedings for the purpose of having the same wound up by the court. 1856 § 105; 1862 § 145; Consol. § 197.

Appeals may be taken against decisions or orders of District and Police Courts.

110. All decisions and orders of the District and Police Courts made under the authority of this Ordinance shall be subject to an appeal to the Supreme Court; and every such appeal shall be brought on and prosecuted in such manner and shall be subject to such regulations as now exist, or shall be hereafter made by any rule or order of the Supreme Court.

SCHEDULE.

A.—Table of Fees.

Fees for registration, &c.

	£	s.	d.
For registration of a company whose nominal capital does not exceed £1,000	5	0	0
For every £1,000 of nominal capital, or part of £1,000 after the first £1,000, and up to £100,000, an additional fee of	0	5	0
For registration of any increase in the capital of a company, for every £1,000 or part of £1,000 up to £100,000 in the whole	0	5	0
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Ordinance, the same fee as is charged for registering a new company.			
For registering any document hereby required or authorised to be registered, other than the memorandum of association	0	5	0
For making a record of any fact hereby authorized or required to be recorded by the Registrar of Companies, a fee of	0	5	0
For inspection of any document kept by the Registrar	0	1	0
For every certified copy or extract of such document, for every sheet of 120 words or any less quantity ...	0	0	9

B.—Memorandum of Association of "The——— Company, Limited."

Memorandum of Association.

1. The name of the company is "——— Company, Limited."
2. The registered office of the company is to be established in .
3. The objects for which the company is established are "to———."
4. The liability of the shareholders is limited.
5. The nominal capital of the company is———*pounds*, divided into *one hundred* shares of———*pounds* each.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names and Addresses of Subscribers.	Number of Shares taken by each Subscriber.
1. *A. B. of*——— ...	20
2. *B. C. of*——— ...	25
3. *C. D. of*——— ...	10
4. *D. E. of*——— ...	10
5. *E. F. of*——— ...	15
6. *F. G. of*——— ...	10
7. *G. H. of*——— ...	10
Total shares taken ...	100

Dated the———day of———.

Witness to the above signatures,
A. B., No. 13.

C.—Regulations for Management of the Company.

Shares.

1856 Table ; 1862, Table A, revised 1906; Consol. Table A.

Articles of Association.

1. Every person taking any share in the company shall testify his acceptance thereof by writing under his hand, in such form as the company from time to time directs.

2. The company may from time to time make such calls upon the shareholders in respect of all monies unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call by publication in the *Gazette*, and each shareholder shall be liable to pay the amount of calls so made to the persons and at the time and places appointed by the company.

3. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

4. If before or on the day appointed for payment any shareholder does not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate of nine pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

5. The company may, if they think fit, receive from any of the shareholders willing to advance the same all or any part of the monies due upon their respective shares beyond the sums actually called for; and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the shareholder paying such sum in advance and the company agree upon.

6. If several persons are joint holders of any share, any one of such persons may give effectual receipt for any dividend payable in respect of such share.

7. The company may decline to register any transfer of shares made by a shareholder who is indebted to them.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

8. Every shareholder shall, on payment of one shilling, be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon.

9. If such certificate is worn out or lost, it may be renewed on payment of one shilling.

10. The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

11. The executors or administrators or heirs of a deceased shareholder shall be the only persons recognized by the company as having any title to his share.

12. Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, or in any way other than by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the company.

13. Any person who has become entitled to a share in any way other than by transfer may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share.

14. The person so becoming entitled shall testify such election by executing to his nominee a transfer of such share.

15. The instrument of transfer shall be presented to the company, accompanied with such evidence as they may require to prove the title of the transferor, and thereupon the company shall register the transferee as a shareholder.

Forfeiture of Shares.

16. If any shareholder fails to pay any call due on the appointed day, the company may, at any time thereafter during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with any interest that may have accrued by reason of such non-payment.

17. The notice shall name a further day, and a place or places, being a place or places at which calls of the company are usually made payable, on and at which such call is to be paid. It shall also state that in the event of non-payment at the time and place appointed the shares in respect of which such call was made will be liable to be forfeited.

18. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect.

19. Any shares so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company think fit.

20. Any shareholder whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing upon such shares at the time of the forfeiture.

Increase of Capital.

21. The company may, with the sanction of the company previously given in general meeting, increase its capital.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

22. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

General Meeting.

23. The first general meeting shall be held at such time, not being more than twelve months after the incorporation of the company, and at such place as the directors may determine.

24. Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in each year, at such place as may be determined by the directors.

25. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

26. The directors may whenever they think fit, and they shall, upon a requisition made in writing by any number of shareholders holding in the aggregate not less than one-fifth part of the shares of the company, convene an extraordinary general meeting.

27. Any requisition so made by the shareholders shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

28. Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other shareholders holding the required number of shares, may themselves convene a meeting.

29. Seven days' notice at the least, specifying the place and the hour of meeting and the purpose for which any general meeting is to be held, shall be given by advertisement, or in such other manner, if any, as may be prescribed by the company.

30. Any shareholder may, on giving not less than three days' previous notice of any resolution, submit the same to a meeting.

31. Such notice shall be given by leaving a copy of the resolution at the registered office of the company.

32. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of shareholders is present at the commencement of such business, and such quorum shall be ascertained as follows; that is to say, if the shareholders belonging to the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every additional five shareholders up to fifty; and one for every ten additional shareholders after fifty, with this limitation, that no quorum shall in any case exceed forty.

33. If within one hour from the time appointed for the meeting the required number of shareholders is not present, the meeting, if convened upon the requisition of the shareholders, shall be dissolved. In any other case it shall stand adjourned to the following day, at the same time and place; and if at such adjourned meeting the required number of shareholders is not present, it shall be adjourned *sine die*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

34. The chairman (if any) of the board of directors shall preside as chairman at every meeting of the company.

35. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the shareholders present shall choose some one of their number to be chairman of such meeting.

36. The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

37. At any general meeting, unless a poll is demanded by at least five shareholders, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

38. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

Votes of Shareholders.

39. Every shareholder shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares.

40. If any shareholder is a lunatic or idiot or prodigal he may vote by his curator; and if any shareholder is a minor he may vote by his guardian, or any one of his guardians, if more than one.

41. If one or more persons are jointly entitled to a share or shares, the person whose name stands first in the register of shareholders as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

42. No shareholder shall be entitled to vote at any meeting unless all calls due from him have been paid, nor until he shall have been possessed of his shares three months, unless such shares shall have been acquired, or shall have come by bequest, or by marriage, or by succession to an intestate's estate, or by operation of law, or by any deed of settlement, after the death of any person who shall have been entitled for life to the dividends of such shares.

43. Votes may be given either personally or by proxies; a proxy shall be appointed in writing under the hand of the appointor; or if such appointor is a corporation under their common seal.

44. No person shall be appointed a proxy who is not a shareholder, and the instrument or mandate appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote; but no instrument or mandate appointing a proxy shall be valid after the expiration of one month from the date of its execution.*

* A proxy must bear a 5-cent stamp. See Ordinance No. 22 of 1909, schedule B.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Directors.

45. The number of the directors and the names of the first directors shall be determined by the subscribers to the memorandum of association.

46. Until directors are appointed the subscribers to the memorandum of association shall for all purposes of this Ordinance be deemed to be directors.

Powers of Directors.

47. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by this Ordinance or by the articles of association, if any, declared to be exercisable by the company in general meeting, subject, nevertheless, to any regulations of the articles of association, to the provisions of this Ordinance, and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Disqualification of Directors.

48. The office of director shall be vacated—

If he holds any other office or place of profit under the company:

If he becomes insolvent:

If he is concerned in or participates in the profits of any contract with the company:

If he participates in the profits of any work done for the company.

But the above rules shall be subject to the following exceptions: That no director shall vacate his office by reason of his being a shareholder in any incorporated company which has entered into contracts with or done any work for the company of which he is director; nevertheless, he shall not vote in respect of such work or contract, and if he does so vote his vote shall not be counted, and he shall incur a penalty not exceeding twenty pounds.

Rotation of Directors.

49. At the first ordinary meeting after the incorporation of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

50. The directors who are to retire during the first and second years ensuing the incorporation of the company shall, unless the directors agree among themselves, be determined by ballot; in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

51. A retiring director shall be eligible for re-election.

52. The company, at the general meeting at which any directors retire in manner aforesaid, shall fill up the vacated offices by electing a like number of persons.

53. If at any meeting at which an election of directors ought to take place no such election is made, the meeting shall stand adjourned till the next day, at the same time and place; and if at such adjourned meeting no election takes place, the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

former directors shall continue to act until new directors are appointed at the first ordinary meeting of the following year.

54. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation they are to go out of office.

55. Any casual vacancy in the board of directors, may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

Proceedings of Directors.

56. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman, in addition to his original vote, shall have a casting vote. A director may at any time summon a meeting of the directors.

57. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

58. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit, who shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed by the directors.

59. A committee may elect a chairman of their meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

60. A committee may meet and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present, and in case of an equal division of votes the chairman shall, in addition to his original vote, have a casting vote.

61. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors, or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

62. The directors shall cause minutes to be made in a book or books provided for and used solely for that purpose—

(1) Of all appointments of officers made by the directors;

(2) Of the names of the directors present at each meeting of directors and committees of directors;

(3) Of all orders made by the directors and committees of directors; and

(4) Of all resolutions and proceedings of meetings of the company and of the directors and committees of directors.

And any such minute as aforesaid, if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, shall be receivable in evidence without any further proof.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

63. The company in general meeting may, by a special resolution, remove any director before the expiration of his period of office, and appoint another qualified person in his stead; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Dividends.

64. The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares.

65. No dividends shall be payable except out of the profits arising from the business of the company and with the sanction of the directors.

66. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof, and the directors may invest the sum so set apart as a reserve fund upon such securities as they, with the sanction of the company, may select.

67. The directors may deduct from the dividends payable to any shareholder all such sums of money as may be due from him to the company on account of calls or otherwise.

68. Notice of any dividend that may have been declared shall be given to each shareholder, or sent by post or otherwise to his registered place of abode; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the company.

69. No dividend shall bear interest as against the company.

Accounts.

70. Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

71. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

72. A balance sheet shall be made out in every year, and laid before the general meeting of the company, and such balance sheet shall contain a summary of the property and liabilities of the company, arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

73. A printed copy of such balance sheet shall, seven days previously to such meeting, be delivered at or sent by post to the registered address of every shareholder.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Audit.

74. The accounts of the company shall be examined, and the correctness of the balance sheet ascertained, by one or more auditors to be elected by the company in general meeting.

75. If not more than one auditor is appointed, all the provisions herein contained relating to auditors shall apply to him.

76. The auditors need not be shareholders in the company. No person is eligible as an auditor who is interested otherwise than as a shareholder in any transaction of the company, and no director or other officer of the company is eligible during his continuance in office.

77. The election of auditors shall be made by the company at their ordinary meeting, or, if there are more than one, at their first ordinary meeting in each year.

78. The remuneration of the auditors shall be fixed by the company at the time of their election.

79. Any auditor shall be re-eligible on his quitting office.

80. If any casual vacancy occurs in the office of auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

81. If no election of auditors is made in manner aforesaid, the Governor may, with the advice and consent of the Executive Council, and on the application of one-fifth in number of the shareholders of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.

82. Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

83. Every auditor shall have a list delivered to him of all books kept by the company, and he shall at all reasonable times have access to the books and accounts of the company. He may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the company.

84. The auditors shall make a report to the shareholders upon the balance sheet and accounts, and in every such report they shall state whether, in their opinion, the balance sheet is a full and fair balance sheet containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs; and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

85. Notices requiring to be served by the company upon the shareholders may be served either personally or by leaving the same or sending them through the post in a letter addressed to the shareholders at their registered places of abode.

86. All notices directed to be given to the shareholders shall, with respect to any share to which persons are jointly entitled, be given to whichever of the said persons is named first in the register of shareholders, and notice so given shall be sufficient notice to all the proprietors of such share.

87. All notices required by this Ordinance to be given by advertisement shall be published in the *Government Gazette*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Form of Balance Sheet Referred to in Table.

Dr. Balance Sheet of the ——————Company, made up to ——————, 18— *Cr.*

Capital and Liabilities.			£ s.d.	£ s. d.	Property and Assets.			£ s.d.	£ s. d.
I. *Capital.*	1	Showing: The total amount received from the shareholders; showing also: (*a*) The number of shares. (*b*) The amount paid per share. (*c*) If any arrears of calls, the nature of the arrears and the names of the defaulters. Any arrears due from any director or officer of the company to be separately stated. (*d*) The particulars of any forfeited shares.			III. *Property held by the Company.*	4	Showing: Immovable property, distinguishing: (*a*) Land. (*b*) Buildings. (*c*) Leasehold.		
	2	Showing: The amount of loans on mortgage or debenture bonds.				5	Movable property, distinguishing: (*d*) Stock in trade. (*e*) Plant. The cost to be stated, with deductions for deterioration in value, as charged to the reserve fund, or profit and loss.		
II. *Debts and Liabilities of the Company.*	3	The amount of debts owing by the company, distinguishing: (*a*) Debts for which acceptances have been given. (*b*) Debts to tradesmen for supplies of stock in trade and other articles. (*c*) Debts for law expenses. (*d*) Debts for interest on loans. (*e*) Unclaimed dividends. (*f*) Debts not enumerated above.			IV. *Debts owing to the Company.*	6	Showing: Debts considered good for which the company hold bills or other securities.		
						7	Debts considered good for which the company hold no security.		
						8	Debts considered doubtful and bad. Any debt due from a director or other officer of the company to be separately stated.		
					V. *Cash and Investments.*		Showing: The nature of investment and rate of interest. The amount of cash, where lodged, and if bearing interest.		
VI. *Reserve Fund.*		Showing: The amount set aside from profits to meet contingencies.							
VII. *Profit and Loss.*		Showing: The disposable balance for payment of dividend, &c.							
Contingent Liabilities.		Claims against the company not acknowledged as debts. Monies for which the company is contingently liable.							

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

D.—Summary of Capital and Shares of the ——Company, Limited, made up to the ——day of——, 18—.

Nominal capital, £——, divided into ——shares of £——each.

Number of shares taken up to the——day of——, ——.

There has been called up on each share, £——.

Total amount of calls received, £——.

Total amount of calls unpaid, £——.

Total amount of shares forfeited, £——.

List of Persons holding Shares in the——Company, Limited, on the——day of——, and of Persons who have held Shares therein at any time during the year immediately preceding the said——day of——, showing their Names and Addresses, and an Account of the Shares so held.

	Names.		Addresses and Occupations.		Account of Shares.					Remarks.
Folio in Register, Ledger containing particulars.	Surname.	Christian Name.	Address.	Occupation.	Shares held by existing Shareholders on the ——day of ——, 18—.	Additional Shares held by existing Shareholders during the preceding year.		Shares held by persons no longer Shareholders.		
						Number.	Date of Transfer.	Number.	Date of Transfer.	

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

E.—Form of Transfer of Shares.

I, ———, of ——— (in consideration of the sum of £——— paid to me by ———, of ———).* do hereby transfer to the said ——— share (*or* shares), numbered ———, in the ——— Company, Limited, standing in my name in the books of the company, to hold unto the said ———, his heirs, executors, administrators, and assigns, subject to the several conditions on which I hold the same; and I, the said ———, do hereby agree to take the said share (*or* shares), subject to the same conditions.

As witness our hands the ——— day of ———, 18—.

F.—Form of Mortgage.

The ——— Company, Limited (in consideration of the sum of £——— paid to such company by ——— of ———), mortgages unto him, his heirs, executors, administrators, and assigns, the following ———

Given under the seal of the said company this ——— day of ———, 18—.

4th September, 1861.

No. 4 of 1888.

An Ordinance to enable Joint Stock Companies to compound for the Stamp Duties payable on certain Shares issued by them unstamped.

Preamble.

WHEREAS by schedule B to the Ordinance No. 43 of 1884,† intituled "An Ordinance to consolidate the Stamp Duties leviable in this Colony," it is provided that every certificate or other document evidencing the right or title of the holder thereof, or any other person, either to any share, scrip, or stock in or of any company or association, or to become proprietor of any share, scrip, or stock in or of any company or association, shall bear a stamp of five cents:

And whereas several of the joint stock companies incorporated under "The Joint Stock Companies' Ordinance, 1861," have inadvertently, and through ignorance of the provisions of the above in part recited schedule of the Ordinance No. 43 of 1884,† issued share

* The words within brackets will be omitted if no consideration is paid.

† The Stamp Ordinance, 1884, repealed by No. 3 of 1890, now replaced by Ordinance No. 22 of 1909.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

certificates without attaching thereto the necessary stamp of five cents:

And whereas it is expedient to provide for the recovery of the stamp duty so due and unpaid, and to remove all doubts as to the validity of the shares so issued: Be it therefore enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof, as follows:

Joint stock companies empowered to compound for the payment of duty on unstamped shares heretofore issued.

1 It shall be lawful for any joint stock company now incorporated under "The Joint Stock Companies' Ordinance, 1861," to compound for the payment of duty on all unstamped share certificates heretofore issued, on the following conditions: that within six months from the passing of this Ordinance the said joint stock company do forward to the Commissioner of Stamps an affidavit sworn to by the secretary, or some officer of the said company, setting out the number of share certificates issued by the said company since the passing of the Ordinance No. 43 of 1884,* which have not been so stamped as aforesaid, and do pay to the Commissioner of Stamps the amount of the duty due in respect of the same, together with a penalty of ten rupees.

Commissioner to issue certificate declaring the duty leviable in respect of shares has been paid.

2 The Commissioner of Stamps, on receipt of the said affidavit and of the amount of the duty due in respect of the said shares and of the penalty imposed by section 1 of this Ordinance, shall issue a certificate under his hand to the joint stock company, declaring that all the duty leviable in respect of the said shares has been duly paid.

After issue of certificate all shares issued to be valid.

3 After the issuing of the aforesaid certificate all share certificates issued by the said joint stock company subsequent to the passing of the Ordinance No. 43 of 1884* and prior to the passing of this Ordinance, shall be admitted for all purposes to be good and available in law as if duly stamped at the date of the execution thereof.

28th November, 1888.

* The Stamp Ordinance, 1884. repealed by No. 3 of 1890, now replaced by Ordinance No. 22 of 1909.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

A similar provision has been made in regard to new share certificates and debenture stock by the Stamp Ordinance No. 22 of 1909 § 5, as follows:—

THE STAMP ORDINANCE, 1909.

Duty on share certificates may be compounded by Governor's authority.

5 (1) The Governor may, with the advice of the Executive Council, by a notification published in the *Government Gazette* ..... authorize any joint stock company incorporated under "The Joint Stock Companies' Ordinances, 1861 to 1907," or any Ordinance for the time being in force relating to the incorporation and registration of joint stock companies in Ceylon, to compound for the payment of stamp duty payable on share certificates specified in schedule B to this Ordinance on the following conditions :—

(i) That in the case of a joint stock company now incorporated issuing new certificates upon a new issue of shares out of capital, whether original or increased, the company shall forward to the Commissioner of Stamps a statement signed by the secretary or a director of the Company setting forth the total face value of the shares forming the new issue, and shall pay to the Commissioner of Stamps a duty of five cents for every one hundred rupees of the said new issue.

(ii.) That in the case of a joint stock company hereafter incorporated the Company shall forward to the Commissioner of Stamps a statement signed by the secretary or a director of the company setting forth the total face value of the shares forming any issue, and shall pay to the Commissioner of Stamps a duty of five cents for every one hundred rupees of such issue.

(iii.) That in the case of a joint stock company creating or issuing debenture stock, the company shall forward to the Commissioner of Stamps a statement signed by the secretary or a director of the company setting forth the total value of the debenture stock to be created and issued, and shall pay to the Commissioner of Stamps a duty of five cents for every one hundred rupees of such debenture stock.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(iv.) That every share certificate issued under the above conditions shall bear on its face a certificate under the hand of the secretary of the company that the stamp duty has already been paid in pursuance of this section. Such certificate shall be as nearly as circumstances permit in the following form :

> It is hereby certified that the stamp duty payable in respect of the capital issued has been commuted in terms of section 5 of "The Stamp Ordinance, 1909."

(2) All share certificates, the payment of stamp duty payable whereon shall have been compounded for as aforesaid, shall be admitted for all purposes to be good and available in law as if duly stamped.

Stamp on share certificate.

[The stamp duty leviable on share certificates is fixed by Ordinance 22 of 1909, Schedule B, item 50, as follows]

SHARE CERTIFICATE—On each Rs. 100 of the face value of the shares, scrip, stock, or debenture stock, to which the certificate relates 0 5

Exemptions.

(*a*) New share certificates issued upon a subdivision or consolidation of existing shares forming the capital (original, increased, or reduced) of any joint stock company.

(*b*) New share certificates issued in lieu of share certificates lost or destroyed, or in lieu of existing share certificates, but for a greater or less number of shares, as the case may be.

No. 6 of 1888.

An Ordinance to amend "The Joint Stock Companies' Ordinance, 1861."

Preamble.

WHEREAS "The Joint Stock Companies' Ordinance, 1861," requires in some respects to be amended: It is hereby enacted by the Governor of Ceylon, by and with the advice and consent of the Legislative Council thereof, as follows:

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

Short title.

1 This Ordinance may be cited for all purposes as "The Joint Stock Companies' Ordinance, 1888."

Ordinance to be construed as one with Ordinance No. 4 of 1861.

2 "The Joint Stock Companies' Ordinance, 1861," is hereinafter referred to as "the principal Ordinance," and the principal Ordinance and this Ordinance are hereinafter distinguished, and may be cited for all purposes, as "The Joint Stock Companies' Ordinances, 1861 and 1888," and this Ordinance shall, so far as is consistent with the tenor thereof, be construed as one with the principal Ordinance; and the expression "this Ordinance" in the principal Ordinance, and any expression referring to the principal Ordinance which occurs in any Ordinance or other document, shall be construed to mean the principal Ordinance as amended by this Ordinance.

Commencement of Ordinance.

3 This Ordinance shall come into force on the first day of January, 1889, which date is hereinafter referred to as the commencement of this Ordinance.

1877 § 3; Consol. § 46.

Construction of capital and powers to reduce capital.

4 The word "capital" as used in this Ordinance shall include paid up capital, and the power to reduce capital conferred by this Ordinance shall include a power to cancel any lost capital or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company; and to the extent to which such liability is not extinguished or reduced, it shall be deemed to be preserved.

1867 § 9; Consol. § 46.

Power to company to reduce capital.

5 Any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the court is registered by the Registrar of joint stock companies, as is hereinafter mentioned.

1867 § 10; Consol. § 48.

Company to add "and reduced" to its name for a limited period.

6 The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the court may fix, the words "and reduced" as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the company, within the meaning of the principal Ordinance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

Company to apply to the court for an order confirming reduction.

7 A company which has passed a special resolution for reducing its capital may apply to the court by petition for an order confirming the reduction; and on the hearing of the petition the court, if satisfied that, with respect to every creditor of the company who, under the provisions of this Ordinance, is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged, or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit. 1867 § 11 Consol. §§ 47, 50.

Definition of "the court."

8 The expression "the court" shall in this Ordinance mean the District Court which has jurisdiction to make an order for winding up the petitioning company, and the 68th section of the principal Ordinance shall be construed as if that section included proceedings under this Ordinance, and the court may in any proceedings under this Ordinance make such order as to costs as it deems fit. 1867 § 12.

Creditors may object to reduction, and list of objecting creditors to be settled by the court.

9 Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction and to be entered in the list of creditors who are so entitled to object. 1867 § 13; Consol. § 49.

The court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered, or to be excluded from the right of objecting to the proposed reduction.

Court may dispense with consent of creditor on security being given for his debt.

10 Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the court may, if it think fit, dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating in such manner as the court may direct a sum of such amount as is hereinafter mentioned; that is to say: 1867 § 14; Consol. § 49.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

(1) If the full amount of the debt or claim of the creditor is admitted by the company, or, though not admitted, is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated.

(2) If the full amount of the debt or claim of the creditor is not admitted by the company, and is not such as the company are willing to set apart and appropriate, or if the amount is contingent, or not ascertained, then the court may, if it think fit, inquire into and adjudicate upon the validity of such debt or claim and the amount for which the company may be liable in respect thereof, in the same manner as if the company were being wound up by the court; and the amount fixed by the court on such inquiry and adjudication shall be set apart and appropriated.

Dispensing with consent of creditors and of adding the words "and reduced." in certain cases.

1877 § 4; Consol. §§ 48, 49.

11 Where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid up capital—

(1) The creditors of the company shall not, unless the court otherwise direct, be entitled to object, or required to consent to the reduction; and

(2) It shall not be necessary, before the presentation of the petition for confirming the reduction, to add, and the court may, if it thinks it expedient so to do, dispense altogether with the addition of the words "and reduced."

In any case that the court thinks fit so to do, it may require the company to publish in such manner as it thinks fit the reasons for the reduction of its capital, or such other information in regard to the reduction of its capital as the court may think expedient with a view to give proper information to the public in relation to the reduction of its capital by a company, and, if the court thinks fit, the causes which led to such reduction.

Order and minute to be registered.

1867 § 15; Consol. § 51.

12 The Registrar of joint stock companies, upon the production to him of an order of the court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order and of a minute

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(approved by the court), showing with respect to the capital of the company as altered by the order the amount of such capital, the number of shares in which it is to be divided, the amount of each share, and the amount (if any) proposed to be deemed to have been paid upon each share at the date of the registration, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect. Reference to English Acts.

Notice of such registration shall be published in such manner as the court may direct.

The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Ordinance with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute.

Minute to form part of memorandum of association.

13 The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity, and subject to the same alterations, as if it had been originally contained in the memorandum of association, and, subject as in this Ordinance mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute. 1867 § 16; Consol. § 52.

Saving of rights of creditors who are ignorant of proceedings.

14 If any creditor who is entitled in respect of any debt or claim to object to the reduction of the capital of a company under this Ordinance is, in consequence of his ignorance of the proceedings taken with a view to such reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after such reduction the company is unable within the meaning of the 76th section of the principal Ordinance to pay to the creditor the amount of such debt or claim, every person who was a member of the company at the date of the registration of the order and minute relating to the reduction of the capital of the company shall be liable to contribute for the payment of such debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day prior to such registration, and on the company being wound up, the court, on the application 1867 § 17; Consol. § 53.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

of such creditor, and on proof that he was ignorant of the proceedings taken with a view to the reduction, or of their nature and effect with respect to his claim, may, if it think fit, settle a list of such contributories accordingly, and make and enforce calls and orders on the contributories settled on such list in the same manner in all respects as if they were ordinary contributories in a winding up; but the provisions of this section shall not affect the rights of the contributories of the company among themselves.

1867 § 18; Consol. § 52. Copy of registered minute.

15 A minute when registered shall be embodied in every copy of the memorandum of association issued after its registration, and if any company makes default in complying with the provisions of this section, it shall incur a penalty not exceeding ten rupees for each copy in respect of which such default is made, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

1867 § 19; Consol. § 54. Penalty on concealment of name of creditor.

16 If any director, manager, or officer of the company wilfully conceals the name of any creditor of the company who is entitled to object to the proposed reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor of the company, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall be guilty of an offence, and shall be punishable by such punishment as the court before which a conviction therefor shall be obtained shall award.

1867 § 20. Power to make rules extended to making rules concerning matters in this Ordinance.

17 The powers of making rules concerning winding up conferred on the Judges of the Supreme Court by the 104th section of the principal Ordinance shall respectively extend to making rules concerning matters in which jurisdiction is by this Ordinance given to the court which has the power of making an order to wind up a company; and until such rules are made the practice of the court in matters of the same nature shall, so far as the same is applicable, be followed.

1877 § 5. Power to reduce capital by the cancellation of unissued shares.

18 Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital by cancelling any shares which at the date of the passing of such resolution have not been taken, or agreed to be taken, by any person, and the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

provisions hereinbefore contained shall not apply to any reduction of capital made in pursuance of this section.

Reference to English Acts.

1877 § 6.

Provision for the reception in evidence of certified copies of certificates of incorporation and other documents. [*See* § 65 (6), 14 *of* 1895.]

19 And whereas it is expedient to make provision for the reception as legal evidence of certificates of incorporation other than the original certificates, and of certified copies of extracts from any documents filed and registered under "The Joint Stock Companies' Ordinances, 1861 and 1888": Be it enacted that any certificate of the incorporation of any company given by the Registrar for the time being shall be received in evidence as if it were the original certificate, and any copy of, or extract from, any of the documents or part of the documents kept and registered at the office for the registration of joint stock companies, if duly certified to be a true copy under the hand of the Registrar for the time being, and whom it shall not be necessary to prove to be the Registrar, shall in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document.

11th December, 1888.

No. 3 of 1893.

An Ordinance to amend "The Joint Stock Companies' Ordinances, 1861 and 1888."

Preamble.

WHEREAS it is expedient to amend "The Joint Stock Companies' Ordinances, 1861 and 1888": Be it therefore enacted by the Governor of Ceylon, by and with the advice and consent of the Legislative Council thereof, as follows:

Short title.

1 This Ordinance may be cited for all purposes as "The Joint Stock Companies' Ordinance, 1893."

Ordinance to be construed as one with Ordinances No. 4 of 1861 and No. 6 of 1888.

2 "The Joint Stock Companies' Ordinance, 1861," is hereafter referred to as "the principal Ordinance," and the principal Ordinance, "The Joint Stock Companies' Ordinance, 1888," and this Ordinance shall be read as one Ordinance, and may be cited for all purposes as "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893:" and the expression "this Ordinance" in the principal Ordinance, and any expression referring

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

to the principal Ordinance which occurs in any Ordinance or other document shall be construed to mean the principal Ordinance as amended by "The Joint Stock Companies' Ordinance, 1888," and this Ordinance.

1888* § 1; Consol. § 209. Commencement of Ordinance.

3 This Ordinance shall come into force on the first day of January, 1894, which date is hereinafter referred to as "the commencement of this Ordinance."

4—10 Embodied in the principal Ordinance.

Wages and salaries to be a claim.

11 (1) In the distribution of the assets of any company being wound up under the principal Ordinance, there shall be paid in priority to other debts—

(*a*) All wages or salary of any clerk or servant in respect of service rendered to the company during four months before the commencement of the winding up, not exceeding five hundred rupees; and

(*b*) All wages of any labourers or workmen in respect of service rendered to the company during two months before the commencement of the winding up.

Such claims to rank equally.

(2) The foregoing debts shall rank equally among themselves, and shall be paid in full, unless the assets of the company are insufficient to meet them, in which case they shall abate in equal proportions between themselves.

Liquidators to discharge same upon receipt of sufficient assets.

(3) Subject to the retention of such sums as may be necessary for the cost of administration or otherwise, the liquidator or liquidators or official liquidator shall discharge the foregoing debts forthwith, so far as the assets of the company are and will be sufficient to meet them, as and when such assets come into the hands of such liquidator or liquidators or official liquidator.

1867 § 38; 1900 § 10; Consol. § 88. Prospectus, &c., to specify dates and names of parties to any contract made prior to issue of such prospectus, &c.

12 Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors, or the company, or otherwise, and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person

* Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. And any promoter, director, or officer of a company who shall issue any such prospectus or notice contrary to the provisions of this section shall be guilty of an offence, and be punished with imprisonment of either description for a term which may extend to twelve months, and with a fine not exceeding five thousand rupees.

Penalty for breach.

Register of mortgages.

1862 § 43; 1900 § 14; Consol. §§ 100, 101.

13 Every limited company under the principal Ordinance shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge; if any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding five hundred rupees. The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times, and if such inspection is refused any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding fifty rupees, and a further penalty not exceeding twenty rupees for every day during which such refusal continues, and in addition to the above penalty any District Judge, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

Power of company to alter objects subject to confirmation by court.

1890* § 1; Consol. § 9.

14 (1) Subject to the provisions hereinafter mentioned a company registered under the principal Ordinance may, by special resolution, alter the provisions of its memorandum of association with respect to the objects of the company, but in no case shall any such alteration take effect until confirmed on petition by the court which has jurisdiction to make an order for winding up the company.

(2) Before confirming any such alteration the court must be satisfied—

*Companies' (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*a*) That sufficient notice has been given to every holder of debentures or debenture stock of the company, and any person or class of persons whose interest will, in the opinion of the court, be affected by the alteration; and

(*b*) That with respect to every creditor who in the opinion of the court is entitled to object, and who signifies his objection in manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged, or has determined, or has been secured to the satisfaction of the court. Provided that the court may, in the case of any person or class of persons, for special reasons dispense with the notice required by this section.

(3) An order confirming any such alteration may be made on such terms and subject to such conditions as to the court seems fit, and the court may make such orders as to costs as it deems proper.

(4) The court shall, in exercising its discretion under this Ordinance, have regard to the rights and interests of the members of the company, or of any class of those members, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that any arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members; and the court may give such directions and make such orders as it may think expedient for the purpose of facilitating any such arrangement or carrying the same into effect: Provided always that it shall not be lawful to expend any part of the capital of the company in any such purchase.

(5) The court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company—

(*a*) To carry on its business more economically or more efficiently; or

(*b*) To attain its main purpose by new or improved means; or

(*c*) To enlarge or change the local area of its operations; or

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*d*) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(*e*) To restrict or abandon any of the objects specified in the memorandum of association.

Reference to English Acts

Registration of order together with memorandum as altered, and consequences thereof.

1890 § 2; Consol. § 9.

15 (1) Where a company has altered the provisions of its memorandum of association with respect to the objects of the company, and such alteration has been confirmed by the court, an office copy of the order confirming such alteration, together with a printed copy of the memorandum of association, shall be delivered by the company to the Registrar of joint stock companies within fifteen days from the date of the order, and the Registrar shall register the same and shall certify under his hand the registration thereof, and his certificate shall be conclusive evidence that all the requisitions of this Ordinance, with respect to such alteration and the confirmation thereof, have been complied with, and thenceforth (but subject to the provisions of this Ordinance) the memorandum so altered shall be the memorandum of association, and shall apply to the company in the same manner as if the company were a company registered under the principal Ordinance with such memorandum.

(2) If a company makes default in delivering to the Registrar any document required by this section to be delivered to him, the company shall be liable to a penalty not exceeding one hundred rupees for every day during which it is in default.

Penalties to be recoverable at the suit of the Registrar in the Court of Requests, Colombo.

16 All penalties imposed by and recoverable under this or the principal Ordinance shall be deemed and taken to be a debt to Her Majesty of the party, parties, or company liable to pay the same, and shall and may, whatever may be the amount claimed, be sued for and recovered by the Registrar on behalf of Her Majesty in the Court of Requests, Colombo.

21st November, 1893.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Banking and Insurance Companies were excluded from the operation of the principal Ordinance No. 4 of 1861 by section 3, following the Joint Stock Companies' Act, 1856. The Companies' Act, 1862, removed the exclusion. Accordingly the Ordinance 2 of 1897 was passed to provide for Banking Companies in Ceylon. But Insurance Companies remain unprovided for.

No. 2 of 1897.

An Ordinance to empower Banking Companies to become incorporated under the Joint Stock Companies' Ordinances.

WEST RIDGEWAY.

Reference to English Acts.

Preamble.

WHEREAS it is expedient to empower persons associated together for the purpose of banking to incorporate themselves as a joint stock company under "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893:" Be it therefore enacted by the Governor, by and with the advice and consent of the Legislative Council thereof, as follows:

Short title

1 This Ordinance may be cited for all purposes as "The Joint Stock Banking Ordinance, 1897."

Governor may authorize banking companies to be incorporated and to be registered.

2 It shall be lawful for the Governor to authorize by order, under the hand of the Colonial Secretary, to be published in the *Government Gazette*, any number of persons, not less than seven, who desire to be incorporated and registered as a company for the purpose of carrying on the business of banking, to apply under the provisions of "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893," and of this Ordinance, to be incorporated and registered as a banking company with limited liability. And upon such order such persons may proceed in the manner provided by part II. of "The Joint Stock Companies' Ordinance, 1861," to obtain incorporation and registration as a company limited, and all the provisions of "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893," shall, in so far as they are not inconsistent with the provisions of this Ordinance, apply to all companies so incorporated and registered.

1862 § 4; Consol. 1.

Prohibition on banking companies not so incorporated.

3 No company, association, or partnership consisting of more than six persons shall be formed after the commencement of this Ordinance for the purpose of carrying on the business of banking in the island, unless

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

such company, association, or partnership be incorporated and registered as a banking company under the Ordinances or Acts relating to companies from time to time in force in this island, or in any British colony or possession, or in British India, or under any Acts of Parliament, or be incorporated by an Act of Parliament, or of the Governor-General of India in Council, or by Royal Charter or Letters Patent. Reference to English Acts.

Form of memorandum of association.

4 In lieu of the memorandum of association prescribed by section 9 of "The Joint Stock Companies' Ordinance, 1861," the memorandum of association of a banking company shall be in the form marked A in the schedule hereto, or as near thereto as circumstances admit; and it shall, when the company is incorporated, bind the company and the shareholders therein as if there were in such memorandum contained on the part of every shareholder, his heirs, executors, and administrators a covenant to conform to all the regulations of such memorandum, subject to the provisions of "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893," and of this Ordinance.

Articles of association.

5 The memorandum of association may be accompanied by or have annexed thereto or endorsed thereon articles of association signed by the subscribers to the memorandum of association, and prescribing regulations for the company; but if no such regulations are prescribed, or so far as the same do not extend to modify the regulations contained in the table marked B in the schedule hereto, then, in the case of a banking company, in lieu of the regulations prescribed by section 11 of "The Joint Stock Companies' Ordinance, 1861," the regulations contained in the aforesaid table B in the schedule hereto shall, so far as the same are applicable, be deemed to be the regulations of the company, and shall bind the company and the shareholders therein to the same extent as if they had been inserted in articles of association and such articles had been registered.

Banking companies to publish half-yearly statements.

6 Every banking company duly incorporated and registered under the provisions of "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893," and of this Ordinance, shall, before it commences business and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked C in the schedule hereto, or as near thereto as circumstances will admit, and a copy of such statement shall be put up on a conspicuous place in the registered office of the 1862 § 44; Consol. § 108.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Reference to English Acts.

company and in every branch office or place where the business of the banking company is carried on; and if default is made in compliance with the provisions of this section, the banking company shall be liable to a penalty not exceeding fifty rupees for every day during which such default continues, and every director and manager of such company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Every member and every creditor of any banking company shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding twenty-five cents.

1862 § 188; Consol. § 256.

On registration of banking companies with limited liability, notice to be given to customers.

7 Every association of bankers existing as such at the date of the passing of this Ordinance which registers itself as a company limited under the provisions of "The Joint Stock Companies' Ordinances, 1861, 1888, and 1893," and of this Ordinance, shall, at least thirty days previous to obtaining a declaration of incorporation with limited liability, give notice that it is intended so to do to every person and partnership firm who have a banking account with the association, and such notice shall be given either by delivering the same to such person or firm, or by leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated, or otherwise become known as his or their address to or by the association, or should there be no such address, by publishing the notice addressed to such person or firm in the *Government Gazette* and one of the local newspapers; and in case the association omits to give any such notice as is hereinbefore required to be given, then as between the association and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further, or otherwise the declaration of incorporation with limited liability shall have no operation.

1879 § 7.

Audit of accounts of banking companies.

8 (1) Once at least in every year the accounts of every banking company registered after the passing of this Ordinance as a company limited shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting.

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

(2) A director or officer of the company shall not be capable of being elected auditor of such company. Reference to English Acts.

(3) An auditor on quitting office shall be re-eligible.

(4) If any casual vacancy occurs in the office of any auditor, the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy or vacancies in the auditorship.

(5) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company, and any auditor may in relation to such books and accounts examine the directors or any other officer of the company.

(6) The auditor or auditors shall make a report to the members on the accounts examined by him or them and on every balance sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether in his or their opinion the balance sheet referred to in the report is a full and fair balance sheet properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shown by the books of the company, and such report shall be read before the company in general meeting.

(7) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company.

Signature of balance sheet.

9 Every balance sheet submitted to the annual or other meeting of the members of every banking company registered after the passing of this Ordinance as a company limited shall be signed by the auditor or auditors and by the secretary or manager (if any) and by the directors of the company, or three of such directors at the least. 1879 § 8; Consol. § 113 (5).

SCHEDULE.

FORM A.

MEMORANDUM OF ASSOCIATION OF "THE——— BANK, LIMITED."

First.—The name of the company is "The—— Bank, Limited."

Second.—The registered office of the company will be situate in —— —

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Third.—The objects for which the company is established are—

(1) The carrying on the business of bankers, including making advances of money and dealing in exchange, coin, and bullion.

(2) The acting as agent for any corporation, company, firm, or person in making and obtaining loans and advances on security of stock, funds, debentures, bonds, produce, manufactured goods, and otherwise; and in the transaction of any other monetary business.

(3) The acquisition by purchase, concession, or otherwise of any powers, rights, privileges, or property in ———or elsewhere, which the company may deem it advantageous to possess for the purpose of occupation, sale, or otherwise, and the acting as agents in relation to any such acquisition.

(4) The doing of all such things as shall be incidental or conducive to the above objects.

Fourth.—The liability of the shareholders is limited.

Fifth. The capital of the company is ———, divided into ———.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names:

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.

Date the——— day of ———, 18—.

Witness to the above signatures: ———.

Table B.

Articles of Association of "The ——— Bank, Limited."

[Not printed.]

Form C.

1. The capital of the company is Rs. ———, divided into ——— shares of Rs. ——— each.

2. The number of shares issued is ———.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

3. Calls to the amount of Rs. ——— — per share have been made, under which the sum of Rs. ——— has been received

4. The liabilities of the company on the first day of January (*or* July) were :

Debts owing to sundry persons by the company———

On judgment, Rs. ———.

On bonds, Rs. — ———.

On notes or bills, Rs. ———.

On simple contracts, Rs. ———.

On estimated liabilities, Rs. ———.

5. The assets of the company on that day were :

Government securities, Rs. ———.

Bills of exchange and promissory notes, Rs. ———.

Cash at the bankers, Rs. ———.

Other securities, Rs. ———.

Passed in Council the Sixth day of February, One thousand Eight hundred and Ninety-seven.

J. J. THORBURN,
Acting Clerk to the Council.

Assented to by His Excellency the Governor the Eleventh day of February, One thousand Eight hundred and Ninety-seven.

E. NOEL WALKER,
Colonial Secretary.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Mutual Provident Societies.

The registration of Mutual Provident and other Societies is provided for by the Societies' Ordinance, No. 16 of 1891. This is based on the Friendly Societies' Acts, 1875 and 1887, England (38 and 39 Vict. c. 60, and 50 and 51 Vict. c. 56), which have now been replaced by the Friendly Societies' Act, 1896.

STAMP DUTIES.

Payable in Connection with Joint Stock Companies.

Document on Which Payable.	Under What Ordinance.	Amount of Duty.
		Rs. Cts.
Memorandum of Association ..	4 of 1861, sec. 15	50 00
Articles of Association	do do	10 00
Proxy to vote at meeting ..	22 of 1909, Sch. B. 34	0 05
*Share Certificate	do , Sch. B. 50	0 05 on every Rs. 100
* (*a*) New share certificates issued upon subdivision or consolidation of shares, and (*b*) certificates issued in lieu of those lost, etc., are exempted.		

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

FEES.

Payable in Connection with Joint Stock Companies.

Act or Document for which Payable.	Under What Ordinance.	Amount.
		Rs. Cts.
Certificate of Incorporation ..	15 of 1861, sec. 15	2 50
Registration of List of Shareholders	18 of 1909, sec. 2	2 50
Registration of Balance Sheet ..	do sec. 3	2 50
Registration of a Company whose nominal capital does not exceed 10,000	4 of 1861, Table A	50 00
Every Rs. 10,000 of nominal capital or part of Rs. 10,000 after the first Rs. 10,000 and up to 1,000,000, an additional fee of	,, ,,	2 50
Registration of any increase in the capital of a Company, for every 10,000 or part of Rs 10,000 up to Rs. 1,000,000 in the whole	,, ,,	2 50
Registration of any existing Company, except such companies as are exempted by the Ordinance from payment of fees	,, ,,	Same fee as for a new Company.
Registering any doct. authorized by the Ordinance (other than the memorandum of association)	,. ,,	2 50
Making a record of any fact authorized by the Ordinance ..	.. ,,	2 50
Inspection of any document ..	,, ,,	0 50
Every certified copy or extract of such doct. for every sheet of 120 words	,, ,,	0 37½

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX II.

ORDINANCES AFFECTING THE CROWN.

1. Crown Lands Encroachments: Ordinance No. 12 of 184.
2. Waste Lands Ordinances, 1897 to 1903.
3. Crown Lands (Boundaries and Surveys): Ordinances No. 1 of 1844 and No. 4 of 1866.
4. Evidence Ordinance No. 14 of 1905 § 82: Proof of plans &c.
5. Crown Landmarks Ordinance No. 7 of 1909.
6. Crown Grants Signature: Ordinances Nos. 11 and 30 of 1884.
7. Lands Resumption Ordinance, 1887.
8. Land Acquisition Ordinances, 1876 to 1905.
9. Crown Debts Ordinance No. 14 of 1843.

No. 12 of 1840.

To prevent Encroachments upon Crown Lands.

(See Order in Council of 11th August, 1841, and Ordinances No. 9 of 1841, No. 1 of 1844, and No. 4 of 1866.)

Preamble.

WHEREAS divers persons, without any probable claim or pretence of title, have taken possession of lands in this colony belonging to Her Majesty, and it is necessary that provision be made for the prevention of such encroachments:

Information of encroachment. [*See* § 2, 9 *of* 1841.]

1 It shall and may be lawful for the District Court, upon information supported by affidavit charging any person or persons with having, without probable claim or pretence of title, entered upon or taken possession of any land which belongs to Her Majesty, Her heirs, or successors, to issue its summons for the appearance before it of the party or parties alleged to have so illegally entered upon or taken possession of such land, and of any other person or persons whom it may be necessary or proper to examine as a witness or

* (See Articles 175-6, pp. 295-304).
† (See Articles 177 *et seq.*, pp. 305 *et seq*).
‡ (See Articles 200-1).

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

witnesses, on the hearing of any such information; and the said District Court shall proceed in a summary way in the presence of the parties, or in case of wilful absence of any person against whom any such information shall have been laid, then in his absence to hear and determine such information; and in case on the hearing thereof it shall be made to appear by the examination of the said party or parties, or other sufficient evidence to the satisfaction of such District Court, that the said party or parties against whom such information shall have been laid hath or have entered upon or taken possession of the land mentioned or referred to in such information without any probable claim or pretence of title, and that such party or parties hath or have not cultivated, planted, or otherwise improved and held uninterrupted possession of such land for the period of *five** years or upwards, then and not otherwise, such District Court is hereby authorized and required to make an order directing such party or parties to deliver up to Her Majesty, Her heirs, or successors, peaceable possession of such land, together with all crops growing thereon, and all buildings and other immovable property upon and affixed to the said land, and to pay the costs of such information; and in case the party or parties against whom any such order shall have been made shall not, within fourteen days after service thereof, deliver up possession of the said land and premises, pursuant to the said order, or shall afterwards make or cause to be made any further encroachments upon the said land or premises contrary to such order or in evasion thereof, then and in such case it shall be lawful for such District Court to adjudge such party or parties to pay a fine not exceeding five pounds, or to be imprisoned, with or without hard labour, for any time not exceeding fourteen days, and to make a further order for the immediate delivery over of the possession of such land and premises to Her Majesty, Her heirs, or successors; and the District Court shall thereupon cause possession thereof to be delivered to Her Majesty, Her heirs, or successors, accordingly.

Order for delivery up of possession.

Penalty on disobedience of order or renewed encroachment.

2 Any person against whom any such order as aforesaid may have been made may, notwithstanding such order, proceed by the ordinary course of law to recover possession of such lands, in case he shall be able to establish a title thereto; and may also in such case

Subsequent proceeding by ordinary course of law.

* Order of Council of 11th August, 1841.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

recover a reasonable compensation for the damage he may have sustained by reason of his having been compelled to deliver up possession of the said premises, and in like manner, in case of the dismissal of any such information, the party having preferred the same may proceed according to the ordinary course of law, as if no such information had been preferred.

Court may order payment of costs.

3 Provided always that in case any such information shall be dismissed, it shall be lawful for the said District Court, if it shall think fit, to order payment by Government to the party or parties against whom the same may have been preferred of such sum as the said court may consider to be the amount of costs fairly incurred by such party or parties by reason of such information so dismissed.

Proceedings subject to rules of court.

4 The forms of the proceedings to be observed on lodging complaints, in issuing summonses, in the examination of the party or parties, in the citation of witnesses, in the making orders, and generally for the complete carrying into execution the powers hereby vested in the said District Court, shall be according to such general rules of practice as the judges of the Supreme Court may now or hereafter frame thereon.

Cinnamon lands, when the property of the Crown.

5 All cinnamon lands which shall have been uninterruptedly possessed by Government for a period of thirty years and upwards, by peeling the cinnamon growing thereon, shall be held and deemed to be the property of the Crown.

Waste lands to be deemed the property of the Crown.

6 All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandian provinces (wherein no thombo registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues, or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts; and in all other districts in this colony such chena and other lands which can only be cultivated

[*See No.* 1 *of* 1897.]

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause.

Government Agent when to grant certificate against the right of the Crown.

[*See No.* 1 *of* 1844.]

7 It shall be lawful for any person in the possession of land to make application in writing to the Government Agent of the province in which such land is situate for a certificate of the Crown having no claim to such land, which application shall contain a full description of the property, together with a survey thereof made by or under the authority of the Surveyor-General, and shall contain a declaration by the applicant, stating the nature of his right, or the manner in which he acquired possession; and if the Government Agent shall, upon investigation, be satisfied that the Crown has no claim to such land, he shall, with the consent of the Governor, grant a certificate to that effect to such applicant, and a copy of such certificate shall be previously entered in a book to be kept in the office of the Government Agent for that purpose, and such certificate, or any copy from such entry thereof, attested by the Government Agent, shall be received by any court as a good and valid title to such land against any right, title, or claim of the Crown thereto existing at the date of such certificate.

If party ten years in uninterrupted possession of Government land.

[*See* § 2, 9 *of* 1841.]

8 Whenever any person shall have, without any grant or title from Government, taken possession of and cultivated, planted, or otherwise improved any land belonging to Government, and shall have held uninterrupted possession thereof for not less than ten nor more than thirty years, such person shall be entitled to a grant from Government of such land, on payment by him or her of half the improved value of the said land, unless Government shall require the same for public purposes, or for the use of Her Majesty, Her heirs, and successors, when such person shall be liable only to be ejected from such land on being paid by Government the half of the improved value thereof, and the full value of any buildings that may have been erected thereon.

9 Repealed by the Ordinance No. 9 of 1841.

Encroachment on road, &c.

10 All and every encroachment on any public road, street, or highway, by building or other erection, or by enclosure, planting, or otherwise, shall, on information thereof, be immediately abated and removed by judgment, order, or decree of the District Court thereon, and the party or parties offending found liable in damages besides the costs of suit.

11 Any principal or other headman who shall wilfully or knowingly refuse or neglect to give every

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

information within his knowledge or power immediately to the Government Agent of his province, or some Assistant Agent thereof, of any encroachment made by any person or persons upon any land belonging to Her Majesty, Her heirs, or successors, and situated in the district or village of such headman, shall be liable for every such offence to a fine not exceeding ten pounds. Headman to give information.

No. 9 of 1841.

To repeal the ninth clause of the Ordinance No. 12 of 1840, and to re-enact certain of its provisions.

1 [Repeals the ninth clause of the Ordinance No. 12 of 1840.]

2 None of the provisions contained in the eighth clause, nor the provision touching prescription contained in the first clause of the said Ordinance No. 12 of 1840, shall extend to any land referred to in the sixth clause thereof, nor to any public road, street, or highway, nor to any land known or held as toonhawul land. Operation of 8th clause and part of 1st clause of Ord. No. 12 of 1840 restricted.

No. 1 of 1897.

An Ordinance relating to Claims to Forest, Chena, Waste, and Unoccupied Lands.

(As amended by the Ordinances No. 1 of 1899, No. 5 of 1900, and No. 4 of 1903. See also No. 5 of 1900 and No. 16 of 1907.)*

WHEREAS it is expedient to make special provision for the speedy adjudication of claims to forest, chena, waste, and unoccupied lands: Be it therefore enacted by the Governor of Ceylon, by and with the advice and consent of the Legislative Council thereof, as follows: Preamble.

*The italics in the text indicate the amendments made in the original Ordinance No. 1 of 1897 by the later Ordinances noted in the margin.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Government Agent to publish notice calling for claims.

[§ 3, 5 *of* 1900.]

1 (1) *Whenever it shall appear to the Government Agent of a province or to the Assistant Government Agent of a district that any land or lands situated within his province or district is or are forest, chena, waste, or unoccupied, it shall be lawful for such Government Agent or Assistant Government Agent to declare by a notice that such land or lands, or any of such lands, in respect of which no claim is made to him within the period of three months from the date specified in such notice shall be deemed the property of the Crown and may be dealt with on account of the Crown. Provided, however, that the date specified in such notice shall not be earlier than the date of the first publication of such notice in the "Government Gazette," and that two or more lands shall not be included in one notice unless such lands are situated in the same village.*

[*. . . .*Repealed by* § 2, 4 *of* 1903.]

(2) *Every notice shall be published in the English, Sinhalese, and Tamil languages* *. . . . . * *in the "Government Gazette," and copies of such notices shall be posted on and near the land or lands appearing in such notice, and shall also be affixed to the walls of the several Kachcheries and the several courts of the province, including Gansabhawa Courts, within which such land or lands is or are situated, and in such other localities as may secure the greatest possible publicity thereto, and the said notice shall likewise be advertised by beat of tom-tom at such places on or near such land or lands and at such times as the Government Agent or Assistant Government Agent may direct and order.*

(3) *Whenever such land or lands is or are more than ten acres in extent, such notice shall be further published once at least in any two of the newspapers published in the Island in the language in which such newspapers are published.*

(4) *If the Government Agent or Assistant Government Agent shall have reason to think that any person is interested in such land or lands or in any of such lands, he shall cause notice to be given to such person, not only by general notice as aforesaid, but also by causing to be served upon him or by posting a copy of such notice addressed to such person at his last known place of abode.*

(5) *Every such notice shall be as near as is material in the forms in the schedule hereto, and the production of a copy of the "Government Gazette" purporting to contain such notice shall be received in all courts of law in this Island as* prima facie *evidence that such notice has been*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

duly made, dated, published, posted, affixed, and advertised as hereinbefore required.

Where no claim is made, land to be declared property of the Crown.

2 (1) *If no claim shall be made within the period of three months from the date specified in such notice, the Government Agent or Assistant Government Agent shall make an order declaring such land or lands or any of such lands to which no claim has been made to be the property of the Crown.*

[§ 2, 1 *of* 1899.]

(2) *Every such order shall be published in the "Government Gazette" and shall be final and conclusive, subject to the provisions contained in sections* 20, 21, *and* 26 *hereof, and the "Government Gazette" containing such order shall be, subject as aforesaid, received in all courts of law in this Island as conclusive proof that the land or lands mentioned in the order was or were at the date of such order the property of the Crown.*

(3) *Provided always that whenever within the said period of three months it shall be brought to the knowledge of the Government Agent or Assistant Government Agent that some person is interested in any land which is the subject of a notice under section* 1, *and that such person is then absent from the Island and was so at the date of the first publication of such notice in the "Government Gazette," then and in every such case the Government Agent or Assistant Government Agent shall not make his order declaring such land to be the property of the Crown until the expiration of a further period of six months, commencing on the expiry of the said period of three months.*

Inquiry into claims.

[§3, 1 *of* 1899.]

3 (1) *If in pursuance of the notice published under the provisions of section* 1 (*a*) *claim shall be made to any land specified in any notice or to any interest in such land within the period of three months, or in any case in which such period has been extended under the provisions of sub-section* (3) *of the preceeding section within such extended period, the Government Agent of the province or Assistant Government Agent of the district in which such land is situated shall *. . . . . * proceed to make inquiry into such claim.*

[*. . . .**Repealed by* § 2, 5 *of* 1900.]

(2) *For the purpose of such inquiry the Government Agent or Assistant Government Agent may exercise the powers conferred on Commissioners appointed under the provisions of Ordinance No.* 9 *of* 1872 *for compelling the attendance of witnesses and the production of documents and for administering oaths to all persons who shall be examined before them, provided that the requirements of*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the proviso to section 2 of that Ordinance shall not be necessary for the purposes of this Ordinance.

Procedure in such cases.

[§ 4, 5 *of* 1900.]

4 (1) *The Government Agent or Assistant Government Agent shall call upon the claimant, by notice in writing served upon him or left at his last known place of abode, to produce before such Government Agent or Assistant Government Agent the evidence and documents upon which he may rely in proof of his claim; if when so called upon the claimant does not appear, or does not produce such evidence and documents, or withdraws his claim, the Government Agent or Assistant Government Agent may then make an order declaring such land to be the property of the Crown, and the provisions of sub-section (2) of section 2 shall apply to such order. If the claimant appears and produces such evidence and documents, the Government Agent or Assistant Government Agent, after considering the same and making any further inquiry that may appear proper, may either admit the whole or part of such claim or enter into an agreement in writing, which shall be signed by the Government Agent or Assistant Government Agent and the claimant, for the admission or rejection of the whole or any portion of such claim, or for the purchase of the whole or any portion of the land which is the subject of such claim, and shall embody such admission or agreement in an order.*

(2) *Every such order shall be published in the "Government Gazette" and shall be final and conclusive, and the "Government Gazette" containing such order shall be received in all courts of law in this Island as conclusive proof of the admission or agreement entered into under sub-section (1). Provided that in any case in which the land or portion of land which is the subject of such admission or agreement is more than ten acres in extent, such order shall not be published in the "Government Gazette," nor be final or conclusive unless the consent of the Governor has been obtained to the publication of such order, nor shall such admission, agreement, or order be of any effect until such consent has been given.*

Disputed claims to be referred to Commissioner or District Judge.

5 If and whenever the Government Agent or Assistant Government Agent does not admit such claim either as to the whole or as to part, and fails to enter into any agreement with the claimant in respect thereof, then and in every such case the Government Agent or Assistant Government Agent shall refer such claim, or so much thereof as is in dispute between the Government Agent or Assistant Government Agent

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and the claimant, to the Commissioner to be appointed as hereinafter provided, or in the event of no Commissioner being appointed to the District Judge of the district within which such land is situated.

Provided that whenever the Government Agent or Assistant Government Agent and claimant agree to refer such claim to the Commissioner of Requests of the division within which such land is situated, the Government Agent or Assistant Government Agent shall refer such claim to such Commissioner, who shall have and exercise in respect of such claim all the powers and duties vested by this Ordinance in the District Judge; and any decision or order of such Commissioner shall be subject to appeal to the Supreme Court, and the provisions of section 18 shall apply to all such appeals.

Form of reference to Commissioner or District Judge.

6 In making a reference under section 5 the Government Agent or Assistant Government Agent shall state, for the information of the Commissioner or District Judge, in writing under his hand—

(*a*) The situation, name (if any), boundaries, and extent of the land in dispute;

(*b*) The names of the claimants or claimant and of any other person whom he has reason to think interested in such land.

Proceedings of Court on reference.

7 (1) The Commissioner or District Judge shall thereupon cause to be served on each of the persons so named as aforesaid a notice requiring him to make a written statement to such Commissioner or Judge on or before a date to be mentioned in such notice setting out the nature and extent of his claim, and in every such statement of claim the Government Agent or Assistant Government Agent shall be named as the party defendant on behalf of the Crown.

(2) Any two or more persons claiming under the same right or title may join and embody their claims in one statement of claim.

Proceeding when no claim has been made.

8 (1) If no statement of claim is made to the Commissioner or District Judge pursuant to the notice mentioned in section 7, the Commissioner or Judge shall cause to be affixed on some conspicuous place on or near such land a notice to the effect that if the persons interested in such land do not, on or before a day to be therein mentioned, appear before such Commissioner or District Judge and state the nature of their respective interests in the land and the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

particulars of their claims, the Commissioner or District Judge will proceed to adjudicate such land to be the property of the Crown.

(2) If on the day named no such person appears in pursuance of such notice, the Commissioner or District Judge shall adjudicate such land to be the property of the Crown, and from such adjudication there shall be no appeal.

Special Commissioner for trying claims.

9 It shall be lawful for the Governor, as occasion may require, from time to time to appoint a proper person for any province or district to be Commissioner for the investigation and trial of references under this Ordinance.

Notice of appointment of Commissioner.

10 Whenever any Commissioner is appointed under this Ordinance for any province or district, notice thereof shall be given by Proclamation in the *Government Gazette*, copies of which shall be affixed in the several courts of the Island; and from the date of the issue of such Proclamation no other court shall be competent to entertain any references for the investigation and trial of which such Commissioner is appointed.

Claims not cognizable in other courts.

Special courts where to be held.

11 (1) Every Commissioner appointed under this Ordinance shall hold his court at such place or places within the limits of his jurisdiction as shall be by him considered most convenient, and for the purpose of every investigation and trial under this Ordinance may administer oaths, and shall have and exercise within his province all and every the powers and jurisdiction of a District Judge.

(2) In case of the death, sickness, resignation, removal from office, absence from the Island, or other disability of any such Commissioner before whom any inquiry upon a reference made under this Ordinance is pending, such inquiry may be continued by the successor of such Commissioner, who shall have power to act on the evidence already recorded by such first named Commissioner, or partly recorded by such first named Commissioner and partly recorded by himself, or, if he think fit, to re-summon the witnesses and commence afresh.

Parties may appear by pleader. [§ 5. 1 *of* 1899.]

12 *At the hearing of every reference under this Ordinance the claimant shall appear personally or by pleader as plaintiff, and the Government Agent or Assistant Government Agent shall appear personally or by pleader as defendant on behalf of the Crown.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Proceedings regulated by Civil Procedure Code.

13 In references instituted under this Ordinance, except as in this Ordinance provided, the proceedings shall be regulated, so far as they can be, by the Code of Civil Procedure.

Cases to have precedence.

14 All proceedings in any District Court had under this Ordinance shall be taken up before any other business of the said court, unless special circumstances of urgency in any particular case call, in the opinion of the Judge, for a relaxation of this rule.

Procedure before hearing of reference.

15 The Commissioner or District Judge, as the case may be, shall, as soon as the written statement is presented under section 7, or the persons interested appear in pursuance of the notice issued under section 8, fix a day for the appearance of the parties and for the hearing of the reference, of which due notice shall be given to the parties, their pleaders, or agents; and on the day so fixed the parties or their agents shall bring their witnesses into court, together with any documents on which they intend to rely. If either party require the assistance of such Commissioner or Judge to procure the attendance of a witness or the production of any document on such day, he shall apply to such Commissioner or Judge in sufficient time before the day fixed for the hearing of the reference, and such Commissioner or Judge shall issue a summons for such purpose. It shall be competent to such Commissioner or Judge to require the personal attendance of a claimant on the day fixed for the hearing or at any subsequent stage of the proceedings.

Irregularities in notices cured after appearance of claimant.

[§ 5, 5 *of* 1900.]

15 A *After a reference has been made to court under section* 5 *it shall not be competent to any claimant who has appeared and made a claim before the Government Agent or Assistant Government Agent under sub-section* (1) *of section* 3, *or has appeared before the Commissioner or Judge in pursuance of the notice issued to him under section* 7, *or of the notice issued by the court under sub-section* (1) *of section* 8, *to plead that the notice issued under section* 1 *of the said Ordinance, as herein amended, was not in fact duly made, dated, published, posted, affixed, and advertised as hereinbefore required.*

Procedure on hearing.

16 On the day fixed for the hearing of the reference, or as soon after as may be practicable, the Commissioner or District Judge, as the case may be, shall proceed to examine the claimant or his agent (when his personal attendance is not required) and the witnesses of the parties, and upon such examination,

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

and after inspecting the documents of the parties and making any further inquiry that may appear necessary, shall proceed to pass such order in the case as he may consider just and proper.

Commissioner or Judge may order a survey.

17 Whenever the Commissioner or District Judge is of opinion that a fresh survey is necessary for the purposes of the investigation and trial of any claim under this Ordinance, he may cause the land, the subject of the claim, to be surveyed, and the costs of such survey shall be costs in the cause.

Appeals.

18 (1) Any party to the reference who is dissatisfied with the decision or order of the Commissioner or District Judge, as the case may be, may appeal to the Supreme Court against such order or decision, by lodging within thirty days from the date of such order or decision with such Commissioner or District Judge a petition of appeal addressed to the Supreme Court, together with an affidavit setting out the value of the land with regard to which the order or decision has been given against him.

[§ 6, 1 *of* 1899.]

(2) *Such Commissioner or Judge on receiving such affidavit and petition of appeal shall transmit the same together with all proceedings taken by him to the Registrar of the Supreme Court, and such appeal shall have precedence of all other appeals, and the said court shall make such order as the justice of the case may require, and such order shall be duly carried into effect.*

(3) Stamp duty shall be charged upon every such petition of appeal and upon every such affidavit at the rates specified in part II. of the schedule B to "The Stamp Ordinance, 1890," for similar instruments in the District Courts, and upon subsequent proceedings at the rates specified in the said schedule for appeals from the District Courts; and every such appeal shall be dealt with and disposed of in the same manner and subject to the same rules as appeals from District Courts are dealt with and disposed of.

Records of cases where to be deposited.

19 The records of cases disposed of by Commissioners appointed under this Ordinance or by District Judges shall be deposited amongst the records of the District Court of the district in which the land, the subject of the claim, is situated.

Limitation as to claims.

20 No claim to any land or to compensation or damages in respect of any land declared to be the property of the Crown under the provisions of this Ordinance shall be received after the expiration of one year from the date on which such declaration shall have

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

been made. If within such year any claimant shall prefer a claim to such land or to compensation or damages in respect thereof before the Commissioner appointed under this Ordinance for the province in which such land is situated, or in the event of no Commissioner being appointed, before the District Judge of the district in which such land is situated, and shall show good and sufficient reason for not having preferred his claim to the Government Agent or Assistant Government Agent as aforesaid within the period limited under section 1 of this Ordinance, such Commissioner or Judge shall file the claim, making the claimant plaintiff and the Government Agent or Assistant Government Agent as aforesaid defendant on behalf of the Crown in the action, and the foregoing provisions of this Ordinance shall be applicable to the investigation and trial thereof.

Provision for such claim if preferred within time

21 (1) In any case in which the land has been sold, if such Commissioner or Judge shall be of opinion that the claim of the claimant is established, such Commissioner or Judge shall not award the claimant possession of the land in dispute, but shall order him to receive from the Crown, by way of compensation, a sum equal to the price at which the land was sold by public auction *or otherwise.*

If claim established and land sold, possession not to be given, but compensation. [§ 7, 1 *of* 1899.]

(2) In any case in which the land shall not have been sold, but shall have been otherwise dealt with on account of the Crown, and such Commissioner or Judge shall be of opinion that the claim to such land is established, such Commissioner or Judge shall order that the claimant be placed in possession of the said land.

If claim established and land not sold, claimant to be placed in possession.

(3) The amount awarded under sub-section (1) shall be in full satisfaction of the claim of the claimant, and shall bar any future claim on his part in respect of the land claimed.

Award to be in full satisfaction.

22 (1) *After the date of the "Government Gazette" containing the first publication of the notice prescribed in section 1 it shall not be lawful for any person, without the written consent of the Government Agent or Assistant Government Agent, to enter on any land specified in such notice with intent to establish a right of possession or occupation of such land or to exercise rights of ownership, or to build any house or hut or to form a plantation thereon, or to make clearings, for the purpose of cultivating such land or for any other purpose, or to cut or fell any trees upon such land, or to open, work, or to use*

Prohibition of building, clearing, &c., pending investigation. [§ 8, 1 §§ 1899.]

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

any mine thereon, until such land has been declared not to be the property of the Crown.

(2) *It shall be lawful for the District Court upon the complaint of the Government Agent or Assistant Government Agent, supported by a copy of the "Government Gazette" containing the notice prescribed by section* 1 *and by affidavit charging any person or persons with having acted in contravention of this section, to issue its summons for the appearance before it of such person or persons and of any other person or persons whom it may be necessary or proper to examine as a witness or witnesses on the hearing of any such complaint, and the said District Court shall proceed in a summary way in the presence of such person or persons, or in case of wilful absence of any person against whom any such complaint shall have been laid, then in his absence, to hear and determine such complaint; and in case on the hearing thereof it shall appear by the examination of the complainant or of such person or persons, or other sufficient evidence to the satisfaction of such District Court, that such person or persons against whom such complaint shall have been laid hath or have, after the date of first publication in the "Government Gazette" of the notice prescribed in section* 1, *without the written consent of the Government Agent or Assistant Government Agent, entered upon or taken possession of the land mentioned or referred to in such complaint, with intent to establish a right of possession or occupation of such land, or to exercise rights of ownership, or to build any house or hut, or to form a plantation thereon, or to make clearings for the purpose of cultivating such land, or for any other purpose, or to cut or fell any trees upon such land, or to open, work, or use any mine thereon, then such District Court shall make an order directing such person or persons to deliver up possession of such land together with everything thereon, including all crops whether growing or severed, all minerals, and all buildings and other immovable property upon and affixed to the said land, to some person to be named by the said court; and in case the person or persons against whom any such order shall have been made shall not within seven days after service thereof deliver up possession of the said land and premises pursuant to the said order, or shall afterwards enter upon the said land or premises personally or by his or their assigns, agents, or servants, contrary to such order, or in evasion thereof, then and in such case it shall be lawful for such District Court to sentence such person or*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

persons to simple or rigorous imprisonment not exceeding six months, or to a fine not exceeding one thousand rupees, and to make a further order for the immediate delivery over of the possession of such land and premises to the person named by the said court, and the said court shall thereupon cause possession of such land and premises to be delivered to such person accordingly.

It shall further be lawful for the said District Court at the time of passing sentence on such person or persons to order such person or persons to execute a bond, with or without sureties, to abstain from entering upon such land and premises personally or by his or their assigns, agents, or servants, for such period as the said court thinks fit to fix.

(3) *The prohibition imposed by sub-section* (1) *of this section shall cease in any case in which a reference under section* 5 *has not been made within six months from the date of a claimant having preferred his claim.*

Governor in Executive Council may award damages.

23 Whenever the claim of any person to a land, in respect of which a notice under section 1 of this Ordinance has issued, is upheld by the Commissioner or District Judge or by the Supreme Court in appeal, and the claimant to such land satisfies the Governor in Executive Council that he has suffered pecuniary loss by reason of the prohibition in the preceding section contained, it shall be lawful for the Governor in Executive Council to ascertain and determine the amount of compensation that should be allowed in respect of such loss, and to cause the amount so determined to be paid to such claimant.

Presumption as to forest and waste land.

24 For the purposes of this Ordinance:

(*a*) All forest, waste, unoccupied, or uncultivated lands, and all chenas and other lands which can be only cultivated after intervals of several years, shall be presumed to be the property of the Crown until the contrary thereof be proved.

Occupation of a small portion of land not to create presumption of ownership of a large tract of land.

(*b*) The occupation by any person of one or more portions or parcels of land shall not be taken as creating a presumption of ownership against the Crown in his favour for any greater extent of land than that actually occupied by him.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Definition of "unoccupied land."

(*c*) The term "unoccupied land" includes uncultivated land and all land which at the time of the passing of this Ordinance was not in the actual occupation of any person or persons, and also all lands which shall not have been in the uninterrupted occupation of some person or persons for a period exceeding five years next before notice given by the Government Agent or Assistant Government Agent under section 1 in respect of the same.

Application for appointment of guardian or curator.

25 In any case in which the claimant is a minor or person of unsound mind, or in which any person shall claim for and on behalf of a minor or a person of unsound mind, the Government Agent or Assistant Government Agent shall apply to the District Judge of the district in which such land is situated, to appoint a fit person in manner provided by the Civil Procedure Code to represent such minor or person of unsound mind, for the purpose of the claim and the investigation and trial thereof.

Government not barred from awarding compensation for land.

26 Nothing in this Ordinance shall be held to prevent the Governor from awarding to any claimant of land which has been dealt with under this Ordinance, on proof to his satisfaction of the claim of such claimant (notwithstanding that he may not have preferred his claim either to the Government Agent or Assistant Government Agent as aforesaid within the period prescribed by this Ordinance, or has not made any statement of claim to the Commissioner or District Judge as required by section 7 of this Ordinance), such amount of compensation as to the Governor may seem proper.

Penalty for obstructing surveyor, &c.

27 Whoever at any time shall obstruct or molest any surveyor, headman, or officer of the Crown, or any person acting under the immediate orders of any such surveyor, headman, or officer of the Crown, from carrying out or performing any survey or other act or thing which he may be directed, empowered, or required to do by any Government Agent, Assistant Government Agent, Commissioner, District Judge, or Special Officer acting under the authority of this Ordinance, shall be guilty of an offence, and liable on conviction to rigorous or simple imprisonment for a term which may extend to three months, or to a fine not exceeding fifty rupees.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

28 It shall be lawful for the Governor to appoint one or more Special Officers for the whole Island, who may for the purposes of this Ordinance perform, do, and exercise in any province or district all or any of the powers, duties, and functions vested in the Government Agent or Assistant Government Agent under this Ordinance. Governor may appoint one or more special officers to carry out Ordinance.

29 Nothing in this Ordinance contained shall preclude or prevent the Crown in any case in which no notice has been issued under section 1 in respect of any land from selling, leasing, reserving, or otherwise dealing with the same, or from instituting in any court an action to recover such land. Crown rights of disposition of land reserved.

30 *For the purpose of this Ordinance "land" shall mean an allotment of land the boundaries of which have been defined and delineated by survey.* "Land" defined. (§ 9, 1 of 1899)

SCHEDULE.

Form of Notice.

(Where more than one Land.)

(§ 3, 5 of 1900.)

Take notice, that unless within three months from the ——day of——, the persons, if any, who claim any interest in the lands hereinafter mentioned, or in any one or more of such lands, appear before the Government Agent of the——Province (or *Assistant Government Agent of——*) *at——, and make claim to the said lands or any of them or to some interest therein:*

Such Government Agent, (or *Assistant Government Agent*), *in pursuance of the powers vested in him by Ordinance No.* 1 *of* 1897, *will declare by writing under his hand that the said lands, or such of them as to which no claim has been made, are the property of the Crown.*

Form of Notice.

(Where only one Land.)

Take notice, that unless within three months from the ——day of——, the persons, if any, who claim any interest in the land hereinafter mentioned, appear before the Government Agent of the——Province (or *Assistant Government Agent of——*) *at——, and make claim to the said land or to some interest therein:*

Such Government Agent (or *Assistant Government Agent*), *in pursuance of the powers in him vested by Ordinance No.* 1 *of* 1897, *will declare by writing under his hand that the said land, to which no claim has been made, is the property of the Crown.*

9th February, 1897.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

No. 5 of 1900.

An Ordinance to further amend Ordinance No. 1 of 1897, intituled "An Ordinance relating to Claims to Forest, Chena, Waste, and Unoccupied Lands."

Preamble.

WHEREAS it is expedient to amend in the particulars hereinafter mentioned Ordinance No. 1 of 1897, hereinafter referred to as "the principal Ordinance," and Ordinance No. 1 of 1899:* Be it therefore enacted by the Governor of Ceylon, by and with the advice and consent of the Legislative Council thereof, as follows:

Ordinance to be construed as one with Ordinance No. 1 of 1897 and No. 1 of 1899.

1 The principal Ordinance, the Ordinance No. 1 of 1899,* and this Ordinance shall be read as one, and may be cited for all purposes as "The Waste Lands Ordinances, 1897, 1899, and 1900."

2-5 As amended by No. 4 of 1903, embodied in the principal Ordinance.

Irregularities in notices and orders under principal Ordinance cured.

6 No order purporting to have been made under the provisions of section 4 of the principal Ordinance, either prior or subsequent to the passing of this Ordinance, shall be deemed to be invalid or inoperative by reason of any irregularity in the making, dating, publishing, advertising, posting, or affixing of any notice purporting to have been published under the provisions of section 1 of the principal Ordinance.

Change of officers.

7 Whenever any Government Agent, Assistant Government Agent, or Special Officer, after having commenced or taken any proceedings under the principal Ordinance, is succeeded by another Government Agent, Assistant Government Agent, or Special Officer, such proceedings may be continued by the successor of such Government Agent, or Assistant Government Agent, or Special Officer, or any Special Officer may continue any proceedings commenced or taken by any Government Agent or Assistant Government Agent; and in any case in which any proceedings have heretofore been continued by such successor or by a Special Officer, such proceedings are hereby declared to be valid and effectual for all purposes.

21st March, 1900.

* Embodied in the principal Ordinance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

FORESTS.

For the special provisions as to forests, see the Forest Ordinance No. 16 of 1907 (which amends and consolidates the previous Ordinances) and Articles 188-195, pages 327 to 335, *supra*.

CROWN LANDS: BOUNDARIES.

No. 1 of 1844.

To make provision for the more easily ascertaining the Boundaries of the several Landed Estates possessed by Her Majesty's Subjects within this Colony.

(*As amended by No. 15 of 1905.*)

Preamble. WHEREAS much inconvenience is experienced from the want of any defined boundaries or landmarks of the several estates possessed by Her Majesty's subjects within this colony, and it is expedient to provide a remedy for the same: And whereas by the seventh clause of the Ordinance No. 12 of 1840 it is enacted that the Government Agent of any province may, with the consent of the Governor, grant to any person possessing land within the province a certificate of the Crown having no claim to such land, and it appears that the provision to that effect may conveniently be extended:

ABSTRACT. *

Production of deeds. 1 Government Agent may demand title deeds from occupier or owner of land.

Penalty for refusal.

Survey. 2 If no title deed or survey, Government Agent may cause survey to be made at claimant's cost and may grant certificate of no claim under § 7 of Ordinance No. 12 of 1840.

Trespass. 3 If boundaries of land derived from Crown not clearly defined, no liability for trespass unless wilful.

Land twice sold by Crown: possession by 2nd purchaser for 3 years. 4 If land once sold by the Crown is sold again by the Crown with undefined boundaries and is cultivated and possessed for 3 years by the second grantee, within boundaries clearly defined by him, he

* An abstract is given of this cumbrous Ordinance, as likely to be more useful. Reference should be made to the Ordinance itself for details.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

is, on payment of value which the land had at time of 2nd grant, entitled to a conveyance from 1st grantee and to refund of value paid to the Crown.

Possession less than 3 years.

5 If possessed for period less than 3 years, and land improved with 1st grantee's knowledge, he is subject to provisions of preceding section;

If possessed without such knowledge, 1st grantee has option (*a*) of taking the land, on payment to 2nd grantee of ¾ of improved value, less value in uncultivated state, with right to the latter to recover from the Crown the price paid by him to it: or (*b*) of conveying the land to 2nd grantee on receipt of value of land plus ¼ value of improvements, with right to 2nd grantee to recover from Crown.

Possession of another's land from two to five years.

6 Owner of uncultivated land, which, not having defined boundaries, has been cultivated in good faith by another from two to five years, has option of taking the land on payment to cultivator of ¾ of improved value of land less value in uncultivated state, or of conveying the land to cultivator on payment to the latter of ¼ value of land plus ¼ value of improvements.

But if owner, knowing of cultivation, fails to give notice of his right, he is not entitled to recover the land except on payment of improved value of land less value of land in uncultivated state.

Possession for over five years.

7 If cultivation has been for over five years, owner has option of taking the land on payment of improved value of the land less value in uncultivated state, or of conveying the land to cultivator on payment by the latter of value of the land in uncultivated state.

But if owner, knowing of cultivation, fails to give notice of his right, the cultivator is entitled to keep the land on payment to owner of value of the land when first entered upon.

Liability to define boundaries.

8 Proprietors of adjoining lands are liable each to define ½ common boundary: if Crown be one of the proprietors, the private owner is liable to define the whole.

Defaulter after notice is liable to pay double cost.

Liability to subsequent purchaser.

9 If such Crown land be subsequently sold, ½ the cost of defining the boundary may be recovered from the purchaser.

Arbitration as to value.

10 Disputes as to value under §§ 4, 5, 6 and 7 to be determined by arbitration in terms of this section.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

11 Any dispute as to sufficiency of boundary to be referred to arbitration. — As to boundary.

12 Surveyor-General or person authorised by him shall inspect, on application and payment of fees, and shall certify sufficiency of boundary for the period specified by him, and during such period the boundaries shall be deemed sufficiently defined for the purposes of this Ordinance. — Inspection by Surveyor-General.

13 Ordinance not to affect property of insane persons or minors or a person to whom an order of a competent court has been issued staying the making of boundaries. — Exemptions.

14 Penalty for destroying or attempting to destroy any landmark or boundary. — Penalty for removing landmarks.

No. 4 of 1866.

An Ordinance to enlarge the power of the Surveyor-General to demand the Production of Deeds and make Surveys of Lands, and to facilitate the proof of Surveys.

WHEREAS the continued encroachments made by private individuals upon lands belonging to the Crown, and the necessity for ascertaining and distinguishing the lands belonging to the Crown from those belonging to private individuals, render it necessary that the Surveyor-General and his officers should be vested with increased powers to demand the production of title deeds, and to make surveys of lands, whether public or private; and whereas it is expedient to facilitate the proof of Government surveys: It is therefore enacted as follows: — Preamble.

ABSTRACT.

1 Surveyor-General, &c., may demand production of deeds. — Demand for deeds.

Penalty for refusal.

2 Demand for production of deeds to include power of examining them. — Examination.

Penalty for refusal.

3 Surveyor-General or person authorized by him may enter into and survey lands. — Survey.

4 Repealed.

5 Penalty for abuse of authority by Surveyor-General, &c. — Abuse of authority

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Proof of plans signed by the Surveyor-General.

[*See* §83, 14 *of* 1895.]

6 If any plan or survey offered in evidence in any suit shall purport to be signed by the Surveyor-General or officer acting on his behalf, such plan or survey shall be received in evidence, and may be taken to be *primâ facie* proof of the facts exhibited therein; and it shall not be necessary to prove that it was in fact signed by the Surveyor-General or officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate, until evidence to the contrary shall have first been given. [See *infra*, Evidence Ordinance, 1895.]

Copies purporting to be authenticated by the Surveyor-General receivable instead of originals.

[*See* §83, 14 *of* 1895.]

7 Any plan or survey purporting to be a true copy of one purporting to be signed as aforesaid shall, provided the said copy purport to be signed and authenticated by the Surveyor-General or officer acting on his behalf as a true copy of the original, be received in evidence in all cases and for all purposes instead of the original, and may (without proof that the original is not procurable) be taken as *primâ facie* evidence of the truth of the facts exhibited therein as fully as that original may be under this Ordinance; and it shall not be necessary to prove that the said copy was in fact signed or authenticated by the Surveyor-General or officer acting on his behalf, nor that it is a true copy, nor that the facts established therein are accurate, until evidence to the contrary shall have first been given.

CEYLON EVIDENCE ORDINANCE NO. 14 OF 1895.

PROOF OF PLANS.

83 The court shall presume that maps, plans or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate; but maps, plans or surveys not so signed must be proved to be accurate.

CROWN LANDMARKS.

The Crown Landmarks Ordinance No. 7 of 1909 provides for the erection and maintenance of permanent landmarks to define the boundaries of land alienated by the Crown, and imposes on the owners the duty of keeping the landmarks in repair, with penalty for setting up counterfeit marks or misusing the Government broad arrow mark.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

LAND SALES BY CROWN.

No Crown land can be disposed of except by grant, lease, or settlement under the Waste Lands Ordinance, nor without the Governor's previous sanction. Every grant or lease must be under the signature of the Governor and the public seal of the Colony.

For the Land Sale Regulations see the Ceylon Manual, 1910, pages 563 to 574.

SIGNATURE OF CROWN GRANTS.

The Governor's signature to Crown grants may be attached by a rubber stamp, provided that

(1) all such grants are countersigned by the Colonial Secretary or other person duly appointed by the Governor (Ordinance 11 of 1884 sec. 1), and

(2) the Governor's signature is attached in the presence of his Private Secretary or other officer duly authorised by the Governor on that behalf, and

(3) such Private Secretary or other officer certifies on the face of the Crown grant that the Governor's signature was so attached in his presence (Ordinance 30 of 1884, sec. 1).

ABANDONED LANDS: RESUMPTION BY CROWN.

The Lands Resumption Ordinance No. 4 of 1887 relating to lands alienated by the Crown which are abandoned by the owners thereof, provides for the resumption of the lands by the Crown after due notice and inquiry. See Article 187 *supra*, page 324.

LAND ACQUISITION FOR PUBLIC PURPOSES.

The Land Acquisition Ordinance No. 3 of 1876, as amended by Ordinance No. 6 of 1877, No. 3 of 1883, No. 18 of 1904 and No. 13 of 1905, provides for the acquisition of land for public purposes and for determining the amount of compensation to be made on account of such acquisition. See Article 195, p. 335, *supra*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CROWN DEBTS.

No. 14 of 1843.

For providing for the better security and recovery of Debts due to the Crown.

Preamble.

WHEREAS it is expedient to repeal the Ordinance No. 1 of 1843 and to make further provision in lieu thereof, as well for the security as for the recovery of all debts due to the Crown throughout this Island and its dependencies.

Ordinance No. 1 of 1843 repealed.

1 It is therefore hereby enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof, that the said Ordinance No. 1 of 1843, entitled "*For providing for the better security and recovery of Debts due to the Crown*" shall be, and the same is hereby repealed, save and excepting as to all suits or proceedings commenced or had thereon, and save and except as to the repeal of any former enactment therein contained.

Government Agent to seize property of debtor upon knowledge or notice of debt.

2 And it is further enacted that it shall be lawful for any Government Agent, or Assistant Government Agent (or other person duly authorized by writing signed by such Government Agent, or Assistant Government Agent) within his Province or District, and upon his own knowledge of the default of payment by any debtor to Her Majesty, or notice to him given of any debt having accrued due to Her Majesty, promptly and immediately to seize, take, and in safe custody to keep, but without removing the same (except in those cases only where there are no adequate means for safety and securely keeping the said property at the place where it is seized, and no sufficient security given for the value thereof), all and every the property of any debtor or debtors to the Crown to an amount computed to be sufficient to cover the said debt so due and owing, and the cost attending the same.

Filing of libel or information in Court.

3 Provided always, and it is further enacted that within seven days at farthest (exclusive of Sundays and other authorized public holidays) after such seizure as aforesaid, a libel or information setting forth the nature and amount of the debts so due to Her Majesty shall be filed in any Court having jurisdiction in the case, and every such Court upon any such libel or information being filed, together with the certificate of the property seized signed by the person making the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

seizure, are hereby required to deliver to the Fiscal a warrant to sequester the property of the said debter, and any further proceedings which may be had thereon shall be according to such general rules of practice as now are or hereafter may be framed by the Judges of the Supreme Court. Process thereupon.

4 And it is further enacted that all lands and tenements which any Treasurer, Government Agent, Assistant Government Agent, Collector of Customs, Government farmer or renter, or other officer employed in the collection, charge, receipt or expenditure of the revenue, public money, stores or other property belonging to Government or any other public accountant now hath, or at any time hereafter shall have within the time during which he shall respectively remain accountable to Government, shall be liable for the payment of all arrearages or debts, and all fines, penalties, and forfeitures due or adjudged to Her Majesty, her heirs and successors by or from such officer or public accountant, and the said lands and tenements, and all other the goods, chattels, property, and effects of the said officer or public accountant shall be seized and sold in execution for the payment of all such arrearages or debts, fines, penalties, or forfeitures as may be adjudged due and payable to Her Majesty, her heirs and successors, by any competent court of law in like and as large and beneficial a manner to all intents and purposes as if the said officer or public accountant had, the day he became first an officer or accountant as aforesaid, specially mortgaged the said lands and tenements to Her Majesty, her heirs, and successors for the full payment of such arrearages or debts, fines, penalties and forfeitures, and had also at the same time by a Notarial Bond acknowledged the said arrearages or debts, fines, penalties, and forfeitures to be due to Her Majesty, her heirs, and successors. Property of public accountant liable for debt, &c.

5 And it is further enacted that all debts due to Her Majesty, her heirs, and successors, upon mortgage, judgment, award, bond, or other speciality, or upon simple contract from any other persons than officers and public accountants mentioned in the preceding clause shall be entitled from the accruing thereof, respectively, to a preference of payment over all specialties or other debts, which shall subsequent to such date have been contracted by or become due from such Crown debtors to any other person or persons whatsoever. Crown debts on mortgage, &c., preferred to all subsequent debts.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Previous mortgage of immovable property not affected.

6 Provided always, and it is further enacted that this Ordinance or anything herein contained, shall not extend to or affect the right of any person or persons or body corporate who has or have any special mortgage or hypothecation of any land or other immovable property of a prior date to the claim of the Crown and duly executed before a Notary Public or other person appointed by Government for the passing of deeds or other instruments, or to affect the right of any person or persons or body corporate who has or have a legal lien, mortgage or privilege which is entitled to preference over any such prior special mortgage or hypothecation as aforesaid of immovable property, according to the Roman-Dutch law as now administered in the maritime districts of this Island, anything before-mentioned to the contrary thereof notwithstanding.

Nor previous transfer of movable property.

7 Provided also, and it is further enacted that no sale, pledge, transfer, or alienation of any goods, chattels, or other movable property upon good consideration and *bonâ fide* to any person or persons or body corporate prior to the date of the execution of the Crown upon any judgment or award of any debt, fine, penalty, or forfeiture being due and payable to it shall be invalidated by anything contained in this Ordinance to the contrary notwithstanding.

Fraudulent transfer, &c., void.

8 And it is further enacted that all gifts, grants, sales, transfers, mortgages, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels of any debtors to Her Majesty, her heirs or successors which have been or shall at any time hereafter be contrived, executed, had or made by fraud, covin, collusion, or guile to the end, purpose, and intent to delay, hinder, or defraud Her Majesty, her heirs or successors of her or their just and lawful action, suit, debts, accounts, damages, penalties, or forfeitures, shall be from henceforth deemed and taken to be utterly void and of none effect; and any party or parties thereto knowing of such fraud, covin, collusion, or guile, shall be guilty of an offence, and be liable on conviction thereof to a fine of the amount of one year's value of such lands or tenements and the whole value of the said goods or chattels as well as the consideration given for the same, and to imprisonment with or without hard labour for any period not exceeding one year.

Penalty.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Ordinance when to take effect.

9 And it is further enacted that this Ordinance shall commence and take effect from and after the Proclamation by the Governor in the *Government Gazette* that the same has been ratified and confirmed by Her Majesty, unless the same shall be passed by the unanimous votes of the Legislative Council, and all the Judges for the time being, of the Supreme Court, shall certify under their respective hands to the Governor their unanimous opinion that it is expedient that the same should take immediate effect and should not be suspended for the signification of Her Majesty's pleasure. And if such unanimous votes of the Legislature and such certificates of the unanimous opinion of the said Judges shall be given in favour of the immediate operation of this Ordinance, the same shall commence and take effect immediately from and after the date and enactment of the same.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX III.

DECISIONS UNDER THE WASTE LANDS ORDINANCES.

Observations on the decisions.

A lawyer, who has had considerable experience of cases under the Ordinances No. 12 of 1840 and No. 1 of 1897, and has often appeared for private claimants against the Crown, has sent me the following notes on the decisions:—

According to Lawrie J., "can only" means "were;"

Note to page 303. "The holding, in 4 N. L. R. 135, that the words 'can only' in § 6 of Ordinance 12 of 1840, do not mean 'can only' at all but 'were,' contravenes all rules of interpretation, besides being directly inconsistent with authoritative decisions of the Supreme Court which were binding on the judge (Mr. Lawrie) upon whose *obiter dictum* alone this opinion rests,—*e.g.* 1. S. C. C. 26; 3 S. C. R. 1; and especially 2 S. C. C. 88.

No private chena.

"The decisions in 4 N. L. R. 135 and 5 N. L. R. 95 go the length of ruling that there can possibly be no such thing as private chena, for if chena within the meaning of the Ordinance is not merely land '*incapable* of being cultivated otherwise than after intervals', but all land which has been so cultivated, and chena cultivation being necessarily periodical irrespective of the nature of the land, the stronger the proof of possession by such cultivation 'the stronger is the presumption that it belongs to the Crown'. That is to say, a person who chooses to use his industry in his own way thereby destroys his title. That the legislature did not contemplate anything so monstrous, appears from authoritative rulings.

Burnside C. J. & Withers J. *contra.*

"Mr. Justice Withers, in 3 S. C. R. 1, held that not only could evidence of chena cultivation be given in proof of possession to rebut the statutory presumption, but that in such cases continuous cultivation would not be required. In the same case, Chief Justice Burnside lays down in the most definite terms that possession by

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

chena cultivation shows title. He says: 'The plaintiffs have succeeded in shewing title .... to the land *as part of a chena* appurtenant to a low land .... It is clear that as a fact this was not Crown land, but *private chena*, which has been possessed and cultivated *as such* by the parties through whom the plaintiffs claim.' Mr. Justice Lawrie took part in deciding this case in appeal, but did not demur to these propositions of the Chief Justice and Mr. Withers. Mr. Lawrie himself, in 5 N. L. R., page 284, *Kiribanda* v. *Booth*, conceded the position that there can be private chenas, when he said that field appurtenances include chena, but not forest. In 3 Balasingham's Reports, p. 286, a piece of land called Medaduva was claimed as Crown land because it was in a state of forest. Middleton J. and Wendt J. held that 'the presumption would be rebutted by the proof of private occupation to be inferred from the occupation of the bulk of the corpus' —the corpus being described by Mr. Middleton as *private chenas*.

Middleton J. & Wendt J.

"Mr. Justice Lawrie is hardly consistent in his own rulings. In the Nariagama Forest Settlement case (Chilaw Kachcheri record) he said :—

Nariagama Case : Lawrie J.

'Where a man and his ancestors have possessed from time immemorial a defined piece of chena land, the appurtenance of his field or a separate inheritance .... in such cases repeated cultivations of the same chena prove private ownership and rebut the presumption in favour of the Crown.'

"In 3 S. C. R. 1, he said: 'When the Ordinance 12 of 1840 enacted that all forest &c. .... shall be presumed to be the property of the Crown, it did no more than enact the law then existing. The effect of the enactment was rather to restrict presumption than to create it.' After that clear statement he holds, in 5 N. L. R. 98, that proof of a land being chena would not advantage a claimant and rebut the presumption because 'this enactment with regard to chenas has, I think, now made a change in the law. In Kandyan times high land was acknowledged as appurtenant of fields.'

Has Ord. 12 of 1840 changed the law?

"But if his first opinion was correct,—and that the legislature had no intention to effect a change in the Kandyan law is insisted upon by the Government (see the Colonial Secretary Sir Hugh Clifford's speech in the Legislative Council, *Ceylon Hansard*, 1906-7, pp. 164, 166, in reply to the Kandyan member's motion

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

re the Waste Lands Ordinance)—, then it is clear that ordinary chenas which were appurtenant to fields were not within the King's prerogative merely because they were cultivated with fine grain."

Presumption in favour of Crown.

Note to page 310. "The foundation for proceedings under Ordinance 12 of 1840, is the fact that land comes within the description of land presumed to be the property of the Crown under § 6: and 'the burden of proving this foundation is upon the Crown,' 1 Br. 222. By analogy the foundation of proceedings under the Waste Lands Ordinance is the presumption created in § 26 of that Ordinance, which has been said to enact no new law. The burden should, therefore, be on the Crown. But not merely is the onus of proof shifted to the private claimant by the fact of his being forced into the position of plaintiff, but the Supreme Court has recently held that the opinion of the Government Agent stated in the notice under section 1, that any land *appears* to him waste, &c., is *conclusive* and irrebuttable evidence that it is of that description.

Gov^t. Agent's opinion conclusive. *Adippola Sannas Case.*

"This strange dictum was first suggested by Pereira, A. J. in the *Adippola Sannas Case:* 8 N. L. R. 265. He said: 'A preliminary question arises whether the fact that certain land has appeared to the Government Agent to be forest, chena, waste or unoccupied . . . is not itself sufficient proof that the land is such as falls within the scope of the Ordinance.' An authority for this proposition is sought in the reasonable holding that in the case of lands to be acquired for public purposes the decision of the Governor on the question whether a land was needed or not for a public purpose was final. Here, of course, the choice of a locality for a public purpose is an operation of the official mind. But is it conceivable that an official's opinion can alter the concrete fact of the natural condition of a land?

Fernando v. *A. G. A.*

"Still the Supreme Court has given its full sanction to this suggestion of Mr. Pereira by an authoritative holding to that effect in *Fernando* v. *The A. G. A. Kegalle*: D. C. Kegalle No. 2939. (S. C. Minutes No. 29. 13th February, 1909.) Hutchinson C. J.'s judgment, in which Wendt J. concurred, is as follows on this point:—'The first point taken by the appellants is, that the foundation of the authority given by the first section of the Ordinance to issue notice is that it appears to the Government Agent that the land is forest, chena, waste or unoccupied, and that the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

per Hutchinson C. J.

notice issued in this case does not state, and there is nothing in the record to shew, that it so appeared to the Government Agent . . . The form of the notice under section 1 is given in the schedule, and was followed in this case. It states that the Government Agent is acting under the powers vested in him by the Ordinance. If the form had stated that it appeared to the Government Agent that the land was forest, &c., no proof would have been required that it so appeared to him: and in my opinion where the notice follows the form (as it must do), no such proof is required.'

"This judgment of the Chief Justice, it may be said, only deals with a technical objection. But taken with the dictum of Mr. Justice Pereira and the reasoning upon which he supports it, the point laid down seems to shut out all proof that the Government Agent may be misled by appearances. If when a Government Agent follows the form of notice, as he must do, that in itself 'is sufficient proof that the land is such as falls within the scope of the Ordinance,' every reference under the Ordinance must necessarily end in favour of the Crown.

"Mr. Pereira in the *Adippola Sannas Case* goes even further: for he says that apart from the 'preliminary question' just referred to, no question as to the nature of the land arises after proceedings have commenced under the Ordinance. He argues in a circle and shews conclusively that the private claimant is debarred from proving the true nature of the land at every point of the compass. Thus, if a Government Agent proclaims the residing house of a man as a forest, the occupant cannot offer proof that it is a house! Similarly if a coconut estate a hundred years old is brought under the Ordinance as chena, no proof to the contrary is admissible after proceedings have commenced, because, Mr. Pereira says, that in section 1 'chena' &c. stands unqualified!"

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX IV.

THE ADIPPOLA SANNAS CASE.

Cooke et al. v. Assistant Government Agent, Chilaw.

District Court, Chilaw, 2,954.

[EXTRACTS FROM JUDGMENT OF MR. P. ARUNACHALAM, D. J.].

* * * * *

II.

The issues in the case are:—

1. Are the lands under reference in this case forest, chena, waste, or unoccupied lands within the meaning of the Ordinance No. 1 of 1897?
2. (*a*) Did the defendant Assistant Government Agent enter into an agreement with the claimants as to the whole or part of their claim?
   (*b*) If not, is the reference good in law?
   (*c*) In view of defendant's omission to state in the reference that he had failed to enter into such agreement, is the reference good in law?
3. Is the *sannas* relied on by the plaintiffs forgery?
4. Is it competent to the defendant to question its genuineness?
5. Is the Crown entitled to the lands in question, or are the plaintiffs entitled to them under the *sannas?*
6. Have the plaintiffs possessed the lands so as to be entitled to the benefit of prescriptive possession?
7. Have the plaintiffs acquired by long user the right of cultivating according to their necessities the jungle in the lands under reference, and of taking forest produce from the forest therein?

The *sannas* (which is marked P 1) is a thin strip of copper plate about 11 inches long by 1½ inch broad, on which the terms of the grant have been inscribed in Sinhalese characters, which are in parts barely legible. The Government Archæologist, Mr. Bell, has made a transcript B 1 and a translation of it B 2; the plaintiffs a transcript P (A) and a translation P 1 (A). The transcript and translation produced for the Crown differ in some respects from those furnished for the plaintiffs. I have obtained from the Registrar-General a certified transcript Q of the copy made in his Chilaw office in 1873 when the *sannas* was registered. The sense of the material parts of the grant is not disputed, and is as follows:—

"The royal *sannasa* received on Wednesday of the month of Vesak in the year of Saka 1247.

"When Suriyahetti Mudianse, who came from the Telugu country, landed at Ponparippuwa, the King Buvaneka Bahu of Kotte, having heard thereof, sent a message to Suriyahetti Mudianse: and the said Mudianse deeming it necessary to pay obeisance (to the King), paid

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

obeisance to His Majesty, offering as presents 60 *vilisa* (or *viliya*) *kuruns*, 150 pure silver *kuruns*, and a white milch cow with her calf. Thereupon His Majesty bestowed upon him, by tying the band (on his forehead), the title Telangapata Suriyahetti Adikari Mudianse, and for his sustenance the tank called Adippola, having fixed as boundaries on the east Ellagalpitiya, on the west Bihigala in the Sengaloya, on the south Batalawala, on the north Mahadanwila, and having ordained that as long as sun and moon endure there shall be no cattle taxes (here follow various other taxes under names not now intelligible, except 'elephant tusks'), tithes, and burdens, His Majesty King Buvaneka Bahu of Kotte granted to Telangapata Suriyahetti Adikari Mudianse this royal *sannasa* as long as sky, earth, sun, and moon endure."

The important points to be noted in the *sannas* are :—

(1) Date of *sannas* : 1247 Saka era=1325 of the Christian era.
(2) Grantor : King Buwaneka Bahu of Kotte.
(3) Grantee : Suriyahetti Adikari Mudianse of Telugu country in Southern India.
(4) Land granted : the tank of Adippola.
(5) Boundaries of land :—

East : Ellagalpitiya.
West : Bihigala in Sengal-oya.
South : Batalawala.
North : Mahadanwila.

The *sannas* is produced by the present head of the Suriyahetti Adikari Mudianse family, who still occupy the village Adippola. He is the third plaintiff in this case, and was the police headman of the village until about four years ago, when he was dismissed from office by the Assistant Government Agent in connection with this claim. The present custodian received the *sannas* from his uncle Ranhami Vedarala, the late head of the family, who registered it on 30th June, 1873, in the Land Registry of Chilaw, under the Ordinances No. 6 of 1866 and No. 15 of 1867—Ordinances which were enacted to prevent the production in Courts of Justice of false *sannases* and other old deeds, and rendered all documents executed before 1st February, 1840, inadmissible as evidence of civil rights unless registered.

III.

It is necessary for the purposes of this case to have a clear idea of the physical features of the lands in claim. The village Adippola, it will be seen from the Government surveyor's plan, is bounded on the south and west by the river Sengal-oya, on the north by the Crown forest reserve Ambamukalana, on the east by the district boundary made during the Dutch rule and known as the *Kompas-para*. The boundaries given by the *sannas* to "the tank of Adippola" are practically the same.

The western river frontage of the village extends about ¼ mile, and includes the stone "Bihigala in Sengal-oya" referred to in the *sannas*. This is a rock slab indicated by a red star in the plan, a slab which tradition says was imbedded in the river by a *yodaya*, a giant or demon; the name "Bihigala" being probably a corruption of the Tamil word "Peykkal," a demon-rock. The southern river frontage extends about ⅝ of a mile as far as the pool Batalawala indicated by a red star in the plan, where the river meets the district boundary *Kompas-para*. The northern boundary mentioned in the *sannas* is Mahadanwila (probably a pond), which gave its name to about 78 acres of forest (Danwilakele) included in this claim (F 1,175, H 1,175, I 1,175, and 11,086), and hardly distinguishable from the adjoining reserved forest. The eastern boundary, according to the *sannas*, is Ellagalpitiya, *i.e.*, the meadow (*pitiya*) of the Ellagal, which is a carved stone pointed to me at the spot and indicated by a red star on the plan. The name is a corruption of the Tamil *Ellaikkal*, which means boundary-stone.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The Tamil names of these two important boundary marks are consistent with the history of the grant, which purports to have been made to a "Suriyahetti of Telugu country," or, as he would be called in Tamil, *Suriya Chetti*. His place of origin is called Telugu country, probably because at that time (fourteenth century) the greater part of Southern India was under the rule of the once celebrated but now forgotten Telugu Kingdom of Vijayanagaram. The eastern boundary of the claim is marked in the plan by an irregular dotted line passing a little to the west of the district boundary, and which, beginning at the red star Batalawila, passes northwards through Ellagalpitiya (red star) to the Crown forest.

The boundaries of the claim and of the village Adippola are therefore the same, except on the eastern side, where the village boundary, which is also the district boundary, falls a little outside the boundary of the claim. It thus happens that of the lots under reference in this case P 1,176 (26 acres 3 roods 10 perches), Q 1,176 (1 acre 0 rood 18 perches), and 11,086 (4 acres) are not claimed in this case by the plaintiffs or the other claimants, and therefore may at once be adjudged to the Crown.

Within the village boundaries lie 1,464 acres of land, which have been parcelled by the Government surveyor into 202 lots, of which only 48 are under reference in this case and cover 1,181 acres. I have ticked off in blue on the plan and in the tenement sheets these 48 lots to facilitate reference. Among them, excluding those adjudged to the Crown in the last paragraph, the following lots exceed 20 acres in extent :—

Lot.			Description.		Extent. A.	R.	P.
Z	1174	...	Old chena	...	259	1	20
O	1176	...	Do	...	240	0	30
E	1175	...	Do	...	202	3	0
N	1170	...	Do	...	29	2	34
M	1176	...	Do	...	24	3	13
G	1173	...	Do	...	22	0	0
F	1175	...	Forest	...	73	3	10
G	1169	...	Do	...	73	2	0
N	1176	...	Do	...	46	2	20
U	1174	...	Do	...	48	0	0
V	1174	...	Do	...	21	0	16
I	1173	...	New chena	...	26	3	0

By "old chena" is meant scrub jungle between seven and twenty years old, by "new chena" land under chena cultivation at the time of the survey.

Roughly speaking, the claim may be said to consist of a thousand acres of forest and old chena, a hundred acres under residence or cultivation, and fifty acres of water. Scattered over this tract are four hamlets, of which the central one is called the Meda gangoda or "middle hamlet," and the two on the west are called "Ihala" and "Pahala gangoda," "upper hamlet" and "lower hamlet." These three hamlets constitute Adippola proper, which derives its name from the tank, and are inhabited by persons who claim to be descendants of Suriyahetti Adikari Mudianse, the grantee of the *sannas*, and bear his family name.

The fourth hamlet stands far to the east near the district boundary *Kompas-para*, and derives its name from its tank Andanankattuwa, a name which seems to indicate that the tank owed its origin to a Brahmin, *andanan* being the Tamil word for "Brahmin," which is a Sanskrit word. This hamlet was an offshoot of the Adippola village, and is occupied by persons who are said to be descendants of the retainers of the Suriyahetti Mudianse family. The hamlet was claimed before the Assistant Government Agent by some of the descendants (6th, 7th, 8th, 9th claimants), together with its fields and gardens, forests and chenas, extending westward up to a line which I have marked in the plan as the approximate western boundary of the Andanan-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

kattuwa claim. These men were accordingly included by the Assistant Government Agent among the claimants in his reference to this Court, but they have made no written claim before the Court. They appear to have stated that they would abide by the statement filed by Mr. Corea for plaintiffs, in which this claim is admitted.

Fifteen out of the nineteen plaintiffs bear the Suriyahetti Mudianse family name; two plaintiffs (the 18th and 19th) have married into the family. The only strangers among them are the first and second plaintiffs, who by deed P 3 of 1898 have purchased from their co-plaintiffs and other alleged descendants of Suriyahetti Mudianse an undivided half of their rights, exclusive of the fields and gardens and exclusive of the Andanankattuwa claim. It is frankly admitted that the object of this sale was to secure the help of the two vendees, who are apparently persons of means, to maintain against the Crown the rights of the villagers.

The tank of Adippola is now only about 11 acres (C 1,171 and B 1,175), but in olden times must have covered a much larger extent of the village to which it gives its name. About half a mile west of the present tank stands a big bund called the Giant's Bund (Yodayakanda), which bears testimony to the size of the tank and the importance of the village in ancient times. The bund is about half a mile long, in places 20 ft. high and 70 ft. wide at the base. Beginning at the south-west corner of the village near the river Sengal-oya (which it was no doubt designed to dam), the bund runs north-east to the confines of the forest G 1,163, where there are traces of a spill. Near the spill is the "upper hamlet" (Ihala gangoda), at the other end is the "lower hamlet" (Pahala gangoda). On either side of the bund lies the big tract Z 1,174, already referred to, of "old chena," 260 acres in extent, covered for the most part with scrub jungle and on the crest of the bund with forest.

On the west of the bund midway between it and the Adippola tank lies the "middle hamlet" (Meda gangoda), the earliest of the settlements in the village, with its little temple, monastery, and preaching hall, and with a larger number of residential plots and gardens than in the upper or lower hamlet. Adjoining the middle hamlet is a tract of fields irrigated by the Adippola tank by means of channels, which after serving the fields run into the patches of water (Q, R, S, T 1, 170). These after intersecting the bund are continued on its western side in O 1,170 near the spill, and by a now obliterated water-course on to the pool A 1,175, and on the eastern side appear to have been connected by a similar water-course with the big pool M 1,173 and with the still bigger pools P and Q 1,174, adjoining the river Sengal-oya.

Altogether these form, in the Government surveyor's opinion, a complicated system of irrigation works now in ruin owing to the breaching of the bund in many places and to the obliteration of the channels. If these were in order and the water supply controlled, the large tract Z 1,174 on either side of the bund is, he thinks, capable of rice cultivation. There are evidences that such cultivation did take place. The eastern part of Z 1,174 is still called "the upper field" (Ihala kumbura) and the western part "Mudalakkuli field." The name kumbura (field) indicates the uses to which the tract was formerly put, and to which it would still be put but for the ruin of the irrigation works and the inability of the villagers to restore them. The eastern part of Z 1,174 derives its name from the pool M 1,174 called Mudalakkuli (Tamil for "the crocodile's pool"), by which it must have been irrigated. In this tract I saw traces of what seemed old dams or ridges which have been marked in the plan by the surveyor, and were probably used for purposes of rice cultivation. The scrub jungle now in the tract might, according to the surveyor, have grown up in seven to twenty years if the land had been allowed to lie fallow; likewise the forest in sixty or one hundred years. The forests U and V 1,174 and G 1,169 might therefore, like the "old chena" Z 1,174 which they adjoin, have been once cultivated lands.

East of the Adippola tank (C 1,171 and B 1,175) is a little tank Medawewa (D 1,175) about 3 acres in extent, connected with the former by a channel. At the base of Medawewa begins the boundary line which, passing southwards

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

through the traces of a bund indicated by the surveyor, approximately marks off the hamlet of Andanankattuwa and the claim of its inhabitants from the rest of Adippola. There is a tract of fields (S, T, U, V 1,175) irrigated by the Andanankattuwa tank (J, K, L, M, N 1,175). The tank is now the largest in the whole village, being about 24 acres in extent, and is partly under forest and partly adjacent to forests (F, R, P, Q 1,175), and it was with great difficulty that I was able to make my way to the boundary-stone "Ellagalpitiya."

Adjoining this hamlet on the north, north-east, and northwest is the large tract of old chena (E 1,175) 202 acres, which on the north-west extends past the tanks Medawewa and Adippolawewa to the confines of the upper hamlet. On the south and west is the other big tract of old chena (O 1,176) 240 acres in extent, and a forest of about 46½ acres (N 1,176), which extend to the confines of the middle hamlet. Between the hamlets with their adjoining tracts of fields and the forest or old chena lie plots of new chena.

Occasionally fields are found in the heart of the old chena or forest, as *e.g.*, X 1,174 in the western portion of Z 1,174 and called Ihapuwela, a "pool sown (with paddy)," J 1,173 (a field of about 4 acres) in the centre of the eastern portion of Z 1,174, D and F 1,173 (field of about 6 acres) between the 22 acre old chena G 1,173 and the 26 acre new chena E 1,173, both of which chenas, with the new chenas, H and I 1,173, no doubt originally formed one land with the old chena Z 1,174 on one side and with the old chena O 1,176 and the forest N 1,176 on the other side.

So in the Andanankattuwa claim the 28-acre tract of fields R, S, T, U, V 1,175 adjoins on the west and south the 240-acre tract of old chena (O 1,176), and on the north the 202 acre tract of old chena (E 1,175), and on the east the tank and forest. Out of the old chena E 1,175 or the forest that preceded it the hamlet Andanankattuwa was carved on the east, and on the west the upper hamlet which is separated from the middle hamlet by part of this chena and by an extensive tract of fields common to both hamlets.

V.

The history of so ancient a village as Adippola cannot now be clearly ascertained. No records exist except the disputed *sannas*. Whatever other records may have existed have disappeared during centuries of intestine war and foreign invasion. The excellent system of irrigation, of which I have mentioned the relics, depended for their maintenance on the organized and continuous labour of a peaceful village community, and inevitably fell into disrepair and ruin during those troublous times. Rich and fertile corn land and meadow would then become converted into malarious jungle, from which a reduced and sickly population gathered a precarious subsistence. Even in recent years the population has continued to decline. At the Census of 1901 there were twenty houses of eighty-seven persons in Adippola proper and three houses of nineteen persons in Andanankattuwa, or a total of 106 persons, against 112 at the Census of 1891, a decline of 5 per cent. instead of the normal increase of 10 per cent. There was in 1901 only one person left in Adippola over the age of 55, and she a woman. Thus the evidence of old witnesses so useful in these cases is not available. However, enough remains from which, with the knowledge won by the researches of scholars during the last generation of the origin and development of village communities in the East and in the West, we may form a fairly accurate idea of the history of this village.

The Adippola tank served a tract of country practically identical with the present village. What with the tank on one side and the river on two other sides, the land was one attractive to settlers. Whether by virtue of the alleged royal grant in favour of Suriyahetti Mudianse or otherwise a number of persons, united by a common lineage from a person of that name or by the assumption of such lineage, settled near the tank. Their aim was of course the tillage of the soil, and was best attained in those times by the constitution of a "Village Community"—an organized, autonomous, self-acting group of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

families, complete in itself, exercising a common proprietorship over a definite tract of land, cultivating its domain on a common system, sustaining itself by the produce, and providing by a more or less complete staff of functionaries for internal government, for police, for administration of justice, for apportionment of taxes and public duties, and for protection against the aggression of its neighbours. This institution has existed in Europe and Asia from ancient times. Tacitus describes it as existing in the Germany of his time. Traces of it are still to be found in Germany and Great Britain, as the labours of Maurer, Nasse, and others have established. While in Europe political convulsions, economic necessities, the rapacity of kings and nobles and the various causes which are usually summed up in the phrase "the Process of Feudalization," have destroyed the institution, merging it in larger aggregations of territory and population, the Indian Village Community is a living, not a dead, institution. To Sir Henry Maine belongs the credit of being the first to reveal and to establish the essential identity of the Village Community of India with that of the Teutonic races.

The original Teutonic community was an association of freemen, a *gemeinde*, a commonalty or commons, not common people as opposed to uncommon people, *i.e.*, a privileged class, but a body of men having property in common, and among whom the private right of property in land was correlative to the public duty of military service and participation in the legislative and other political acts of the community. The agricultural relations were rather of a complicated kind. The village domain was called the *Mark* (*i.e.*, the geographical area *marked* out and appropriated by the community), as among Indian communities it was called the *gráma* (Sinhalese *gama*), *i.e.*, the area taken hold of by the community (from the Sanskrit root *grah* or *grabh*, which is the root of the English "grab," "grip," "grasp"). This domain ("mark" or "gama") consisted of three distinct parts, as (1) the *Common mark* (the *folc land* of the Anglo-Saxons) owned jointly by the community; (2) the *Arable mark* or *Feld mark*, cut out of the common mark and apportioned in equal lots to the members of the community; (3) the *mark of the Township* (dorf, thorp, villa), also divided into equal lots, individually appropriated as residences and garden lots.

The word "town," it should be noted, had not its present meaning originally, but meant an agricultural community, and is used in that sense in the Statute of Henry VII., 4 cap. 19, "An Acte against the pulling down of townes." The idea of a "town" was that of a fenced-in village, the Anglo-Saxon *tun* being the same as the German *zaun*, a hedge or fence, and meaning the residential part of the village (the mark of the town), which was fenced off from the unenclosed common mark and from the arable mark which was enclosed only while under cultivation. The Statute referred to was one of the ineffectual attempts made to stem the tide of the great "enclosing" movement of the 16th century, which was a main cause of the wholesale destruction of the Village Community in England.

The individual marksman therefore stands, says Morier in his excellent account of the System of Land Tenure in Germany, in a three-fold relation to the land occupied by the *gemeinde* (community). He is a joint proprietor of the common land, he is an allottee in the arable mark and he is a householder in the township. In the first case he owns *de indiviso*, and his rights are strictly controlled by those of his co-marksman. His cattle graze on the common pasture under the charge of the common herdsman, he hews wood in the forest under the control of a communal law officer. In the arable mark he has a distinct inheritance and can call a certain number of square roods his own, but he must cultivate his lot in concert with his associates, and the community at large determines on the mode of its cultivation. The whole mark is divided into as many parts or "Fields" as the rotation of crops and the alteration between fallow and plough requires: usually into three such commonable fields, each lying fallow once in three years, the community having rights of pasturage on the fallow as on the stubbles of the land under the plough. To obviate the possibility of the individual allottee finding

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

himself every third year without any land under cultivation, which would be the case if the lots lay in undivided blocks, each lot is distributed in single parcels over the three "Fields" of the arable mark, a subdivision which renders cultivation in common still more necessary. In the common mark, therefore, and in the arable mark the individual is everywhere controlled by his peers and by the minute customs and usages of the community; he is contained by and tethered to the association. In his dwelling-house and its appurtenances in the township the reverse is the case. Here he is absolute lord and master. His fenced-in court-house or manor is in the fullest sense his own. Over his family and dependents within it he can dispose as seems good to him. To them he is a lawgiver and a law-enforcer. Within his pale neither public nor communal officer can enter otherwise than with his sanction. It lies outside the *community* and constitutes an *immunity*. In the familiar saying, "Every Englishman's house is his castle," we have a distinct echo from those far off times.

The village community of India has, says Sir H. Maine, the same double aspect as the Teutonic township, of a group of families united by the assumption of a common kinship and of a company of persons exercising joint ownership over land. The domain which it occupies is distributed, if not in the same manner, upon the same principles, and the ideas which prevail within the group of the relations and duties of its members to one another appear to be substantially the same. There is the arable mark (Sinhalese *mada bima*) divided into separate lots (*kumbura*), but cultivated according to minute customary rules binding on all. There is the waste or common land (*Ganwásiya*), out of which the arable mark has been cut, and which is enjoyed by all the community *pro indiviso* as pasture for their cattle, and as forest out of which to hew wood and gather other forest produce. There is the hamlet (*Gangoda*) consisting of habitations, each ruled by a despotic *pater familias* and of their garden lots. And there is a Council of Government (*gansabhawa*) to determine disputes as to custom.

The necessities of a tropical climate have of course produced some differences. The Teutonic "three field" system does not obtain here. The great agent of production in a tropical country being water, the modes of cultivation depend on relative proximity to running streams and relative exposure to the periodical rainfall. "The true analogy between the existing Indian and the ancient European systems of tillage must be sought in the minute but multifarious rules governing the proceedings of the cultivators: rules which in both cases have the same object, to reconcile a common plan and order of cultivation on the part of the whole brotherhood with the holding of distinct lots in the arable land by separate families. The common life of the group or community has been so far broken up as to admit of private property in cultivated land, but not so far as to allow departure from a joint system of cultivating that land." This power of the community is occasionally exercised, Sir H. Maine notes, especially in non-Aryan communities—and Adippola was such a community, tracing, as it did, its origin to a Tamil ancestor—by the removal of the entire arable mark from one part of the village domain to another and by the periodical redistribution of lots within the cultivated area.

Sir H. Maine lays special stress on one point of dissimilarity between the Teutonic and Indian village communities, which has an important bearing on the present case. This has reference to the waste or common land of the village community. The members of the Teutonic community, he says, appear to have valued the village waste chiefly as pasture for their cattle, and possibly may have found it so profitable for this purpose as to have deliberately refrained from increasing the cultivated portion of it which had been turned into the arable mark. But the vast bulk of the natives of India being a grain and not a flesh-eating people, and, it may be added, the slaughter of cattle being regarded by them as a heinous sin, cattle are useful to them mainly as auxiliary to tillage. The waste or common land of the community is, therefore, generally regarded as "that part of the village domain which is temporarily

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

uncultivated, but which will some time or other be cultivated or merge in the arable mark. Doubtless it is valued as pasture, but it is more especially valued as potentially capable of tillage. The effect is to produce in the community a much stronger sense of property in common land than at all reflects the vaguer feeling of right which, in England at all events, characterizes the commoners .....The so-called waste lands are part of the domain of the various communities which the villagers, theoretically, are only wanting opportunity to bring under cultivation."

Two other extracts from Maine have a bearing on this case. "Sometimes a community possessed of common land exceptionally extensive and exceptionally fertile would send colonies of families to parts of it. Each of these new communities would receive a new arable mark, but such of the land as remained unappropriated would still be the common land of all the township. At the head of this sort of confederacy there would, however, be the original mother community from which the colonists proceeded."

The community was also at times obliged to admit strangers. "What is it," asks Maine, "which in primitive states of society forces groups of men to submit to that amalgamation of strangers which seems at first forbidden by its very constitution? It is the urgency of the struggle for existence—a struggle in the West both with men and with Nature; in the East a struggle less with savage enemies than with Nature, not indeed unkindly, but extraordinarily capricious and difficult to subdue from her very exuberance. The utmost available supply of human labour at first merely extracts from the soil what is sufficient for the subsistence of the cultivating group, and thus it is the extreme value of new labour which condones the foreign origin of the new hands which bring it."

Thus it was that the original village community of Adippola, as its families grew and multiplied, sent forth colonies to the "upper" and "lower" hamlet, the mother community being called by way of distinction "the middle hamlet," and that under the necessity of the struggle for existence and of maintaining an elaborate system of irrigation and of guarding the fruits of their labour against the destructive forces of Nature and of man, the community was forced to admit strangers whom it planted in the hamlet of Andanankatuwa, and whose descendants now set up the Andanankatuwa claim.

The process of bringing waste land under rice cultivation is among the Sinhalese known as *asweddamizing*, often a laborious and expensive process, by which the arable mark or *mada bima* is extended. In practice nearly every field or *kumbura* has its appurtenant high land (*pillêwa*) which the villager according to his ability and needs brings under cultivation. The high land which consists of forest and scrub constitutes with the *mada bima* the common land or *ganwásiya* of the village community. That portion of the high land which cannot be *asweddamized* is subjected to an irregular mode of cultivation called *hena* cultivation, which is as ancient as rice cultivation, being referred to in the *Mahawansa*, c. 23 (160 B.C.). The scrub jungle (or, it may be, forest) is cleared by felling all but the largest trees, and after the wood and branches have been allowed to dry for about a month they are set fire to, and when the soil has cooled, the surface is raked to work in the ashes, and the soil thus enriched with manure is cultivated with kurakkan, hill paddy, or maize, and afterwards gingelly, mannoka, &c. When the crop has been gathered, the land is allowed to run into jungle again to secure a fresh supply of ash manure before raising another crop. This method of cultivation being practicable only after intervals of years was called *hin* or *hen*—*i.e.*, weak, irregular—as opposed to the regular yearly cultivation of which rice land is capable; and the land subjected to such cultivation is called *hena* or, in Ceylon official English, *chena*. *Hin* also means 'thin' or 'fine,' and the word 'hena" may have reference to the 'fine grains' cultivated in henas.

It has always been a popular mode of cultivation in Ceylon and the most formidable foe of forest conservation. It involves far less labour and attention than rice cultivation. It enjoyed till recently special advantages

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

as regards taxation over rice, and it yields enormous crops, reaching 150 to 500 fold, in return for a minimum expenditure of labour. In olden times such land was considered fit only for chena cultivation, but with improved agricultural knowledge it has been found in many cases adapted for the profitable cultivation of tea, cocoanuts, &c. Thus an unexpected inversion of the old order of things has occurred. The high land, which formerly for the most part had an insignificant and spasmodic value and only as an appurtenant to a field, has in many cases become the really valuable land, and the field has been almost reduced to the level of an appurtenant to the high land, and yields so little profit that it has all but ceased to be cultivated by the larger land owners, while the small landowner only cultivates it because of the old and honourable associations of rice cultivation, and because if he did not cultivate it he would hardly have anything to do.

VI.

It was necessary to understand clearly the physical features of the Adippola village and of the lands under reference, and something of the nature of Village Communities and of the land tenure therein, in order to deal with the principal issues in the case other than the genuineness of the *sannas*. The first issue is whether the lands under reference are "forest, chena, waste, or unoccupied lands" to which alone the Ordinance No. 1 of 1897, under which the reference is made, applies. The preamble runs, "Whereas it is expedient to make special provision for the speedy adjudication of claims to forest, chena, waste or unoccupied lands, be it therefore enacted," &c. Section 1 (as amended by section 3 of Ordinance No. 5 of 1900) says "Whenever it shall appear to the Government Agent of a province or to the Assistant Government Agent of a district that any land or lands situated within his province or district is or are forest, chena, waste, or unoccupied," it shall be lawful for him to issue a notice declaring that such land will be deemed and dealt with as the property of the Crown unless claimed within three months, this notice being the foundation for all proceedings under the Ordinance.

I take it, nor indeed is it contended otherwise for the Crown, that the opinion of the Government Agent or Assistant Government Agent as to the nature of the land is not conclusive, and that it is for the Court to find whether the land under reference is of the kind contemplated by the Ordinance, and that only on finding it in the affirmative can the reference be entertained. In the *Attorney-General v. Samarasinhe et al.* (1 Browne, p. 222), where the Crown relied on section 6 of Ordinance No. 12 of 1840, in which the same words occur, Moncreiff, J., said: "The burden of proving this foundation for the application of the section is upon the Crown. It is not for the Crown to enter upon a man's land and say 'This is my land unless you prove that it is neither forest nor waste.' It must first show that the section applies, *e.g.*, that the land is waste or forest land."

The question whether or not the lands under reference are of the kind contemplated by the Ordinance No. 1 of 1897 is not a mere academic question, but is one of very serious importance to the plaintiffs and to every other subject of His Majesty. For the provisions of the Ordinance are, as Bonser, C.J., said in *Dias* v. *The Assistant Government Agent, Matara* (3 N. L. R. 175), of a stringent nature and their consequences perilous to the subject. As the result of that judgment fresh legislation was resorted to and some technical objections which he might have taken advantage of can no longer be taken, the position of the Crown being thus strengthened.

Among the perilous consequences that still remain may be mentioned that if no claim is preferred to the Government Agent or the Assistant Government Agent within three months or, in the case of a person absent from the Island, six months from the date of the issue of notice in regard to a land, the land is deemed the property of the Crown, and the order of the Government Agent or the Assistant Government Agent declaring it to be such property is final and conclusive. If a claim is preferred, it is to be inquired

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

into by the Government Agent or the Assistant Government Agent, and if not admitted by him, he must refer the matter to the Court, and on that reference the claimant is to be deemed the plaintiff and the Government Agent or the Assistant Government Agent the defendant. Having once appeared in Court, the claimant cannot withdraw from the proceedings.

The result therefore of a notice under the Ordinance is that the claimant is altogether shut out without the power of appeal to any Court, or is forced into the position of a plaintiff instead of being in the more favourable position of a defendant. By the operation of section 29 he is also denied the benefit of that presumption of right which every system of jurisprudence, on principles of justice and public policy, gives to a party in possession of a property and which is embodied in the maxim *Melior est conditio possidentis*. Moreover, after the issue of the notice by the Government Agent or the Assistant Government Agent, no person may enter the land or exercise any proprietory right over it under pain of three months' rigorous imprisonment.

In the present case the prohibition has already extended for over two years. To forbid a man for a long period to make any sort of use of, or even to enter, lands over which he and his family may possibly have been accustomed to exercise, however fitfully, acts of possession, unless it is declared judicially not to belong to the Crown, was declared by a late Governor, Lord Stanmore, in his letter to the Secretary of State published in the Parliamentary Paper of June, 1899, to be "in itself unjust and impolitic, and to reverse what ought in such cases to be the order of proceeding. What custom, tradition, and common repute assign to the landholder should be deemed his till it is proved not to be so, even though the land may be in forest or may have been left uncultivated."

No doubt these stringent provisions of the law are justified by the greatness of the evil against which they are aimed—the wholesale appropriation of Crown land by speculators claiming title on purchase from villagers who had no title, and the wanton devastation of Crown forests, the safeguarding of which is a duty the Government owes to the present generation and to posterity. But all the more necessary is it to take care that this exceptional law is limited to the cases for which the Legislature has expressly made it, and that by inadvertence or by laxity of interpretation the Courts do not allow it to be used to the detriment of honest claims.

VII.

In the reference in this case are included 15 lots covering 300 acres 1 rood and 38 perches of what is called "forest." But what is a "forest"? There has been, as far as I know, no definition of the term "forest" in Ceylon. The *English Encyclopædic Dictionary* defines a forest as "an extensive wood or tract of wooded country; a wild uncultivated tract of ground interspersed with wood." This is hardly precise enough for our purpose. The definition of "forest" in English law is: "A certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in, in the safe protection of the king for his pleasure." (In later times a forest, though properly the king's, could be vested in a subject). This definition, which is a relic of the severe laws of William the Conqueror, who, according to the old English Chronicle, loved the deer as if he were its father, and mutilated and put to death those who killed it, is quite inapplicable to Ceylon.

A purely artificial definition is given of the term in our Forest Ordinance, No. 10 of 1885, section 3, where it is defined as "land at the disposal of the Crown," of which expression a cumbrous definition in twenty lines is given later. Of this definition Bonser, C.J., said that the only intelligible way of interpreting it is as "all forest, waste, unoccupied, or uncultivated land which has not been expressly granted away by the Crown (clause *b*), or in respect of which the Crown has not waived its right by issuing

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

its certificate of no claim (clause *c*), or which has not been registered as temple land (clause *d*)." This definition, adapted from the Indian Forest Act, was made only for the special purposes of the Ordinance, and includes the very word "forest," of the meaning of which we are in search. The definition does not, therefore, help us in the present case.

In *Wickramaratna* v. *Tene* (3 S. C. R. 99), a prosecution under that Ordinance, Lawrie, J. said: "It lay on the prosecution to prove that the land was forest or waste or unoccupied or uncultivated. The witnesses for the prosecution call it 'Crown land,' but as Withers, J., said, in the Pasyala case, 'that is a mere assumption of the fact to be proved.' The prosecution has not proved that at any time within or beyond the memory of man the Crown has exercised any right of ownership on the land. The land was not at the date of the clearing under virgin, primeval forest," &c. It would seem then that by "forest" Justice Lawrie understood "virgin, primeval forest." I do not think that the "forest" under reference in this case is forest of that kind. The Government Surveyor says that it is about sixty to one hundred years old.

There is hardly any land in Ceylon which can be called virgin, primeval forest, except perhaps the Sinharaja forest to the south of Ratnapura and the lower part of the forests on Adam's Peak. It is very likely that Ceylon in its primitive condition was entirely covered with such forest. It began to be cleared for cultivation, at an early period of the Island's history, at the seat of the ancient monarchies. The cultivated region increased with the progress of the magnificent irrigation works, whose ruins are scattered throughout the Island. But with the downfall of the monarchies, and the dispersion of the village communities on whose organized labour those works depended for their maintenance, a great part of this region reverted to forest, to be cleared perhaps when peace and order were re-established under later dynasties, and again to relapse to forest. The more recently settled regions nearer the coast also underwent a similar fate during centuries of civil war and foreign invasion.

Mr. Vincent, in his report on the Forest Administration of Ceylon (Sessional Paper XLIII. of 1882), expresses his opinion that a large proportion of the existing forests, usually spoken of as virgin or original, are but a secondary growth which sprang up on the disappearance of a large population some time between the 8th and 13th centuries, and he mentions the difficulty experienced by him in distinguishing between secondary and original forest. "Where certain forests grow, we can ascertain from history and from the ancient remains that there were once cities and cultivated fields, but in other places without any remains there is precisely the same forest vegetation."

The forest under reference in Adippola is probably later than a secondary growth. The Government Surveyor, as I have said, thinks it is about sixty to hundred years old. I found it growing on land which would have been irrigable if the irrigation system had been in order, and on the tank bund and on adjoining lands which have been cultivated as chenas or fields. But it is characterized—firstly, by great density and compactness of growth of the trees, which are wild, and include ebony, palu, and other valuable timber, and grow up 30 to 60 feet high, and which, having reached their maximum height, form broad flat crowns which interlace and in places throw an almost impenetrable shade on the soil; and secondly, in many parts, by a dense undergrowth of arboreous shrubs forming a miniature forest 6 to 10 feet high, and rendering progress, except along a cleared path, impossible. No trees of artificial cultivation or other traces of human occupation were observed. Whether of secondary, tertiary, or later growth, the vegetation I have described can hardly be called by any other name than a forest. No other word is appropriate. In the absence of any authoritative interpretation of the word, I must take the term to have been used by the Legislature in the Ordinance No. 1 of 1897 to include such land.

The other lands under reference, it is contended for the Crown, are "chena, waste, or unoccupied lands." There is no evidence that any of these lands is not susceptible of cultivation, which I take to be the meaning

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

of the word "waste." Nor is there evidence that it is a chena within the meaning of the Ordinance. A chena, according to Sir John D'Oyly, is "high jungle ground in which the jungle has been cut and burnt for manure at intervals of from five to fourteen years, for the purpose of cultivating dry grain (such as hill paddy, kurakkan, &c.) and roots (such as mannoca, sweet potatoes, &c.) and other vegetables, and which, after two or at most three crops, is abandoned till the jungle grows again" (*A Sketch of the Constitution of the Kandyan Kingdom, 1818*).

Section 24 (*a*) of the Ordinance, repeating the words of section 6 of Ordinance No. 12 of 1840, speaks of "chenas and other lands which can only be cultivated after intervals of several years." In *The Queen's Advocate* v. *K. Appuhamy et al.* (I S. C. C. 26), where the title to the Crown rested on the presumption raised by the Ordinance No. 12 of 1840, Phear, C.J., held that, "in order to bring the land within the enactment, it is necessary to show that it is chena or other land which is, in the same sense as chena is, incapable of cultivation otherwise than after intervals of several years. Nothing of this sort has been shown here. On the contrary, the Crown's own witnesses prove that the allotments of land in dispute are ordinary cultivable *owita* lands which it has been the practice of the occupiers for a very long time to allow to lie fallow for five or six years and then to cultivate in a succession of various crops for a like period."

In this case there is no evidence that the lands in question can be cultivated only after intervals of several years. The Crown should have established this in order to have the benefit of the enactment. The evidence is rather the other way. The lands are for the most part not high lands but low lands, which would have been irrigable and cultivable with paddy if the irrigation works had not fallen into ruin. Parts of these lands have been cultivated at intervals with paddy or dry grain, while the high land adjoining the hamlets has been cultivated as gardens, though in both cases the crops have been uncertain owing to the difficulty of controlling the water supply, to floods and droughts, and to the ravages of wild elephants.

VIII.

Are the lands under reference, then, "unoccupied" lands?

Section 24 (*c*) defines "unoccupied" lands:—"The term 'unoccupied land' includes uncultivated land and all land which at the time of the passing of this Ordinance was not in the actual occupation of any person or persons, and also all lands which shall not have been in the uninterrupted occupation of some person or persons for a period exceeding five years next before notice given by the Government Agent or Assistant Government Agent under section 1 in respect of the same."

Sub-section (*b*) further provides that "The occupation by a person of one or more portions of parcels of land shall not be taken as creating a presumption of ownership against the Crown in his favour for any greater extent of land than that actually occupied by him."

In *Meera Lebbe et al. v. Juan Fernando et al.* (2 S. C. C. 140) Phear, C.J., in 1879 interpreted the words "unoccupied" and "uncultivated" in the Ordinance No. 12 of 1840, section 6. He said: "It has been more than once held by this Court that the words 'unoccupied' or 'uncultivated' as used in the clause are intended to designate land which has never been occupied or used for the purposes of cultivation within the reasonable limits of time to which ordinary evidence or the knowledge of persons who can speak to the matter extends. That is to say, that the land which had been formerly occupied or formerly cultivated was, at the time when the question as to its ownership arose, unoccupied or uncultivated, would not by itself have the effect under this clause of giving rise to the statutory presumption in favour of the Crown which is prescribed in that clause. Otherwise the enactment would have the effect of transferring a considerable amount of private property of this Island from the true owners to the Crown."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The only change that section 24 of the Ordinance No. 1 of 1897 seems to have made in the law as stated by Chief Justice Phear, is that the occupation to be effective must have been "actual" at the time of the passing of the Ordinance, or uninterrupted for more than five years before the notice given by the Government Agent or Assistant Government Agent, and that the benefit of the occupation is restricted to the extent of land "actually occupied."

But what is "occupation" and what is "actual occupation"? These terms are not defined. They must therefore be understood in the sense of our Common law, *i.e.*, the Roman-Dutch law.

Occupatio, says Voet, XLI. i. 2, following the definition in Justinian's *Institutes* (II. i. 12), *est justa apprehensio rerum corporalium, jure gentium communium, animo domini facta, per quam id, quod nullius est, naturali ratione primo occupanti conceditur*; or, as Maine puts it (*Ancient Law*, page 245), occupation is the advisedly taking possession of that which at the moment is the property of no man, with the view of acquiring property in it for yourself. When the thing thus occupied is retained with the intention of exercising rights of ownership, it is called in law possession as distinguished from detention or "natural possession." (Pothier's *Pandects*, XLI. ii. 3 and 4; Voet, XLI. ii. 1). The apprehension or taking which underlies occupation as well as possession must be *nec solo corpore nec solo animo sed utroque* (*Pandects*, XLI. ii. 3), not with the body or the mind alone, but with both. The corporal element here required, however, is not necessarily a corporal contact. *Jam vero ut corpore acquiratur possessio non necesse est ut res tangatur, sufficit eam oculis et affectu apprehendi* (Pothier's *Pandects*, XLI. ii. 17).

What is essential is the physical power of dealing with the thing as we like. This has been forcibly brought out by Savigny in his Treatise on *Possession*. His views are well summarized in Markby's *Elements of Law* in the chapter on Possession, where he shows how erroneous is the common view that possession consists in the corporal seizure or apprehension of the thing possessed by the possessor, and that in all cases where this corporal contact does not exist there is not a real but only a fictitious possession, and how misleading and unfounded is the theory of symbolical possession derived from it. "The truth is that though we undoubtedly do possess most of the things with which we are in corporal contact, and though we come into corporal contact at some time or other with most of the things which we possess, corporal contact has nothing whatever to do with the matter. A man walking along the road with a bundle sits down to rest and places his bundle on the ground at a short distance from him. No one thinks of doubting that the bundle remains in his exclusive possession, not symbolically or fictitiously but really and actually; whereas the ground on which he sits and with which he is therefore in corporal contact is not in his possession at all. So a man is bound hand and foot with cords. No one thinks of saying that he possesses the cords; it would be just as true to say the cords possess him."

In order that the buyer of a land should take possession, it is not necessary for him to come into physical contact with every part of the land by walking over it, nor need he step on to the land at all. If it is near at hand and the seller points it out to the buyer and shows that the possession is vacant and signifies his desire to hand it over to the buyer, while the buyer signifies his desire to receive it, enough has been done to transfer the possession. The physical possibility of the buyer dealing with the thing exclusively as his own, which is all that is necessary, exists whether he thinks it proper to use it by stepping in the land or not. Add to this physical power the determination to exercise it on your own behalf or at least the intention to retain the thing and you have legal possession.

To constitute occupation, therefore, there must exist the physical power to deal with the thing as we like and to exclude others; to constitute possession there must also be the determination to exercise that physical power on our own behalf or the intention to retain the thing.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

In order to retain possession it is not necessary that the possessor should remain on or even near the land. Possession having been once received, it is not necessary that the physical power of dealing with the land as he pleases should be retained by the possessor at every moment of time. He will continue in the possession if he can reproduce that physical power at any moment. A man who leaves his house and goes to follow his business in a neighbouring town may still retain possession of his family house. Nor is it even necessary that the intention to possess should be constantly present to his mind. Having once determined to exercise control over the thing on his behalf, it is sufficient for the purpose of retaining possession that he should, if he adverts to it, keep to that determination.

He does not lose possession until he loses this control or abandons his determination. "As obligation is dissolved by a reversal of the conditions under which it is created, so possession is lost by a reversal of the conditions under which it is acquired; as its acquisition demands the concurrence of a corporal and a mental condition, so its determination requires the reversal of one or the other" (*Pandects*, L. xvii. 155). Accordingly Voet says (XLI.ii. 15) that it has been held that we retain possession until we abandon our determination or are ejected by force. *Placuit tamdiu nos retinere possessionem donec aut nostra voluntate discesserimus aut vi dejecti fuerimus.*

Now, what are the facts in the present case? Let us assume that the *sannas* is a forgery. Whether forged or genuine, it was publicly propounded and registered in the Land Registry of Chilaw more than thirty years ago by the head of the Suriyahetti Adikari Mudianse family on his own and their behalf, and the *sannas* includes in its boundaries all the lands under reference.

That was a clear intimation to the world and the Crown of their intention to possess the lands as owners within the belt fixed by the *sannas*. Had they physical power to deal with the lands as their own? There can be no doubt about it. Within that belt no other persons have lived or exercised any acts of ownership. The Suriyahetti Mudianse family and their retainers, the Andanankatuwa claimants, alone have lived here, and until they were stopped in June, 1902, by the notice issued by the Assistant Government Agent under the Ordinance No. 1 of 1897, they cultivated what field or garden or chena they pleased out of what they claim as the common mark of the village community, a bit here and a bit there according to their needs and abilities and according to the exigencies of the seasons, their labours often reduced to naught by flood or drought or wild elephants.

These acts of cultivation were scattered over all the tracts of land other than the forests. The greater part of the lands which have been so treated are what the surveyor calls "old chenas" *i.e.*, lands chenaed from seven to twenty years ago, and the rest new chenas or chenas actually under cultivation. In selecting the lots for the purposes of the proceedings under the Ordinance there has apparently been a picking and choosing, and adjacent lots in which cultivation has succeeded and thriven have been carefully excluded. But, as Moncrieff, J., held in D. C. Galle, 5,139 (S. C. 192 of 1900), it is not permissible or fair to cut out portions which are embarrassing to the Crown and to select for their case only the other portions. The Crown officers no doubt felt justified in doing so in view of the uncultivated portion being much larger than the cultivated.

But the principle of the decisions reported in Austin, p. 223, and 3 N. L. R. 212 applies. In the former, which was a decision of the Collective Court in 1860, it was held that the character of "waste" and "cultivated" under the Ordinance No. 12 of 1840 must attach to the land generally and not to any small portion of it, more particularly where the reason of such portion having been allowed to become waste is satisfactorily explained. In *Saibu* v. *Andris* (3 N. L. R. 218) Lawrie, J., said: "On every estate there must be some waste, some uncultivated land, some clumps of trees, some land for firewood, or, as here, a hollow where the water lies, which waits for the man of energy and capital to improve. The Crown surely cannot be presumed the owner of scraps of uncultivated land adjacent to the cultivated land belonging to its subjects."

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Here the uncultivated portion is not small, but the explanation given is not unsatisfactory, viz., the ruin of the irrigation works and the poverty of the villagers which prevents their cultivating more than small patches and protecting the crops against the forces of Nature and wild beasts. The villagers, it is argued, having suffered so much by the ruin of the works, and from not having received the help they expected from Government in restoring them, should not be further punished by a wholesale forfeiture of their lands.

Of the chenas, whether old or new, would it be correct to say that they were not in actual occupation of anybody at the time of the passing of the Ordinance, nor in uninterrupted occupation for over five years before the Assistant Government Agent's notice, and that if there was such occupation, it applied only to the small bits of land actually cultivated? I hardly think it would be correct, for, according to the authorities cited above, it is not necessary in order to constitute occupation that every bit of the land purporting to be occupied should be in corporal contact with the occupant. It is enough that he has the physical power to deal with the whole tract. The non-cultivation of the greater part of the tract by the claimants subsequently to their early attempts at cultivation did not put an end to their occupation, for there was no abandonment of their original determination, nor were they ejected from the land. Their physical control over the whole land remained till suspended by the proceedings under this Ordinance. Their determination to exercise the control still exists, or they would not be engaged in this litigation with the Crown.

The point involved here as to what constitutes "occupation" and "actual occupation" is one of very great public importance, but I cannot find any decision of the Supreme Court on the point to help me. An authoritative ruling is urgently needed for the guidance of the judiciary, the bar and the public, and of the Crown officers engaged in the administration of the Ordinance No. 1 of 1897. In the case I have already cited (2 S. C. C. 140) Phear, C.J., said: "The mere fact, that land which had been formerly occupied or formerly cultivated was at the time when the question as to its ownership arose unoccupied, would not by itself have the effect under the clause of giving rise to the statutory presumption in favour of the Crown." No reason is given for this opinion, but very probably the Chief Justice had in mind the principle enunciated above.

So also Browne, J. (in 1 Browne, 222), said: "It was pressed upon us that to establish occupation there must be proved a purpose of retention. But I do not know that this purpose must be shown to extend to any period beyond what the interests of the occupier might require. If in this country a nomad pasturage anywhere prevailed and cattle owners moved their flocks yearly to different tracts according to the seasons and the pasturage produced thereby, I doubt whether those pastures could thereafter be said to have been never occupied, although such occupation would have been only for as long as they were sufficient or preferable to others." This opinion, too, can only rest on the same principle.

For these reasons I am of opinion that the lands under reference, other than the forest lands, are not "unoccupied lands" within the meaning of the Ordinance No. 1 of 1897. I have already held that they are not waste or chena lands. They are not, therefore, lands which are proper subjects for proceedings under the Ordinance. With reference to these lands, therefore, it is not necessary that I should record my findings on the other issues in the case. But as it is likely to go in appeal to the Supreme Court and I have to deal with the forest lands on the other issues, I will deal with these lands also, so that all the necessary materials may be before the tribunal for the final adjudication of the case on all the issues of fact as well as law.

* * * * * *

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

IX.

We now come to the important issue, the third, as to whether the *sannas* relied on by plaintiffs is genuine or forged. Before considering this, I will dispose of the next issue as to whether it is competent to the defendant to question its genuineness. This issue was added on the motion of plaintiffs' pleader, and it was argued that the *sannas*, being over thirty years old and produced from proper custody and having been registered over thirty years ago under the provisions of the Ordinance No. 6 of 1866, was conclusive proof of its genuineness.

But this view seems to me quite untenable. The registration only makes the document admissible in evidence. Section 7 provides that no deed, *sannas*, ola, or other instrument bearing date before 1st February, 1840, shall be received in evidence in any civil proceeding in any Court of Justice for the purpose of creating, transfering, or extinguishing any right or obligation unless such instrument shall have been previously registered. While making the registered deed admissible in evidence, the section specially provides that registration shall not be held to prevent parties questioning the instrument on grounds other than the registration, and that as to these grounds the Court is to determine as if the Ordinance had not been passed.

The Ceylon Evidence Ordinance, No. 14 of 1895, section 90, contains the only other provision as to old deeds, and provides that "where any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested." The law in force before this Ordinance was the English Law of Evidence, which is the same, with the exception that for the words in our Ordinance "the Court *may presume*" the English Law would substitute "it *is presumed*" (Fitz James Stephen's Digest of the Law of Evidence, Art. 88).

Our Evidence Ordinance in section 4 distinguishes between "may presume," "shall presume," and "conclusive proof."

"Whenever it is provided by this Ordinance that the Court *may presume* a fact, it may either regard such fact as proved unless and until it is disproved or may call for proof of it. Whenever it is directed that the Court *shall presume* a fact, it shall regard such facts as proved unless and until it is disproved. When one fact is declared by this Ordinance to be *conclusive proof* of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

The presumption raised by the English Law in regard to old deeds produced from proper custody is of the second kind; and therefore Best in his *Treatise on Evidence*, says that, "though such deeds prove themselves and the testimony of the subscribing witnesses may be dispensed with, it is competent to the opposite party to call witnesses to disprove the regularity of the execution." Our Evidence Ordinance of 1895 raises no presumption, but leaves it to the Court's discretion to presume or not, at its pleasure, the due execution of the deed. Therefore neither our late nor our present Law of Evidence deems the execution of the deed conclusively proved, but the opposite party is given the liberty to disprove the presumption that was or might be raised. I therefore decide this issue against the plaintiffs, and hold that it is competent to the defendant to question the genuineness of the *sannas*.

X.

In the exercise of the discretion vested in me by law, and remembering the false *sannases* often produced in Courts, I was not prepared to presume that this *sannas* was duly executed, and I called for proof of it. The *sannas*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

purports to be a grant from King Bhuvaneka Bahu of Cotte to one Suriyahetti, and states that, on the latter's arrival in Ponparippu (in the Puttalam District) from the Telugu country, he was ordered to appear before His Majesty, and did so with offerings of 60 *wilisa* (or *wiliya*) *kuruns*, 150 pure silver *kuruns*, and a white milch cow and calf. The king thereupon conferred on him the title of Suriyahetti Adikari Mudiyanse, tying the usual band on his forehead, and also bestowed on him for his sustenance the tank of Adippola within the boundaries specified in the *sannas*. It is dated Wednesday in the month of Wesak, in the year 1247 of Saka era, which is equal to 1825 of the Christian era. The lapse of six centuries makes it of course impossible to furnish proof of actual execution, and the genuineness of the *sannas* must rest on circumstantial evidence. In considering the evidence thus tendered I have borne in mind Sir Edward Coke's warning *Tempus est edax rerum*, and that if an ancient document be scrutinized with the same severity that may be employed in canvassing a modern grant without making allowance for the changes and accidents of time, no ancient title will be found free from objection; "that, indeed, will become a source of weakness, which ought to give security and strength," as Littledale, J., said in *R. v. Archdall.*

The Crown has called two witnesses, the Archæological Commissioner Mr. Bell and the Chief Government Translator Mr. Simon Silva, Mudaliyar. They are in the front rank of experts in all matters connected with the history, archæology, and palæography of Ceylon. They have no hesitation in pronouncing the *sannas* a forgery, and have given the grounds for their opinion. The plaintiffs have called Sri Dharmarama Unnanse, High Priest of the Western Province, a not less eminent authority on those subjects, and almost the ablest of living Pali, Sanskrit, and Elu scholars in Ceylon. He was not asked and did not express an opinion on the genuineness of the *sannas*, but his evidence is in strong conflict with that of the Crown witnesses. The Court is of course not concluded by the judgment of any witness, however highly qualified or respectable, and is bound to form its own judgment on this as on other matters. There is no evidence which so varies in value and hardly any so conflicting as the evidence of experts. Their evidence, being usually not as to facts but opinions, is easily made to correspond with the interests and wishes of the party calling them. Even when conscientiously disposed, they come, said Campbell Lord Chief Justice, with such a bias on their minds to support the cause on which they are embarked that hardly any weight should be given to their evidence. Taylor says: "Perhaps the testimony which least deserves credit is that of skilled witnesses"; and as to ancient writings, "the evidence of skilled witnesses conversant with manuscripts of different ages is admissible to establish the fact that an ancient writing was made at a time it purports to have been written, but such evidence is entitled to very little weight." Bonnier, in his *Traité des Preuves*, after citing instances of the complaisance of expert witnesses in ancient Rome, adds: *On voit que les complaisances de l'expertise ne datent pas de nos jours.* I do not say that there was any unworthy complaisance manifested by the witnesses in this case, but hardly any of them was free from an unconscious bias in favour of his side.

The Crown attacks the *sannas* on both intrinsic and extrinsic grounds which may be thus summarized:—

(1) The thinness of the copperplate.
(2) The writing scratched on it instead of being engraved with incising tools.
(3) The characters quite modern and not such as were in vogue at the period.
(4) Slovenly writing, erasures, omissions, and orthographical errors.
(5) Form and style of grant different from genuine *sannas*.
(6) Anachronisms:—
    (*a*) The city of Kotte, whose king Bhuvaneka Bahu is the alleged grantor, was not in existence till nearly a century after the date of the *sannas*.
    (*b*) Reference to *kurun*, English crown piece, and to "*wilisa*" (or *wiliya*) *kurun*, crown piece of William IV.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The copperplate is certainly thin and very easily bent, and the letters have been scratched on it with a style. In both respects it differs from three *sannases* produced by Mr. Bell, and which appear to be genuine, viz., the Garregoda *sannas* and the Dondra Dewale *sannas* (of which copies are given in pages 93 and 96 of Mr. Bell's Archæological Report of Kegalla, Sessional Paper XIX. of 1892) and the *sannas* of the fourth year of Bhuvaneka Bahu VI. But it has not been shown what kind of incising tools were in use in Ceylon, and what kind of characters they would form. Speaking as a layman, I am not sure that in the three *sannases* produced by Mr. Bell an incising tool was employed; it may have been only a thick style pressed hard on soft copper. There is a marked difference between their characters and the royal sign manual *Sri* on the Molligoda *sannas* at page 102 of the Report. This sign manual shows clear marks of incision with a tool. But granting that the Adippola *sannas* now in question differs in thinness of plate and the scratching of the characters from the *sannases* of Mr. Bell, is it necessarily fatal to its genuineness? In the Karawiti Agara case of this Court (D. C., Chilaw, 643) Mr. Bell said of a silver *sannas* produced there: "The writing is scratched on it, the plate being too thin to bear engraving.....It shows a good specimen of the genuine royal sign manual of the period." The *sannas* was deemed by him genuine, in spite of the thinness of the plate and the scratching of the characters. The same characteristics cannot be fatal to the genuineness of the present *sannas*. The plaintiffs' witness Sri Dharmarama, High Priest, seemed to me to take a more correct and sensible view of the matter than Mr. Bell or Silva Mudaliyar, when he said that the thickness of the plate and the quality of the inscription depended a good deal on the dignity of the recipient.

The origin and development of *sannases* was, as far as can be ascertained, as follows. A royal grant was originally made by word of mouth of the king in his assembly. The oral declaration was sufficient, and needed no written record for its validity. But in order to obviate the risk of repudiation in subsequent reigns, it was usual for the recipient to apply for a written *sannas* to an official who was charged with the duty of reducing royal grants into writing, and who was called *Sannas Peruma* or *Nilame*. To him a fee would be tendered with the material on which the record was to be made. A *sannas* was thus obtained, it may be, a considerable time after the original grant. The earliest grants, especially to temples, were inscribed on stone in the buildings themselves. Grants to individuals were usually written on palm leaf and called *talpat* or *tudupat*. About 1200 A.D. King Kirtti Nissanka Malla appears to have introduced copper *sannases* for greater security and permanence, as he says in his inscription on the Dambulla rock.* Sometimes silver was employed and inlaid in gold. If the *sannas* was furnished at the expense of the king, it would be according to the recipient's dignity and merits; if at the expense of the recipient, according also to his means. The Molligoda *sannas*, which was given by the last King of Kandy to the Adigar Molligoda for valuable service rendered in the suppression of a rebellion, is an example of perfect workmanship and finish on copperplate, $19\frac{1}{8}$ in. by $3\frac{3}{4}$ in. by $\frac{1}{16}$ in., smoothed and polished, with neat scalloped border in silver running round the plate, with the royal sign manual inlaid in gold, within an embossed square framing triple fluted, also of gold. But the recipient of the Adippola *sannas* was an adventurer from India, and had rendered no service to the king, except making him some presents. The thinness of the plate and the characters scratched on it do not seem to me inappropriate to his position and the circumstances of the grant, nor inconsistent with its genuineness.

As to the alleged modernness of the characters, Silva Mudaliyar is unable to give an opinion. Mr. Bell, who does give an opinion, asks that it be accepted on faith. He may be right in what he says as to the age and evolution of the writing of different *sannases*. But he has not satisfied me that a contrary opinion is unjustifiable. I prefer with Silva Mudaliyar to express no opinion.

* Forbes' *Eleven years in Ceylon*, 351; 1 *Epigraphica Zeylanica*, 123.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The next objection based on the erasures, omissions, and orthographical errors, which, in Mr. Bell's opinion, are inexcusable, does not appear to me to take sufficient account of the fact that the workmen employed in inscribing *sannases* were usually ill-educated men, especially about the period of this *sannas*, when learning was on the decline and the country much disturbed, and that such errors, erasures, &c., were almost inevitable. The Beligala *sannas*, given in Mr. Bell's Report (page 94), contains far more numerous errors, yet he considered it genuine. His words in that Report are rather remarkable. He said: "Unique in its erratic arrangement of the writing, its engravings of dog and crow, and not least in the forced effort at a high style by persistent aspiration of simple letters, the *sannas* yet bears on its face"—note the following words—"*evidence of its genuineness despite, or rather by very virtue of, its reckless orthography and fantastic execution.*" The benefit of this opinion might, I think, fairly be extended to the present case.

The next objection deals with the great difference in form and style between this and other *sannases*. This begins by saying that it was "received" and ends with "granted." Dharmarama High Priest explains the former as the language of the *sannas* official, and says that the grant really begins later with the words "from the Telugu country." It is a mere *ipse dixit* of the witness, and being unsupported by precedent or authority, can hardly be accepted.

A careful examination of various *sannases* and of the expert evidence called in this case leads me to the conclusion that, though the extant knowledge of the subject is imperfect, yet certain marks are all but indispensable to a genuine royal *sannas*. Among them are the royal sign manual *Sri*, the auspicious word *Svasti* ("Hail"), a proper description of the king's titles, including one or more such terms as *Swaminvahanse*, *Deviswami*, *Sri Sanghabo*. In this *sannas* the first two marks are absent, while the king himself is rather brusquely described at the beginning as *Rajjuruwo*, though towards the end he is called *Maharajjuruwo*, and none of the usual titles which I have mentioned is given. The concurrence of these three defects seem to me to tell strongly against the *sannas*.

The force of this objection is recognized by plaintiffs' pleader, and he tries to meet it by the theory that the grantor was not actually a reigning king, but only a sub-king (*Prabhu-raja*). It is ingenious, but unsupported by evidence, and seems to be pure speculation. There is little doubt that the writer of the *sannas* intended it to be as from a reigning king, but his unfamiliarity with the niceties of the language of courts and *sannases* has betrayed him. The use of the *Saka* era instead of, or without the addition of, the year of the king's reign has also been taken exception to. But I notice that in some *sannases* given in Mr. Bell's Report the year of the king's reign is omitted and that of Buddha is given. If so, why not the *Saka* year alone?

XI.

I now come to the anachronisms in objection 6.

The first and more important one, 6 (*a*), may be stated thus. There could not have been a King Bhuvaneka Bahu of Kotte in 1325, as Kotte was not then in existence, but was founded nearly a century later by Alagakkonara or Alakesvara, who, after the capture and deportation of his sovereign Wira Bahu II. *alias* Wijaya Bahu VI., by the Chinese, established himself under the name of Bhuvaneka Bahu V.

This opens up problems of great historical interest. Who was the king deported by the Chinese and when? When was Kotte built and by whom? Little is definitely known. The period was a troublous time of internal and religious ferment, foreign invasion, and civil disruption. All historians are more than usually obscure, and the tangled web of Ceylon history during these years is difficult to unravel, owing to the general vagueness and almost hopeless contradictions of the few shreds of information available, and which consist of a few inscriptions, pages of

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

contemporary records, such as the *Nikaya Sangraha* and *Saddharmaratnakara*, supplemented by translations of extracts from imperfectly explored Chinese chronicles. In the investigation of the authorities for the purposes of this case additional light has been obtained, enough to stimulate further inquiry, but hardly enough to furnish a decisive answer.

The fullest account of the Chinese incident is given in the *Rajavaliya*. "During the reign of King Wijaya Bahu, Dosraja, King of Great China, landed in Lanka with an immense army, and under pretence of bringing presents and curiosities craftily carried away the King Wijaya Bahu, who fell into his hands, foolishly thinking that he also brought presents as other foreign princes had done in the time of King Parakrama Bahu. His (Wijaya Bahu's) four younger brothers were killed. Taking many captives, Dosraja returned to Great China.

"After this there was no king in Lanka, but the minister Alakesvara lived in the city of Rayigama, and the nephew of Prakrama Bahu remained in the city of Gampola, whilst King Arya Chakravarti dwelt at the seaport of Yapapatuna [Jaffna]. Arya Chakravarti, whose army and wealth were superior to those of other kings, caused tribute to be brought from the hill and low districts and from the nine ports. While matters stood thus, Alakesvara one day viewed his army and, thinking 'It is not fitting to pay tribute to any one while there is an army as large as this,' built the fortress of Jayawardarna Kotte, constructed dams and moats for the storage of water, collected salt, cocoanut, and paddy sufficient to serve for several years, and hanged the tax collectors of the said Arya Chakravarti who were stationed in different places."

The chronicle goes on to describe how Arya Chakravarti, "kindled with rage like unto a cobra which strikes terror by its poison," sent thousands of Tamils for the simultaneous attack of Gampola and Kotte, how the Prince Bhuvaneka Bahu (who was apparently the nephew of Prakrama Bahu already referred to) fled, in terror from Gampola, and how his hill tribes, undismayed, defeated and scattered the enemy, while Alakesvara gave battle at Gorakana to the other army and destroyed the enemy's ships which lay off the port of Panadure.

The chronicle continues in an important passage giving a definite date. "Here it must be observed that it was in the year 1958 of the illustrious Buddhist era, on Thursday, the 7th day of the bright half of the month Wesak, and under the asterism Phusa, that King Wijaya Bahu was taken captive. Whereupon his queen Sunetra Devi left the city and went to Visidagama, taking her son with her."

They were taken under the protection of the venerable monk Visidagama, a personage apparently of great influence at the time, and the young prince was hidden in the Kegalla District and escaped the emissaries of Alakesvara, who sought to kill him.

"In this manner the prince lived in obscurity until he attained the age of 16 years, when the Elder Visidagama summoned the leading men and, having consulted together, sent for the prince and without the knowledge of Alakesvara brought him out to the people under the asterism Phusa, the 7th day of the bright fortnight of the month Wesak. Having caused Alakesvara to be put to death, he raised the prince to the throne under the name of Sri Parakrama Bahu. Of the Buddhist era, 1,944 [or according to another text, 1,974] years had then expired."

The *Mahawansa* makes no reference whatever to these incidents. There are traces at the end of chapter XC. of the mutilation of the original text. It was probably designed to suppress some disgraceful incidents in the national history. The capture of the king by foreigners and the participation of a famous high priest in the assassination of his successor would hardly be deemed fit for publication by the priestly authors of the chronicle. The laymen who wrote the *Rajavaliya* had apparently no such scruples. But, as a rule, there is no doubt that this work is far inferior to the *Mahawansa* in historical accuracy and authority,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

If the date given in the *Rajavaliya* is correct, the date of the capture must have been 1415 of the Christian era. But no king of the name Wijaya Bahu appears in the *Mahawansa* at that time. The contention of the Crown is that the captive was the King Wira Bahu II., No. 155 in the *Mahawansa* chronological table, and that he had an *alias*, Wijaya Bahu. But the *Mahawansa* records that Wira Bahu died of natural causes, nor is there any evidence that he was ever called Wijaya Bahu.

All the authorities, however, are agreed that at this period a person or a family called Alagakkonara or Alakesvara held a commanding position in the Island. Mr. Bell in page 92 of his Archæological Report of Kegalla—a most interesting and valuable work which every student of Ceylon history should read, and which makes one regret that Mr. Bell has not given us more from the stores of his rich knowledge—says: "The one name that stands out prominently against the haze of the history of the time is that of Alagakkonara or Alakesvaraya—probably the mere cognomen of a powerful *gotra* of Dravidian stock, rich, high born, and talented, tracing descent from the *Giri vansa* of Vengi in Southern India. The minister 'Conar' whom Ibn Batuta mistook for the King (Bhuvaneka Bahu IV.) when passing through 'Conacar' (Kurunegala) in 1344 A.D.; 'the mighty prince of great wisdom, Alagakkonara by name,' who quitted Peradeniya to found Kotte during the reign of Vikrama Bahu III.; and the stout opposer of the Chinese and of Arya Chakravarti, the Jaffna Ruler, between 1405 and 1410, doubtless particularize different members of a clan which for fifty years and more virtually swayed the destinies of the Island."

The *Mahawansa* (chapter XCI., verses 2-10) thus refers to Alagakkonara. The verses has been translated by Wijayasinha Mudaliyar (page 320) as follows:—

"Now in the time of the King Vikrama Bahu (III.) there was a mighty prince of great wisdom, Alagakkonara by name, and he dwelt in the beautiful and famous city of Peradoni, which is on the banks of the river Mahoruganga. And he was endued with majesty and faith and such like virtues and desired greatly to promote the welfare of the church and the kingdom" (verses 2-4).

After a description of the glory of Kelaniya, the chronicle proceeds: "On the southern side thereof and nigh unto the village Darurugama, which contained a large pond and was a goodly place, wherein dwelt men of great wisdom and virtue, he built the famous city of Jayavaddhana Kotte, and adorned it with rows of great ramparts and towers" (verses 6-8).

Next is a very important verse: "And this man became king in that city by the name of Bhuvaneka Bahu V." (verse 9).

An account follows of his great services to the Buddhist religion, of his convocation of priests for the reformation of the clergy, and of his death after a reign of twenty years, when he was succeeded by "his own mother's son" Vira Bahu, the supposed captive of the Chinese, who after a similar career in the service of religion "yielded himself up to the King of Death."

For the identity of Alagakkonara, who founded Kotte, with Bhuvaneka Bahu V., the Crown relied on the verse 9 cited above. It refers to an event at the close of the fourteenth century, and occurs at the commencement of the last part of the *Mahawansa*, which was written by Tibbotuwawe Terunanse four centuries later in the reign of Kirti Sri Rajasinha, as appears from chapter XCIX., verses 78 *et seq*. It can hardly be expected that at that date events four centuries old would be accurately known.

Additional difficulty has been caused by the mistranslation which has been discovered in verse 9. The original Pali runs:—

Pure tahin panchamo so Bhuvaneka Bhujo ahu.

The correct translation, which has the sanction of the learned editors of the Pali and Sinhalese editions, the high priest Sri Sumangala and Pandit Batuwantudawa, is "In that city lived *that* (*so*) Bhuvaneka Bahu V." How the translation of Wijaysinha Mudaliyar, "And this man became king by the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

name of Bhuvaneka Bahu V," came to be evolved is not clear. *So* is obviously used here in the emphatic sense of the Latin *ille*, viz., *that*, the well-known, the famous; a not unusual use in Pali, as, *e.g.*, in *Sa* Magadhi mula bhasa, *that* (the famous) Magadhi, the original language: Milinda nama *so* raja, the illustrious king named Milinda. In fact, the word is used in that sense in verse 3, which, too, has been mistranslated, and a wrong meaning given to verses 2, 3, 4. The original runs: –

Peradoniti namena pasiddhe nagare subhe
Vikkama bahu rajassa kaleeva mahamati
Girivansabhi jato so'lagakkonara namako
Prabhu raja asi

The correct translation is, "In the very time of King Vikkama Bahu while he lived in the fair city, famed by the name of Peradoni, *that* (*so*) Alagakkonara, born of the *Giri* race, a man of mighty wisdom, was sub-king (*prabhu-raja*)." Two such serious mistranslations admitted by the Crown to occur in two verses taken almost casually, emphasize the necessity for great caution in the use, for purposes of historic investigation, of the authorized translation, made though it was by a scholar.

Though the Crown now admits the mistranslation in verse 9 and that Alagakkonara was not Bhuvaneka Bahu V., the other side does not. Their witness Sri Dharmarama insists that *so* has not the meaning now given to it, though he admits that in verse 3 it has. I can only call this another instance of *la complaisance de l'expertise*. For contemporary records establish beyond the shadow of a doubt the non-identity of Alagakkonara with Bhuvaneka Bahu V.

The *Nikaya Sangraha*, a history of the Buddhist church written by a contemporary of Alagakkonara or Alakesvara, viz., the high priest Dharmakirti, who under Alagakkonara's auspices summoned the convocation of priests referred to by the *Mahawansa*, says: "Alakesvara, with pure motive standing in the midst of priests with the authority of the king, authorized the monks who observed the rules to inquire into the matter and disrobe a number of monks who did not observe the precepts, and thus he glorified the religion of Buddha. This harmony of the priesthood lasted up to the fifteenth year of Bhuvaneka Bahu V. Up to this fifteenth year 1,929 years elapsed from the date of Buddha."

This passage, besides establishing that Alagakkonara or Alakesvara was not King Bhuvaneka Bahu V., but his representative, also fixes the date of Bhuvaneka Bahu's accession as the 1,914th year of Buddha, equal to 1371 of the Christian era. The continuation of this passage throws new light on the building of Kotte. Alakesvara, it says, made deep moats and high ramparts with towers and "abhinava Jayawardana namin prasiddha Kottayak lava," *i.e.*, "caused to be made a splendid fort under the name *new Jayawardana*." This would show that he was not the first builder of Jayawardana Kotte, but that he fortified the old town and called it "new Jayawardana."

The prior existence of Kotte is confirmed by the Ambulugala *sannas* (page 42, Bell's Kegalla Archæological Report) which bears date "Jayawardanapura, Saka 1254," equal to 1332 A.D. Mr. Bell, however, misled then by the mistranslation in the *Mahawansa*, added: "This date must be wrong. Jayawardanapura (Kotte) was built by the Minister Alakesvara (Bhuvaneka Bahu V.?) towards the close of the fourteenth century." But as he considers the *sannas* genuine, it is not understood how the date could be wrong.

There is also contemporary European testimony as to the prior existence of Kotte. De Marignoli, the celebrated traveller of the Middle Ages, who left Constantinople in 1339 overland for Pekin, and on his return by sea was accidentally driven by the winds to Ceylon, mentions that he visited Kotte. "Kota in Ceyllan, a place where I have been" (Colonel Yule's *Cathay*, page 369). He returned home in 1353. Yule adds in a footnote that "Kotta Jayawardanapura near Colombo is first mentioned as a royal residence about 1314, but it again became the capital of the Island in 1410."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The *Saddharma Ratnakara*, a Buddhist history of Ceylon written by the pupil of Dharmakirti, the author of *Nikaya Sangraha*, repeats from it the passage about the lasting of religious harmony up to 1929 A.B., and adds this passage, which is most important, as referring, if only in the briefest manner, to the Chinese capture :—

"Afterwards there were Alakesvara Prabhuraja's son Kumara Alakesvara, his (*i.e.*, Kumara Alakesvara's) father's nephew Vira Alakesvara, his younger brother Vira Bahu Epa, his son Vijaya Epa, his younger brother Tunayesa. His father's brother, the aforesaid Vira Alakesvara, having been defeated in battle by his younger brother, went abroad. He returned, and after reigning twelve years *was* owing to his sins in a former birth *caught in the snares of the Chinese* (*China máyimata asuvagiya*). Next, Parakrama Bahu Epa, grandson of the aforesaid Lanka Seneverat. After the death of these seven, *i.e.*, 1,958 years after the death of our Buddha and 1,722 years from the establishment of the religion in Lanka, Sri Parakrama, the Great King, descended of the Sakya race, infinite in power and prosperity, attained to the sovereignty of Sri Lanka."

This fixes the date of the accession of Parakrama Bahu VI. at 1958 of the Buddhist era, equal to 1415 of the Christian era, and makes him the immediate successor of the captive Wira Alakesvara, the son of Prabhuraja Alakesvara's sister. The captive must then have been Wira Bahu VI., No. 155 in the *Mahawansa* table. The date of Parakrama Bahu VI.'s accession is confirmed by the celebrated poem *Kavyasekara*, written by his adopted son Rahula Totagamua. "There was in the year of Buddha 1958 a king famous o'er the world, like unto the sun and moon in glory and fame, named Perakum. With the fire of his glory he consumed the strength of his enemies. He blew away his savage foes, and the Goddess of prosperity clung to his arm."

Attanagala Wansa, a Sinhalese account, translated from the Pali, of the ancient and famous Attanagala Vihare, which was built about 250 A.D., to commemorate the supreme self-sacrifice of King Sri Sangabodhi, mentions that the translation was "made in Saka year 1304," equal to 1382 of the Christian era, "at the request of the General Satrusinha Kunjora, a friend of Alakesvara, the chief minister of King Bhuvaneka Bahu, and of that minister's brother Asthanayaka."

In the *Mayura Sandesa*, a poem written in the time of Bhuvaneka Bahu V., the poet imagines himself sending forth a peacock from the capital Gampola to Dondra Head to entreat for the king the blessings of the god Vishnu who presided there in the thousand-columned temple, which was some centuries later destroyed by the fanaticism of the Portuguese. After describing the beauties of Gampola under "the great King Bhuvaneka Bahu," he calls the attention of the bird to the important places in the course of its flight. Among them were Jayawardana Kotte and Rayigama, the seat of Alakesvara Prabhuraja, who is thus described in verse 57 :—

"Friend, now hear the greatness of Alakesvara Prabhuraja, the friend of Mahesvara (*i.e.* Siva), the lord of this city.

"May our lord Alakesvara, who so often causes the chank of victory to resound, who is like unto a lion which destroys numberless elephant-like enemies, and whose fame and glory spread over the world, may he live long in this city!"

There can thus be no doubt that Prabhuraja Alakesvara was not Bhuvaneka Bahu V., but a sub-king under him, though really exercising far greater power than the nominal sovereign, and that he did not found Kotte, but only fortified it. It is also established that Kotte was in existence at about the date of the Adippola *sannas*, and that the objection taken to its genuineness by the Crown on that ground cannot be sustained.

But was there, as alleged by the plaintiffs, a little before the date of the *sannas*, another Ceylon king, Bosat Wijaya Bahu (No. 144 in the *Mahawansa*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

chronological table), captured by the Chinese, and did an Alagakkonara establish himself then at Kotte as king or sub-king under the name Bhuvaneka Bahu?

The *Mahawansa* is opposed to this, as it attributes Bosat Wijaya Bahu's death to assassination at the hands of a traitorous general. The *Rajavaliya*, on which the plaintiffs mainly rely, gives a definite date for the capture: the year 1958 of the Buddhist era, 7th day of the bright half of the month of Wesak, and under the asterism Phusa. The year 1958 of Buddha corresponds to 1415 of the Christian era, and is consistent with the Crown theory that the captive was Wira Bahu II., barring, however, that there is no evidence that he was called Wijaya Bahu. Plaintiffs, however, wish to make out that 1958 is a mistake for 1858, as the day and asterism mentioned did not, according to them, fall in 1958, but in 1858, of the Buddhist era. In support of this Dharmarama high priest refers to some astronomical reckonings. He did not make them himself, and the person on whom he relied has not been called. But another priest, who has taken a lively interest in this action on behalf of the plaintiffs, is ready to swear that he made the reckonings himself afresh. But he does not produce his calculations, and I cannot say that I believe him.

The plaintiffs also rely on the admitted gap in the *Rajavaliya* of about ten sovereigns and 100 years about this period. This gap has been the subject of much controversy, which has yielded no useful result, and has only served to throw into relief the general inaccuracy of that chronicle.

The *Rajavaliya* account, however, embodies no doubt an ancient tradition. It was known to the Portuguese rulers of Ceylon, for it is mentioned in the work of Ribeiro on Ceylon. He served in their last war with the Dutch, and was taken prisoner by them at Jaffna in 1658 of the Christian era. On his return home after his release, he wrote this history and dedicated it to the King of Portugal. At page 24 of Lee's translation occurs this passage:—

"It is a common opinion among the Eastern nations that a son of the Sun gathered together the inhabitants of Bengala, gave them laws, and formed of them one of the largest States ever known in Asia. The kings of Ceylon derive their descent from that son of the Sun, who was the head of the royal family of the Survajas [Suryavansa?]. It is stated that the family reigned 2.000 years in Ceylon without any interruption, and that the Chinese, having then treacherously carried off the king, placed the tyrant Alagaxeres [Alakesvara?] in his room. But after the death of that usurper, the people offered the Crown to a certain priest, who refused it and caused it to be conferred again on the family to whom it rightfully belonged, that the eldest son of Ambadena Bandar was recognized as King of Kotta and married the daughter of the King of Kandy."

Ribeiro gives no clue to the date. Fortunately this omission is supplied by the translated extracts available from the Chinese chronicles, and which Sir Emerson Tennent was the first to publish in his work on Ceylon. In Vol. I., page 416, he says, basing his narrative on one of these chronicles:

"Prior to that time (the fifteenth century) the community of religion between Ceylon and China.....led to the establishment of an intercourse .....The Sinhalese monarchs, overawed by the magnitude of the imperial power, were induced to avow towards China a sense of dependency approaching to homage, and the gifts which they offered are all recorded in the Chinese annals as so many 'payments of tribute.' At length in the year 1405 A.D., during the reign of Emperor Yung-lo of the Ming dynasty, a celebrated Chinese commander Ching-Ho, having visited Ceylon as the bearer of incense and offerings to be deposited at the shrine of Buddha, was waylaid together with his followers by the Sinhalese king.....and with difficulty effected an escape to his ships. To revenge this treacherous affront Ching-Ho was despatched a few years afterwards with a considerable fleet and a formidable military force, which the king, whom the Chinese historian calls A-lee-ko-

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

nee-wahr [Alagakkonara ?], prepared to resist; but by a vigorous effort Ho and his followers succeeded in seizing the capital and bore off the sovereign, together with his family, as prisoners to China. He presented them to the Emperor, who, out of compassion, ordered them to be sent back to their country on the condition that 'the wisest of them' should be chosen king. Seay-pa-nae-na was accordingly elected, and this choice being confirmed he was sent to his native country duly provided with a seal of investiture as a vassal of the Empire under the style of Sri Parakrama Bahu VI."

Another Chinese chronicle is at page 622 reported as saying "that in 1405 A.D., the reigning King A-lee--ko-nae-wahr a native of Solee [Chola country in South India], and an adherent of the heterodox faith, so far from honouring Buddha tyrannized over his followers." From a third Chinese work is extracted the following at page 627 : "In the sixth year of his reign (1407) Yung-lo of the Ming dynasty sent an ambassador extraordinary, Ching Ho, and others to transmit the imperial mandate to the King A-lee-go-nai-wah, ordering him to present numerous and valuable offerings and banners to the monastery and to erect a stone tablet, and rewarding him by his appointment as tribute-bearer. A-lee-go-nai-warh ungratefully refusing to comply, they seized him in order to bring him to terms, and chose.....Apa-na-na and set him on the throne."

"An Officer of the Ceylon Rifles," in his book on Ceylon (Vol. II., page 149), says : 'According to the Chinese accounts.....the Emperor Ching-tso.....sent Ching-Ho, one of his generals, with a fleet. The fleet did not reach Ceylon until 1408 A.D., having returned to China.....in 1407 and departed a second time. The King.....called A-lee-koo-næ-wuhr by the Chinese tried to decoy some of the invaders.....into the interior.. ..... but Ching-Ho.....succeeded.....in capturing the King and his family at Gampola.....One of the commentaries on the Si-ya-ki of Hwen Thsang, an interpolation in the original text of the fifteenth century, says that the tooth of Buddha was among the spoil carried to China.'"

Beal, in his *Buddhist Records of the Western World* (Vol. II., page 282), gives a rather fuller account of the collision with the ambassadors from China :—

"The remainder of the section noticed on pages 248, 249, records a mission sent to the same King of Ceylon, Alibunar, by the Emperor of China (Ch'heng Tsu) under the direction of the eunuch Ch'hing Ho ; his object was to offer incense and flowers. Having arrived, he exhorted the king to respect the teaching of Buddha and to expel the heretics. The king, being enraged, desired to slay him, but Ch'hing Ho being aware of the plot escaped. Again the same ambassador was sent to receive the homage of Foreign States, and came to Ceylon (Silan-khan-Kwo, the country of the Seilan mountain). The king rebelliously refused to pay any respect to the embassage, and collected 50,000 soldiers to block the ways and destroy the ships. Ch'hing Ho, having learned the purposes of the king, sent secretly by a circuitous way to the ships and got 3,000 soldiers by night to march on the royal city. Being surrounded by the enemy's troops, they defended the city for six days, and then having treated the king with contumely, they opened the gates in the morning and fought their ways for twenty *li* ; when the daylight began to fail, they offered up prayers to the Sacred Tooth, and suddenly an unusual light shone before them and lighted them on their way. Having reached their ships they rested in peace, and arrived at the capital in the ninth year of Yung-loh (1412 A.D.), the seventh month and ninth day."

There are some discrepancies in these extracts which must await reconciliation until a careful examination is made and accurate translations published by competent scholars of all that the Chinese chronicles say on this subject. For the present, however, there is a practical unanimity that between 1405 and 1412 a Ceylon king called A-lee-ko-nee-wahr or Alibunar, who is no doubt the Alagakkonara of the Sinhalese histories, treated with

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

indignity an embassy from the Chinese Emperor, who thereupon sent a punitive expedition and caused him to be seized and brought to China. The date, on the whole, tallies with that of Sinhalese contemporary records, according to which the captive of the Chinese was the immediate predecessor of Parakkrama Bahu VI., who ascended the throne in 1415, and with the *Rajavaliya*, which definitely fixes the date at 1415. There is no evidence that a Ceylon king was taken captive at any other time by the Chinese.

It is true that Marco Polo in his Travels records that there was an earlier expedition from the Khan of China in 1284, and that the pressure put on the king of Ceylon induced him to part with three precious relics. I was asked by the plaintiffs' pleader to infer that the king was taken prisoner. I see no reason to draw such an inference. Marco Polo's words are :—

"And the King of this Island possesses a ruby which is the finest and biggest in the world.....You must know the great Khan sent an embassy and begged the king as a favour greatly desired to sell him this ruby, offering to give him for it the ransom of a city or in fact what the king would. But the king replied that on no account whatever would he sell it, for it had come to him from his ancestors.

"Furthermore, you must know that in the Island of Seilan there is an exceeding high mountain..... Now it befell that the great Khan heard how on that mountain there was the sepulchre of our first father Adam, and that some of his hair and of his teeth and the dish from which he used to eat were still preserved there. So he thought he would get hold of them somehow or another, and despatched a great embassy for the purpose in the year of Christ 1284. The ambassadors with a great company travelled on by sea and by land until they arrived at the Island of Seilan and presented themselves before the king, and they were so urgent with the king that they succeeded in getting two of his grinder teeth which was passing great and thick, and they also got some of the hair and the dish from which that great personage used to eat, which is of a very beautiful green porphyry" (Colonel Yule's *Travels of Marco Polo*, Vol. II., page 295).

This account is so full and explicit, that if the king had been taken prisoner, so important a fact would not have been omitted by Marco Polo, especially as, at the time of this expedition, he was resident at the Khan's Court and as he visited Ceylon on his homeward route to Venice.

The consensus of all the trustworthy testimony available is to establish that, whoever was the king taken captive by the Chinese and whatever his name, there was only one such capture, and that it occurred about 1415 of the Christian era, that Alagakkonora or Alakesvara was sub-king at Kotte about that time, and not in the first half of the previous century, and was not called Bhuvaneka Bahu. I hold therefore that in 1325, the date of the *sannas*, there was at Kotte no king or sub-king of the name of Bhuvaneka Bahu who could have granted the *sannas*.

There remains the other anachronism, objection 6 (*b*). Among the offerings of Suriyahetti Mudiyanse to the king are mentioned 60 *wilisa* (or *wiliya*) *kuruns* and 150 pure silver *kuruns*. Both Mr. Bell and Silva Mudaliyar take *kurun* as the English crown piece. The English crown was originally a gold coin, and was first struck in the reign of Henry VIII., being so called from the figure of the crown on the reverse. Silver crowns were issued in the reign of Edward VI., and had the figure of the king crowned on horseback. The crown was therefore not in existence at the alleged date (1325) of the *sannas*, and the use of the term, if it means the English crown, would be a distinct anachronism. Mr. Bell, furthermore, takes *wiliya kurun* as crowns of William IV. But Silva Mudaliyar, reading it as *wilisa* or *wiliya*, understands by it "very good gold." In this interpretation he has the support of Dharmarama high priest, who agrees that *wilisiyana* means "very good gold," and was contracted to *wilisa* or *wiliya*. But he disagrees entirely

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

both with Mr. Bell and Silva Mudaliyar as to the word *kurun*. In his opinion it is the Sanskrit *karshapana*, a gold coin, which in Pali becomes *karisapana*, and from which an Elu word *kuru* may be derived, which in the plural might be *kurun*. But he has not seen the word *kuru* or *kurun* used elsewhere. His explanation seems to me far-fetched, and a pure speculation. *Kurun* I take to be used in the *sannas* to designate the English crown piece, and I hold the use of the term to be a fatal anachronism.

Both, therefore, on intrinsic and extrinsic grounds I find the *sannas* to be a forgery. I believe that it was concocted after the commencement of British rule in Ceylon, in support of some vague tradition in the Suriyahetti Mudiyanse family as to the origin of their settlement in Adippola, and in order to claim a larger extent of land than they are entitled to.

It follows from this finding that the next issue, the 5th, must be decided against the plaintiffs, and that they are not entitled under the *sannas* to any of the lands claimed.

The two remaining issues, the 6th and 7th, need not detain us long. The physical features of the village of Adippola as described at pages 4 and 5 above, taken with what is known of the history of Village Communities (pages 6-8), have enabled us to form a fairly correct idea of the origin and development of this village and of the land tenures therein. And if the law of possession in Ceylon has been correctly stated above (pp. cxi. to cxiii.) the issue as to possession may be said to have been practically decided when I dealt with the first issue. I consider it proved that the plaintiffs and their predecessors in title have had for a considerable time – at least half a century, may be one or two centuries—exclusive and adverse possession of the lands under reference, except the unclaimed lots P 1,176, Q 1,176, and 11,086, and except the lots of forest land.

The evidence in favour of the plaintiffs can hardly be said to be affected by that tendered for the Crown, viz., the Assistant Government Agent's rather imperfect register of permits issued for chena cultivation in Adippola, and applications made to him for purchase of bits of lands in the village. Even if these documents were admissible in evidence and referred to these lands, it has been said by an eminent authority that "where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial will not be defeated by proof of slight, partial or occasional variations in the exercise and extent of the right claimed ..... It follows almost necessarily from the imperfections and irregularity of human nature that a uniform course is not preserved during a long period; a little advance is made at one time, a retreat at another, something is added or taken away from indiscretion or ignorance or other causes: and when by lapse of years the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice."

In the present case the persons whose acts are put forward as a kind of estoppel were ignorant rustics, and in one case a subordinate headman of the Assistant Government Agent. In a similar case (*Appuhami v. Sinno Lebbe*, 1 S. C. C., 60) the Supreme Court refused to draw any unfavourable inference. Phear, C. J., and Dias, J., said: "We entirely agree with the District Judge in thinking that, regard being had to the social position of the plaintiff, a rural villager, and his apparent want of education and instruction, the fact of his having consented to buy off the Government claims ought not to interfere with or alter the inferences which otherwise might be reasonably drawn from the long continued possession and user just mentioned of the subject in suit."

As to the forest lands, however, the plaintiffs have failed to prove that they exercised any rights therein. Their needs as to forest produce could have been easily satisfied from the extensive lands which are now "old chenas" and "new chenas," and were, I think, so satisfied.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

XII.

My findings may be summarized as follows :—

1. Of the lands under reference :—

(*a*) The three lots P 1,176 (26 acres 3 roods 10 perches), Q 1,176 (1 acre 0 rood 18 perches), and 11,086 (4 acres), being outside the claim of the plaintiffs and the other claimants in this case, and not being claimed by any other person, are the property of the Crown.

(*b*) The following 15 lots of forest, in total extent 300 acres 1 rood and 38 perches, to wit :—

Lot.		Extent. A.	R.	P.	Lot.		Extent. A.	R.	P.
G 1169	...	73	2	0	F 1175	...	73	3	10
W 1172	...	4	2	20	H 1175	...	0	2	34
X 1172	...	7	3	5	I 1175	...	0	1	4
K 1173	...	0	2	34	P 1175	...	2	3	17
N 1173	...	3	0	11	Q 1175	...	9	2	37
O 1173	...	1	1	32	R 1175	...	6	0	38
U 1174	...	48	0	0	N 1176	...	46	2	20
V 1174	...	21	0	16					

are lands within the meaning of the Ordinance No. 1 of 1897.

(*c*) The other lots included in the Reference are not lands within the meaning of the Ordinance, and not proper subjects for proceedings under it.

2. The defendant, Assistant Government Agent, attempted but failed to enter into an agreement with the claimants, but his omission to record such failure in his Reference is not fatal to it.

4. It is competent to the defendant to question the genuineness of the *sannas* pleaded by the plaintiffs.

3 and 5. The *sannas* is a forgery, and conveyed no title to the plaintiffs.

6. The plaintiffs and their predecessors in title and the other claimants have for at least half a century possessed the lands referred to in 1 (*c*) adversely to the Crown, so as to be entitled to the benefit of prescriptive possession.

7. The plaintiffs have not acquired a prescriptive right to take forest produce from the forest lands referred to in 1 (*b*), but have acquired a prescriptive right to cultivate according to their necessities the jungle in the lands under reference, and which are included in 1 (*c*).

Judgment will therefore be entered for the Crown for the lots referred to in 1 (*a*) and (*b*). The Reference in regard to all the other lots will be dismissed, and the *sannas* will be declared a forgery. Each party will bear his own costs.

In conclusion, I desire to record my sense of the great ability with which this difficult case has been conducted for the plaintiffs by Mr. C.E. Corea and for the Crown by Mr. Advocate C. M. Fernando, and my obligations to those gentlemen for the invaluable help I have received in the trial of the case.

P. ARUNACHALAM,
District Judge.

8th July, 1904.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX V.

[*Note to page 300 supra.*]

KANDYAN PROVINCES.

Ordinance No. 12 of 1840, section 6.

THE Ordinance No. 12 of 1840 was an enactment made (as stated in the preamble) for the prevention of encroachment on Crown lands by persons without any probable claim or pretence of title. Section 6, which is the most important section of the Ordinance, has been the cause of much litigation between Crown and subject, of heated discussion by lawyers and politicians, and of frequent judicial interpretation. It provides that :—

(1) All forest, waste, unoccupied or uncultivated lands are presumed to be the property of the Crown until the contrary is proved.

(2) All chenas and lands which can only be cultivated after intervals of several years,

(*a*) *if situated in the districts formerly comprised in the Kandyan Provinces*, are deemed to belong to the Crown and not to be the property of any person claiming the same against the Crown, except only on proof by such person

(i) of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or

(ii) of such customary taxes, dues or services having been rendered within 20 years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts; and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(*b*) *if situated elsewhere in the Island*, are deemed to be forest or waste land within the meaning of sub-section (1).

"Districts formerly comprised in the Kandyan provinces."

A distinction is thus created between lands situated in "the districts formerly comprised in the Kandyan Provinces," and lands situated elsewhere. A special mode of proof is prescribed in order to rebut the presumption in favour of the Crown in the former case. But the expression "the districts formerly comprised in the Kandyan Provinces" has not been explained in the Ordinance. What is the precise meaning of the expression is not clear, and has not been authoritatively decided. Owing to the lapse of time and the research now necessary among ancient documents, the question is a difficult and complicated one. It raises points of historical and political as well as legal interest as to the constitution of the ancient Kandyan Kingdom, the changes introduced therein from time to time under British rule, and the territorial limits within which the system of law called the Kandyan law prevails.

Robertson's Case and *Wijesinha* v. *Wijesinha*.

In *Robertson's Case*, 1886, 8 S.C.C. 36 and in *Wijesinha* v. *Wijesinha*, 1891, 9 S.C.C. 199, the Supreme Court referred to the Proclamation of 11th February, 1815, which was issued upon the annexation of the Kandyan Provinces, in illustration of the expression. In *Robertson's Case*, Burnside, C. J., said:

"The Kandyan Provinces, denominated in the Proclamation of February 11th, 1815, 'The Four Korales,' 'The Saffragam Korale,' and 'The Three Korales,' were by that Proclamation declared to be integral parts of the British possessions in the Island of Ceylon and from thenceforth were received under the sovereignty and protection of His Majesty the King of Great Britain; since which time they have continued to be and form a part of, and have been absorbed into, this Colony of Ceylon. * * * Moreover, the old divisions which defined the original Kandyan Provinces, at the time of the cession, and separated them from the other provinces, have long since disappeared, and the Kandyan Provinces, as Provinces apart from others, no longer exist, and it would not, I take it, at the present day, be possible to define any particular area of this Colony as the Kandyan Provinces. True it is, that there may be found throughout the Ordinances references to the "Kandyan Provinces" *eo nomine*. But this is undoubtedly a loose

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Supreme Court on the term "Kandyan provinces."

mode of expression, rendered conspicuously so by the interpretation clause of the Marriage Ordinance 3 of 1870, which defines "Kandyan Provinces" to mean the "Provinces mentioned in Schedule B;" and Schedule B enumerates only one entire Province, the Central, with parts of the Eastern, Western, North-Western, Southern, and Northern Provinces, an area widely different from that mentioned in the Proclamation. The expression "Kandyan Provinces" has, therefore, no legal significance as defining any particular area, distinct and apart from the topographical division of the Island into the several provinces, Northern, Southern, Eastern, Western, North-Western, Central, North-Central, and very lately, Uva. These together comprise the whole territory of the Colony, but the subdivisions, whether for administrative, judicial, or revenual purposes, are ever changing at the will of the executive or legislative authority, and if there were any such thing as a provincial domicile, it would necessarily be subject to the ever-varying changes of provincial boundaries, which to-day might fix the domicile in one province and to-morrow transfer it to another, without any actual change of residence."

In the same case Clarence J. said: "It is impossible to speak precisely as to any territorial limits of this application of Kandyan law, since we are entirely without any definition precising any area over which it may be supposed to extend;" and Dias J. said: "With regard to the exact limits of the Kandyan Provinces we have no precise information, and probably when the whole Island became a British possession it became unnecessary to ascertain and define the exact limits of the two Provinces, Kandyan and Maritime. The first, and so far as I know, the only official paper which deals with the subject is the Proclamation of February 11th, 1815." In *Wijesinha* v. *Wijesinha* Clarence J. repeated: "it is a matter of much difficulty to ascertain within what territorial limits the so-called Kandyan law is to be considered prevailing."

Proclamation of 11th Feb., 1815.

The Supreme Court was mistaken in supposing that the only official document dealing with the subject was the Proclamation of February, 1815, or that it set forth the whole of the Kandyan provinces. That proclamation after describing the armies of His Majesty the King of Great Britain as having occupied and entered into complete possession of "the Kandyan Provinces denominated the Four Korles, the Suffragam Korle,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and the Three Korles," and that the Chiefs and people of those provinces had fully and freely surrendered themselves to His Majesty the King of Great Britain, declares the same to be integral parts of the British possessions of the Island of Ceylon, and adds that "many other provinces of the Kandyan Kingdom have been entered and are partially occupied by the British forces" (Legislative Acts of the Ceylon Government, 1853, Vol. 1, p. 177).

Kandyan provinces acc. to Sir John D'Oyly, 1818.

According to Sir John D'Oyly (*A Sketch of the Constitution of the Kandyan Kingdom*, 1818*), the Kandyan Kingdom consisted of twenty-one grand divisions, of which the twelve principal were called *dissavani* (counties) and the majority of the rest *Rata* (districts).

The *dissavanis* were each placed under the order of a chief or Governor called *Dissawe*. They were the Four Korles, the Seven Korles, Uva, Matale, Sabaragamuwa, the Three Korles, Walapane, Udapalata, Nuwarakalawiya, Wellasse, Bintenna and Tamankaduwa. The other nine districts were respectively under the authority of chiefs who, except the last two, were distinguished by the name of Ratemahatmayas. They were Udunuwara, Yatinuwara, Tumpane, Harispattuwa, Dumbara, Hewaheta, Kotmale, Uda Bulatgama and Pata Bulatgama (*ibid.* p. 17).

The term Kandyan Provinces as distinct from Maritime Provinces was used by the British Government to designate the provinces of the Kandyan Kingdom. See *e.g.* Order in Council of 12th April, 1832, published at p. 371 of Vol. 1 of the Legislative Acts of the Ceylon Government, 1853, where the terms Maritime Provinces and Kandyan Provinces are contrasted.

* Prepared by him when administering that territory, 1815-1824, and published in part in the Transactions of the Royal Asiatic Society of Great Britain and Ireland (1833) Vol. 3, p. 191 *et seq.*, at the instance of the Vice-President Sir Alexander Johnstone, who was Chief Justice of Ceylon 1811-1820; re-printed in the Sessional Papers 1891, p. 107 *et seq.* Complete copies exist only in manuscript. There is one in the Colombo Museum. The whole of this interesting work deserves publication after collation of all existing manuscripts by a competent editor. Sir John D'Oyly was a very distinguished member of the Ceylon Civil Service. After a creditable career at Cambridge, where he was 2nd Chancellor's medallist in Classics and a Senior Optime, he entered the Ceylon service in 1802, rose to be Resident and First Commissioner of the Government in the Kandyan provinces and was created a baronet in 1821 for his services in conducting the negotiations in communion with the Kandyan Convention. He died at Kandy in 1824.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Boundary between Kandyan and Maritime provinces.

The boundary between the Maritime districts acquired by the British at the capitulation of Colombo in 1796, and the Dominions of the Sinhalese Monarchy ceded to the King of Great Britain by the Convention of 1815, had been clearly defined by a Treaty between the Sinhalese Government and the Dutch East India Company in the Saka year 1688, equivalent to 1766 A.D.

The material portions of that Treaty* are as follows:—

Second Article.

Treaty of 1766 A.D. between the King of Kandy and the Dutch Government.

"The illustrious Lord Emperor, and the illustrious the principal members of His Majesty's Great Council of Ministers . . . . . recognize the . . . . . States General of the United Provinces and the Company of Hollanders (in the East) as the rightful and independent over-lord (*hamuduruvansa*) of the several districts of this Island of Lanka, which had been held by the Company before the war now concluded, to wit, Yapa Pattanama, the Districts thereto belonging, Hettikula Pattuva, Mannarama, with the places appertaining thereto, the country from there (that is to say) Kalpitiya and the places appertaining thereto; Kolamba Disava: Galu Korle: Matara Disava: Puliyanduva: Trikunamale, with the places appertaining thereto. ..... †

Third Article.

"Moreover, all the sea-board round the Island not held by the Company before the war ..... is to be given over to the above-named..... Company,..... to wit, on the West from Kammala to the furthest limit of the Yapa Pattanama Government, on the east from Yapa Pattanama to the Walagiya-ganga; this coast-line thus given up is a distance of one Sinhalese gawwa, more or less, inland, provided (however) that the

* The Treaty in the original Sinhalese appears in Vol. 16 of the Journal of the Royal Asiatic Society, Ceylon (p. 62 *et seq.*) with a translation by Mr. H. C. P. Bell, first published in the *Orientalist*, Vol. 3, p. 115. The translation given above differs slightly from Mr. Bell's.

† Yapa Pattanama = Jaffnapatam or Jaffna;
Hettikulapattuwa = Chettikulam;
Mannarama = Mannar; Kolambadissawa = Colombo;
Galukorale = Galle; Puliyanduwa = Puliyantivu or Batticaloa;
Trikunamale = Trincomalie.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

demarcation (of the boundary) may be suitably carried out according to the rivers and mountains that fall (into line).

.....

FIFTH ARTICLE.

"On the other hand, the.....Company recognizes the Supreme Government (of His Majesty) as the Sovereign and independent Lord Paramount of the other districts of this Island of Lanka."

In accordance with the above Treaty the boundary of the sea board mentioned in the third Article appears to have been defined by a surveying compass, and the Compass Road then opened, on the west coast still exists under the name *Kompas Pára* from Kammala northwards, marking the line of separation between the districts governed by the Roman-Dutch law and those where the Kandyan law prevails. *Kompas Pára.*

The Proclamation of 11th February, 1815, it will be seen, mentions by name only a part of the Kandyan Provinces, equivalent in the main to the modern districts of Ratnapura and Kegalle. Another Proclamation was issued on 2nd March, 1815, after the capture of the Kandyan King and as a result of the Convention held with the Chiefs of the Kandyan Provinces. This Proclamation declares the dominion of the Kandyan Provinces to be vested in the Sovereign of the British Empire, and that the administration of civil and criminal justice and police over the Kandyan inhabitants of the said province is to be exercised according to established forms and by the ordinary authorities, but does not specify the names or limits of those provinces (Legislative Acts of the Ceylon Government 1853, Vol. 1, p. 179). Proclamation of 2nd March, 1815.

The constitution and administration remained unaltered except that a Resident on behalf of the King of Britain was placed at the head, *viz.*, Mr. (afterwards Sir) John d'Oyly, assisted by Mr. Simon Sawers as first assistant to the Resident and Agent of Government at Badulla, and by Mr. Henry Wright as second Assistant and Agent of Government at Kandy.

Under the Minute of April 26, 1815, the Kandyan Provinces were divided into five divisions and placed under the administration of a Board consisting of a President, a Judicial Commissioner, and a Revenue Board of Commissioners. 1815.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Commissioner, with the Commanding Officer of the troops in the interior. This Board with the Adigars and principal chiefs, formed the great Court of Justice, from whose sentence there was no appeal except to the Governor. The civil authority was exercised as before by the native Dissawas.

I have not been able to trace this Minute, which I quote from Ievers' Manual of the North Central Province, p. 62. It is not to be found in the Kandy Kachcheri or in the Colonial Secretary's Office. The Government Agent Kandy, Mr. Hellings, has kindly supplied me with copy of a warrant or commission dated 13th September, 1816, establishing the Board and prescribing its duties. The Board did not then include the Commanding Officer of the Troops, who apparently did not join the Board till 1819.

The Government Almanacs of 1817 and 1818 (pp. 65-69) enumerate the following Kandyan Provinces:—

1. Four Korles
2. Seven Korles
3. Uva
4. Matale
5. Sabaragamuwa
6. Three Korles
7. Walapane
8. Udapalata
9. Nuwarakalawiya
10. Wellassa
11. Tamankaduwa
12. Bintenne
13. Udunuwara
14. Yatinuwara
15. Tumpane
16. Harispattu
17. Dumbara
18. Hewaheta
19. Kotmale and Upper Bulatgama
20. Minnere and Lower Bulatgama

Proclamation of 21st November, 1818.

On the 21st November, 1818, a proclamation was issued (Legislative Acts, 1853, Vol. 1, p. 223) after the suppression of the Kandyan insurrection, delegating the general executive and judicial authority in the Kandyan Provinces to the Board of Commissioners, and under their superintendence to resident Agents of Government in the Dissavanis, with the Kandyan chiefs under them. Sections 53 to 55 of this proclamation fix the jurisdiction of these officers for administrative and judicial purposes, and enumerate the divisions in the Kandyan Provinces:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1.	Four Korles	Which were assigned to the Board of Commissioners, with an Agent of Government at Attapittia in the Four Korles and another at Nalanda in Matale.
2.	Matale	
3.	Udapalata, including Upper Bulatgama	
4.	Udunuwara	
5.	Yatinuwara	
6.	Tumpane	
7.	Harasiyapattu	
8.	Dumbara*	
9.	Hewaheta	
10.	Kotmale	
11.	The part of Walapane lying west of the Kuda and Uma Oya.	
12.	Hurulu, Tamarawewa, Maminiya, and Ulugalla Pattus of Nuwarakalawiya.†	
13.	Uva	Assigned to the Agent of Government resident in Uva.
14.	Wellassa	
15.	Bintenne	
16.	Wiyaluwa	
17.	Royal village of Madulla	
18.	Seven Korles	Assigned to the Agent of Government resident in the Seven Korles.
19.	Northern and western parts of Nuwarakalawiya†	
20.	Sabaragamuwa	Assigned to an Agent of Government resident there.
21.	Three Korles	Assigned to an Agent of Government resident there.
22.	Tamankaduwa	Assigned to the Collector of Trincomalie.

* Minneri of the previous list was merged in Dumbara.

† By the Governor's Minute of 18th September, 1819, the jurisdiction of Nuwarakalawiya was changed as follows:—Kuraluwa, Matombuwa, Undurawa, Kalagomuwa, Hurulu, Mahapotana, and Maminiya pattus were assigned to the Board of Commissioners and under them the Agent of Government in Matale; and Parawaha, Kahalla, Negampaha, Kalagam, Eppawala, Ulugalla and Nuwaragam pattus to the Agents of Government in the Seven Korales.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Census, 1821. A Census was taken of the population of the Kandyan Provinces in the year 1821. From the records that have been preserved in the Colombo Museum, the Registrar-General's Office and the Government Record Office, the Kandyan Provinces of which the census was taken were :—

1. Yatinuwara, consisting of the town and suburbs of Kandy and "villages within the rivers and districts beyond the rivers"
2. Udunuwara
3. Udapalata
4. Uda Bulatgama
5. Kotmale
6. Harasiyapattu
7. Tumpane
8. Dumbara
9. Hewaheta
10. Walapane
11. Uva (Upper and Middle divisions)
12. Uva (Lower division)
13. Wellassa
14. Bintenne
15. Sabaragamuwa
16. Three Korles and Lower Bulatgama
17. Four Korles
18. Seven Korles (Upper and Lower divisions)
19. Matale
20. Nuwarakalawiya (Western and Eastern half)
21. Tamankaduwa

Census, 1832. Another Census appears to have been taken in the year 1832, and the following Kandyan Provinces as distinct from Maritime Provinces are shown in the record of the census results in the Government Almanac of 1834. The Census did not embrace all the Kandyan Provinces but only the following:—

1. Udarata
2. Four Korles
3. Three Korles
4. Seven Korles
5. Matale
6. Sabaragamuwa
7. Tamankaduwa.

The Government Almanac of 1832 (pp. 91-92) gives the districts of the Kandyan Provinces as follows for the purposes of jurisdiction under the proclamation of 21st November, 1818:—

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

1. Uva and Bintenne
2. Sabaragamuwa
3. Seven Korles and north part of Nuwarakalawiya
4. Three Korles
5. Tamankaduwa
6. Kandy
7. Four Korles
8. Matale and east part of Nuwarakalawiya
9. Harasiyapattu and Tumpane
10. Hewaheta south of Maha Oya and Walapane
11. Lower Uva and Wellassa.

Lieut.-Col. Colebrooke's Report, 1831.

Lieutenant-Colonel Colebrooke, one of His Majesty's Commissioners of Inquiry on the Administration of the Government of Ceylon, in his Report of 24th December, 1831, to the Secretary of State, says:—

"The Kandyan Provinces, which had been first acquired by the British Government in 1815, were settled on their present footing after the rebellion in 1818, and have been separately administered by the Governor, without the assistance of his Council. These provinces were placed under the immediate superintendence of a Board of Commissioners, which Board is now composed of the Commandant of the troops in Kandy and two Civil servants, having charge respectively of the Judicial and Revenue Departments. The Kandyan territory is divided into eleven provinces or districts, of which five, situated above the hills around Kandy, *viz.*, (1) Udaratte, (2) Four Korles, (3) Matale and east part of Nuwarakalawiya, (4) Harasipattoo and Tumpane, (5) Hewahette and Walapane, are placed under the immediate superintendence of the Board of Commissioners, to whom the Government Agents resident in those districts directly refer. The districts situated more remotely from Kandy, and below the hills, are also placed under Government Agents, who are intrusted with the same authority which is exercised by the Collectors in the maritime provinces. In one district (Seven Korles) a separate agent for part of the judicial affairs has been appointed, but the Government Agents in that and all the other districts are charged with the civil and judicial duties and with those of police. With the exception of the Government Agencies in the three provinces of Saffragam, Seven Korles and Tamankaduwa, which are held by civil servants, these offices have been filled by officers of the regiments stationed in the Island.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"The separate administration of the Kandyan Provinces is maintained under the Convention which was concluded in the name of His Majesty with the Kandyan chiefs in 1815, *and modified in some of its provisions by a Proclamation of the Governor,† issued after the rebellion in 1818, by which the authority of the chiefs was curtailed. By the 4th clause of the Convention of 1815, the dominion of the Kandyan Provinces was vested in His Majesty, subject to the condition of maintaining the laws, institutions and customs of the country; and by the 5th clause, the religion of Bhood was declared inviolable, and its rights, members and places of worship, were to be maintained and protected" (Ramanathan's Reports 1820-33, p. 204).

Lieutenant-Colonel Colebrooke added (*Ibid.* p. 216): "The maintenance of separate and independent establishments in the Maritime and the Kandyan Provinces has been impolitic, in the check it has opposed to the assimilation which it is on every account desirable to promote between the various classes of whom the population is composed. By maintaining a separate Government at Kandy the influence of the chiefs has been upheld to the prejudice in some instances of the people. The Kandyan Districts which are situated below the mountain have a nearer and more natural connection with those of the coast, with which they maintain a trading intercourse."

Proclamation of 1st Oct. 1833 abolishing Kandyan provinces and dividing Island into five provinces.

As the result of this Report, a Proclamation was issued on 1st October, 1833, by which the distinction between Kandyan and Maritime provinces was abolished and the whole Island was divided into five provinces—the Northern, the Southern, the Eastern, the Western and the Central, which were declared to consist of the following districts. I have italicised the names of the Kandyan Provinces and districts under the previous constitution.

> "The Northern Province shall consist of the country hitherto known as the districts of Jaffna, Mannar and the Wanny; as the Dessavony of *Nuwargkalawiya*; and as the Island of Delft.
>
> The Southern Province shall consist of the country hitherto known as the districts of Galle, Tangalle, Matara, and Hambantotte; as the

*See Convention dated 2nd March, 1815.
†See Proclamation dated 21st November, 1818.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Dessavony of *Soffragam*; and as the province of *Lower Uva* and *Welasse*.

The Eastern Province shall consist of the country hitherto known as the districts of Trincomalie and Batticaloa; and as the provinces of *Tamankadewe* and *Bintenne*.

The Western Province shall consist of the country hitherto known as the districts of Colombo, Chilaw, and Putlam; as the Dessavonies of *Seven Korles*, *Four Korles* and *Three Korles*; and as the province of *Lower Bulatgamma*.

The Central Province shall consist of the country hitherto known as the districts of *Kandy*, *Yattinuwara*, *Udunuwara*, and *Harasiapattoo*, *Tumpane*, *Dumbara*, *Hewahette*, *Kotmale*, *Upper Bulatgamme*, and *Weyeloowa*; and as the Dessavonies of *Uwa*, *Matelle*, *Udapalata*, and *Wellapana*."

Meaning of "Districts formerly comprised in the Kandyan provinces."

The expression in the Ordinance 12 of 1840, section 6, "Districts formerly comprised in the Kandyan Provinces," therefore, emphasises the fact that there were no longer in law any provinces that could be called the Kandyan Provinces, and must be understood to mean the territory covered by the Dissavanis and Ratas enumerated by Sir John D'Oyly and the divisions set out in the proclamation of November 21, 1818, the western boundary between the Kandyan and Maritime Provinces being the *Kompas Para* referred to at p. cxxxii. above.

Capt. Schneider's map of Ceylon, 1822.

The conclusion I have arrived at I have since found to be supported by an old map of Ceylon, which has recently come into the possession of the Surveyor-General. It was prepared in 1822 by the then Surveyor-General, Capt. Schneider, and was a few years ago discovered at the Hague and acquired by the Ceylon Government. In this map the Kandyan provinces are indicated as consisting of the divisions I have mentioned. A copy of the map is attached to my paper on the Kandyan Provinces in the Journal of the R. A. S. (Ceylon Branch), 1910.

Re-arrangement of Kandyan Provinces after 1833.

As to the history of the Kandyan Provinces subsequent to 1833:—

In 1837 Bintenne was transferred from the Eastern to the Central Province, and in 1845 the district of Alupota, which consisted of Lower Uva and Wellasse, was added from the Southern Province. The Central Province so constituted remained till 1886, when

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Bintenne east of the Mahaweliganga, Wellasse and Uva were formed into a separate province called the Province of Uva.

Re-arrangement of Kandyan Provinces after 1833.

In 1839 the District of Alupota was subdivided and distributed among Hambantota, Batticaloa and Uva Districts (Ceylon Manual 1909, p. 305).

In 1845 by proclamation of 1st October, 1845, the Seven Korles were with Chilaw and Puttalam Districts taken from the Western Province and formed into a separate Province called the North-Western Province, the headquarters remaining at Puttalam till 1856 when they were transferred to Kurunegala.

In 1873 by the proclamation of 6th September, 1873, Demalahatpattu of the Puttalam District was attached to the newly created North-Central Province, but was re-transferred to the North-Western Province in 1875 by proclamation of 1st January, 1875, and is still treated as a Kandyan District for the purposes of the registration of Kandyan marriages (Ordinance 3 of 1870, Schedule B).

In 1845 by proclamation of 1st October, 1845, the Dissawani of Saffragam was transferred from the Southern Province to the Western Province except the Yakawala Hatarabage, which still remains in the Southern Province and is treated as a Kandyan District under Ordinance 3 of 1870, Schedule B.

In 1889, Saffragam (with that exception) and the Four Korles and Three Korles and Lower Bulatgama (assigned in 1833 to the Western Province) were formed into one Province called the Province of Sabaragamuwa.

In 1873 by the proclamation of 6th September, Nuwarakalawiya (which had been assigned in 1833 to the Northern Province) and Tamankaduwa (which had been assigned to the Eastern Province) were formed with the Demalahatpattu of the North-Western Province into a Province called the North-Central Province. Demalahatpattu was restored to the North-Western Province by proclamation of 1st January, 1875.

In 1886 (by the proclamation of 1st February of that year) the present province of Uva was created as stated above.

Difference between the provinces of 1833 and of to-day.

The provinces created in 1833 thus differed from those of the present time as follows: the Western Province embraced in addition to its present area the modern North-Western Province, and the district of Kegalle; the Central Province embraced besides its

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

present area the greater part of Uva Province; the Southern Province in addition to its present area included the Ratnapura District and lower Uva and Wellassa of Badulla District; the Northern Province included Nuwarakalawiya of the present North-Central Province, while the Eastern Province included Tamankaduwa of the North-Central Province and Bintenne of the Badulla District.

Kandyan Provinces for purposes of marriage registration under Ord. 3 of 1870.

For the purposes of the registration of Kandyan marriages under the Ordinance 3 of 1870, the following provinces are (by section 4) declared to be meant by the term "Kandyan Provinces":

The Central Province

Seven Korles Demalapattu of Puttalam	North-Western Province.
The Uda, Palle, and Radda Palatas of Bintenne; the Vannames of Nadene, Nadukadu, and Akkaraipattu; the Sinhalese villages in the division of Panawa—all in the Batticaloa District; Tamankaduwa; the Sinhalese villages in the Kaddukulam pattu, in the District of Trincomalie.	Eastern Province.
Sabaragamuwa. Four and Three Korles and Lower Bulatgama.	Western Province, now Sabaragamuwa Province.

Yakawala in the Southern Province.

Nuwarakalawiya in the Northern (now in the North-Central) Province.

The Ordinance No. 9 of 1870 has added to this list "Sinhalese Villages in the Mannar District."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX VI.

(Note to page 287 supra).

[EXTRACT FROM THE "CEYLON GOVERNMENT GAZETTE" OF JUNE 2, 1910.]

"THE STAMP ORDINANCE, 1909."

IT is hereby notified for general information that His Excellency the Governor, with the advice of the Executive Council, in pursuance of the power in him vested by sub-section (1) (*a*) of section 5 of the above-named Ordinance, has altered the Notification bearing date January 25, 1910, which requires the use of certain special stamps for the particular instruments described in the schedule to the said Notification annexed, by directing that from and after July 1, 1910, the use of the stamps bearing the words "Ceylon Stamp Duty" with the word "Judicial" printed thereon in red shall be discontinued, and that on and after the said date revenue stamps bearing the words "Ceylon Stamp Duty" only shall be used for all the purposes for which Judicial Stamps were before such date required to be used.

By His Excellency's command,

H. L. CRAWFORD,

Acting Colonial Secretary.

Colonial Secretary's Office,

Colombo, May 31, 1910.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX VII.

(Note to Article 199, p. 345 supra).

PRESCRIPTION AGAINST THE CROWN IN LAND SUITS.

JUDGMENT OF BERWICK, D.J., COLOMBO.

In D. C. Colombo 1245 (1870), Vanderstraaten 83, the District Judge Mr. T. Berwick in the course of a learned and masterly judgment said :—

Can title to land be acquired by prescription against the Crown?

The question, therefore, which has to be decided is the exceedingly important, and, so far as the court is aware, hitherto unsettled one,—whether in this country a private party can by any, or by what length of possession, acquire a title to land by prescription against the Crown.

I will first deal with the case as one of Roman-Dutch law, which I think is the only law applicable to it. Nothing can be more certain than that certain property of the Fisc is subject by Roman-Dutch law to the ordinary laws both of prescription and of usucaption,—and the points on this part of the case are, whether at the present time the Fisc includes the Crown, and whether Crown or rather Government lands are among the *fiscalia jura*, which are subject to prescription. Burge (Vol. III. p. 9) says that the property of the Church and State is not the subject of usucaption. But the passage cited in support of this shews that the reference is to the old Roman civil law. Again, at p. 35, he says that the law of Holland does not exempt the property of the Fisc or Church from the prescription to which that of private individuals is subject. But this statement is much too loose and general, for there can be no doubt that there are certain *fiscalia jura* which cannot prescribe.

The question moreover remains, what is the Fisc? Among the subjects which the civil law originally excluded from the incidents of usucaption and prescription, were things *extra commercium*,—things of which the law forbid the alienation and (it seems to me as a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

consequence of that larger rule and as included therein) the property of the Church and State. Burge, Vol. III. 19; Voet 41. 3. 12 and 13. These leading principles of being *extra commercium* and inalienable seem to have determined the subsequent fluctuations of the liability to usucaption of property, fiscal and ecclesiastical.

What rights of Crown may, and may not, be prescribed?

Res Fisci vel Principis were at first expressly excluded from the operation of usucaption and prescription (Voet. 41. 3. 12). But Voet also shews very clearly in 44. 3. 11. that subsequently these consisted of two classes, from one of which the law of prescription is excluded, while to the other it applies. Of the first are the incommunicable and inalienable rights of the State or Sovereign Power (*quae ad majestatem pertinent*), such as that of taxation; from liability to which Voet says that no one can prescribe. Of the other class is property, either corporeal or incorporeal, of which the Fisc can have either an actual or quasi possession, such as the money payable as taxes exigible for any particular year or years, but which had been suffered to fall into arrear; and these past due taxes he says may prescribe, they being very different from the general liability to taxation. He also approves the doctrine that in the class of rights which can prescribe are included all things which the Prince can communicate and transfer, and which he is not forbidden by the law to communicate or transfer. In this category must necessarily fall now and here such lands as the Crown can and constantly does alienate.

Such seems to be the only distinction which exists under the Roman-Dutch law between the rights of the Crown (or Public) which may, and those which may not, be prescribed. It is quite true that in the earlier times of the civil law there was a different distinction,

The Fiscus in the Roman law.

viz.: that between the *Fiscus* and the *Aerarium*. The latter being the property of the public was not subject to prescription, while the *Fiscus* which was the property of the Prince was subject to it. Later, a further distinction grew up between such *bona fiscalia* as were only the property of the Prince in the sense of his having the use and administration of them for public purposes, and such as formed his private patrimony (See Vinnius' Commentaries on title 6, secs. 4 and 9 of the 2nd Book of the Institutes, and Voet ad Pand. 49. 14), but ultimately the expression *Fiscus* comprehended and was used indiscriminately with *Aerarium* or Public Treasury.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

In Roman-Dutch law.

Under the Roman-Dutch law this distinction lapsed, and the general expression *Fiscus* then meant all the public property and Crown property not the private patrimony of Sovereign. This is quite clear, not only from the whole references throughout the Dutch authors to Fiscal rights, to the Chamber of Accounts, and to the functions of the Advocate Fiscal, but from the enumeration by Voet of the Minor Regalia, as *pars jurium fiscalium*, in 49. 14. 3. *ad Pand.* which, as already shewn, are subject or not to prescription, according to their nature, viz.: whether or not they pertain *ad majestatem* and are incommunicable or not. The title to public lands in this country being notoriously a communicable and transferable right,—not being *extra commercium* and not pertaining or inherent to the *majestas* or dignity of the Sovereign power, are identical in their nature with such property of the Fisc as it is certain was subject by Roman-Dutch law to the ordinary term of prescription, and being so identical are subject to the same general law of prescription as governed private lands prior to the Ordinance 8 of 1834, *i.e.* the ordinary Roman-Dutch law term in case of immovable property, namely one-third of a century. The point being one of great general importance, a translation of the whole passage specially relied on from Voet is appended.

Voet. 44.3.11:

44. 3. 11. "There can however be no prescription of the right to redeem a pledge; nor of the right to annual rents not yet due, nor of powers (*rerum merae facultatis*), nor against the rights of the commonwealth relating to the public embellishment of the city; for which reason structures heaped up in the Forum or other public places which interfered with the adornment, convenience or beauty of the city might be demolished. Nor can there be any prescription against the liability to taxation or any similar right which pertains to the sovereignty (*ad majestatem*), which I consider stands on a very different footing from such property of the Fisc, whether corporeal or incorporeal, as it can have neither actual nor quasi possession, in the same manner as the Church or private persons can; which property, both of the Fisc and of the Church, is prescribed by the civil law in 40 years, and with us in the ordinary prescriptive term namely 30 years, as is mentioned in the title de Usucap. n. 12 *in fine*. For although prescription is admitted as to such taxes as have been in arrear over 30 years (or whatever else

Crown property prescribed in 30 years.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

may be the particular term fixed by the municipal law), yet the arrears are leviable for the years which do not exceed the thirtieth, and are also leviable in the future, prescription being no defence to them, and the case identical with that of annual rents. This, I think, is the explanation of the common statement that Fiscal and Sovereign rights cannot be prescribed. Compare Ant: Matthaeus *paræm.* 9 *num. ult. ult. de auct:* 1. 2, c. 7, n. 45, 46, 47, 48. Nor does the distinction between these seem far fetched, because these things which the Prince can communicate and transfer to others admit of being prescribed, while those which cannot be alienated (*communicari nequeunt*) do not admit of it *(etiam respuant praescriptionem.)*. Compare Lamb Goris tract: 3. p. 1, c. 9, n. 43 and other places where he expands the maxim *contra dominum seu principem non currit praescriptio.*

Voet. 41. 3. 12.

41. 3. 12 ('*Usucapio.*') "Property of the Church and of the 'Fisc' now prescribes, not in 40 years as under the civil law, but in the same term as private property, as Leeuwen notes in the 'Censura Forensis' part 1, 1. 2, c. 10, n. 10. 11."

Prerogative of the Crown in the Colonies.

II. The case has next to be considered with reference to the question whether that branch of the royal prerogative, which is founded on the maxim *Nullum tempus occurit regi*, is in force in Ceylon, for if so, the Roman-Dutch law will not apply. I think it is not. The maxim in question is a part of the prerogative law of the English Crown, which prerogative is a part of the common law of the 'Realm of England', of which Ceylon forms no part: and Blackstone says, respecting these territories which belong to the Crown, but which are no part of the kingdom; "the common law of England (as such) has no allowance (nor authority), they being no part of the mother country but distinct, though separate, dominions" (Blackstone, I. 108), a passage which Stephen in his New Commentaries more precisely connects with conquered or ceded countries that have already laws of their own (Stephen, Com. I. 99). It follows from the common law of England having no authority here, and from the royal prerogative of the English Crown deriving its authority from the common law of England, that neither has that prerogative any authority in Ceylon, except so far as the particular branch of it claimed is (1) one necessarily incident to sovereignty, or except (2) it has been imposed on this colony by the Crown in its legislative

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

capacity as a new law, or (3) unless it already formed part of the law of the country, as the prerogative of its rulers, before conquest or cession. But each of these three positions is entirely independent of the prerogative of the English Sovereign in particular, and of the common law of England of which the latter is part.

Mayor of Lyons v. *East India Co.*

This view receives authority from the judgment of the Privy Council in the *Mayor of Lyons*, v. *East India Company* (1 Moore's Privy C. Rep: 283), in which it was decided that the incapacity of aliens to hold and devise lands, though a branch of the prerogative of the English Crown, has no existence in Bengal; and in which Lord Brougham, delivering judgment, said:—"This right is certainly not one incident to sovereignty. In several other countries the Sovereign has no such right. Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purposes of protecting the State, and it is not contended that these branches are extended to Bengal. Mines of precious metals, treasure-trove, royal fish are all vested in the Crown for the purpose of maintaining its power and enabling it to defend the State. They are not enjoyed by the Sovereign in all, or even in most, countries, and no one has said that they extend to the East Indian possession of the British Crown." This part of the judgment derives the greater importance from the circumstance that both the Attorney and Solicitor General had expressly contended that the whole royal prerogative, as founded on principles of State policy, is necessarily introduced into a conquered or ceded country. See also to the same effect the observations in Chitty on the Prerogative (p. 25, chap. 3).

Nullum tempus maxim not applicable to Ceylon.

Now (1) it would be difficult to contend that the *nullum tempus* maxim is a prerogative essential to and inseparable from sovereignty; as it would be impossible to argue that, in this country at least, the Crown's right to land is 'incommunicable,' seeing that it is daily alienated in perpetuity. The Crown title to public land seems to rest on much the same footing as its right to recover and reduce into possession arrears of public taxes; and it is clear that the right to these cannot be necessarily inherent to sovereignty, for by the Dutch law they may prescribe (Voet ad Pand. 44. 3. 12). But the best proof that the principle of *nullum tempus* is not essential to sovereignty is to be

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

found in the fact that in England where it is, or rather where it once was, a branch of the royal prerogative, various acts of Parliament have abolished it in sundry cases, and have introduced various terms of prescription against the rights of the Crown, making (for example) 60 years' adverse possession of land bar the prerogative and title of the Crown, and introducing various other terms for barring various other rights even including prosecution for treason. (2) Neither can it be contended that this branch of the English prerogative has been introduced into this country, since its conquest by any legislative act; and it remains only to consider (3) whether it formed a part of the law of the country before then, which the Court has already done, deciding in the negative so far as regards the private possession of such lands or other property as are alienable by the Crown and capable of actual or quasi possession.

The judgment will therefore be that the information be dismissed, the Crown paying costs of suit.

Judgment in appeal of the Supreme Court.

The Supreme Court (*per* Stewart and Lawson J. J.) in affirming the judgment said:—"The question is whether the defendant having been in possession of land for a third of a century can maintain title to the same against the Crown. It was admitted by the appellant that if there be no statutory enactment affecting the case, the point at issue must be decided by the Dutch law, and that by the Dutch law a possession for a third of a century was sufficient against the Crown; but it was contended that the Ordinance 13 of 1822 (confirmed in that respect by the Ordinance 8 of 1834) repealed all the previous law on the subject of prescription, and that the Crown, though not bound by the Ordinances, might nevertheless take advantage of them; that the rights of the Crown, could not in any way be limited or restricted by them, but that they might be relied on by the Crown where they repealed previously existing restrictions or limitations affecting those rights, on the principle that the Crown, though not bound by a statute in which it is not mentioned, may take advantage of such statute. But in determining the effect, if any, of the two Ordinances above referred to on the rights of the Crown, we are not left for guidance to the application of any general rule of construction, as each of them contains an express enactment that nothing contained in it shall

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

affect the rights of the Crown, and it would be as much in contravention of such clauses to hold that the act of which it forms part extends and enlarges, as to hold that it limits and contracts, the rights of the Crown, for in either case those rights would be affected. We are of opinion, therefore, that the law of prescription affecting the Crown is now, as it was before the Regulation of 1822, the law of Holland and that the defendants have under that law established a good title to the land sued for."

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

APPENDIX VIII.

CROWN GRANT: NATURE OF TITLE.

[*Note to page 354 supra.*]

Judgment of Mr. G. A. Baumgartner.

Silva v. *Aberan, 1904, C. R. Galle, 2,366.*

A Crown grant confers absolute dominion on the grantee, superseding all other title existing at the date of the grant, unless such title has been derived from the Crown itself.

The remedy for any person claiming to have had at the date of the grant better title than the Crown is an action for damages against the Crown.

The plaintiff, basing his title on a Crown grant dated 16th May, 1890, in favour of his vendor, alleged possession up to December, 1901, and an ouster in that month by the defendant, and prayed for ejectment and declaration of title in his favour. The defendant denied the ouster and claimed title by prescriptive possession of more than thirty-three years next before December, 1901.

The plaintiff raised the issue whether a Crown grant in Ceylon conferred indefeasible title. At the trial in the Court below, 7th March, 1904, the Commissioner of Requests, Mr. G. A. Baumgartner, held that it did; that the plaintiff's vendor started with a title unchallengeable by the defendant, who, therefore, could only succeed by showing prescriptive possession since the date of the Crown grant; that occupation of the land as shown by the plantations on it had not begun before 1887; and that the evidence as to who had possession subsequently to the sale by the Crown was conflicting; but preponderated in favour of the plaintiff. He, therefore, gave judgment for the plaintiff. An abstract of the judgment appears in 7 N.L.R. 331. He summarized his conclusions as follows:—

"I find that the law in Ceylon is that a Crown grant confers the absolute *dominium* on the purchaser,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

superseding all other title existing at the date of the grant, unless such title has been derived from the Crown itself, and that the remedy for any person claiming to have had, at the date of the grant, better title than the Crown, is an action for damages against the Crown, which action is maintainable, as is demonstrated by Chief Justice Bonser in *Sanford* v. *Waring* and by the other authorities I have cited."

The defendant appealed. The case came on for argument before Moncrieff, A. C. J., on 7th July, 1904. *VanLangenberg*, for appellant. *Ramanathan*, S.-G. (with him *H. A. Jayawardene*), for plaintiff, respondent.

7th July, 1904, MONCRIEFF, A. C. J.

I affirm the judgment of the Court below, as I see no reasons to the contrary.

Mr. Baumgartner's judgment is sufficiently interesting and valuable to deserve fuller extracts, which are given below :—

Does Crown grant convey unimpeachable title ?

Dealing with the issue "Does a Crown grant convey an unimpeachable title?", the learned judge, Mr. Baumgartner, said :

Local decisions.

Mr. F. H. de Vos, for the 1st defendant, referred to the decisions in 2 N. L. R. 33, 3 N. L. R. 61 and 4 N. L. R. 343, and submitted that the second-named contained the present law on the point, namely that it is open to a party contesting a Crown grant to rebut the presumption that the Crown had title at the date of the grant. It had been the previous practice to allow such a contesting party to go into evidence as to the private title at the date of the Crown grant, and the Court in that case was content to follow such previous practice, and found that, at the date of the Crown sale, there had been possession for 40 years against the Crown, and that, assuming the previous practice to be correct, the claimant against the Crown grantee was entitled to judgment.

The issue whether a Crown grant confers an indefeasible title was not adjudicated on. But it had been previously raised, *e.g.* in C. L. R. ii. 43, and not determined. There are other decisions, which have some bearing on the point but are not conclusive. S. C. C. vi. 17 involved the question whether a re-grant by the Crown of its interests in *Malapala* lands conveyed a *dominium* or only tenancy. Ramanathan, 1872, p. 57, was a claim against the Crown for

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

expenses incurred by a purchaser from the Crown in an action respecting the title to the land in which he had been defeated. It was ruled that the implied warranty in sale does not bind the Crown. That does but give effect to Voet 49, 14, 2, which I shall cite later on, and does not touch the antecedent question whether a Crown grant conveys absolute *dominium*.

The contention was distinctly raised in C. R. Jaffna, No. 397, 18th March, 1896, 2 N. L. R. 33, that a Crown grantee takes an absolute title, and that the remedy of a contesting claimant is by action for damages against the Crown, as was apparently the law not very long ago (2 Thompson's Inst. 509), but the Chief Justice thought it unnecessary to determine the point for that case.

Query by Bonser, C. J.

In a later case 4 N. L. R. 343, Chief Justice Bonser said: "It is very inconvenient that we should go behind the Crown grant. It seems to me that the rule of the Civil law, that a purchaser from the Government acquired by the grant a good title, and was, in the words of the rescript of the Emperor Zeno, *statim securus*, was based on sound policy, and tended to establish titles and to diminish litigation." But he did not find it necessary to decide whether that rule is law at the present day. The point is thus still an open one.

Rule of the Roman law: Crown grant confers absolute *dominium*. Inst. 2, 6, 14.

The rule of the Roman law, referred to by Chief Justice Bonser, is stated in the Institutes 2, 6, 14 as an exception to the general rule prescribing the period in which possession would ripen into full ownership, thus (I give Sandars' translation from p. 146): "But a constitution of Zeno of sacred memory has completely protected those who receive anything from the Fiscus by sale, gift, or any other title, by providing that they themselves are to be at once secure and made certain of success, whether they sue or are themselves sued in an action; while they who think that they have a ground of action as owners or mortgagees of the things alienated may bring an action against the sacred treasury within four years."

Adopted by the Roman-Dutch law.

The Roman-Dutch law adopted this rule of the Roman law. Voet in 49, 14, 2, the title *de jure Fisci* dealing with the rights of the Crown, states: *Evictionis nomine nunquam duplum praestat (Fiscus).....Imo jure novissimo rem alienam vendens protinus dominium in emptorem transfert, adeoque ne in simplum quidem quaestio de evictione superesse potest.*

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Again in 18, 4, 8, the title dealing with the rights and liabilities of the purchaser of an inheritance, Voet, after stating that the purchaser of an inheritance from the Crown must settle with the creditors and debtors of the estate in question, continues: *De ipso vero hereditatis jure nullam ab alio controversiam patitur, nec hereditas ei potest in totum aut ex parte evinci; cum ementes a Fisco statim securi sint, et Fiscum ipsum vendentem conveniri debeat quisquis judicio contendere cupit ad se venditam pertinere hereditatem:* cited by Bonser, C. J., in *Sanford* v. *Waring*, 2 N. L. R. 361. Voet 49, 14, 2; 18, 4, 8; 21, 2, 5; 41, 3, 21.

Again in 21, 2, 5, the title dealing with the responsibility of the vendor for eviction of the property from the purchaser, Voet lays down: *Plane si Fiscus aut Princeps rem vendiderit, uti illa emptori evinci nequit, dum is statim ex privilegio dominium acquirit, ita nec de evictione quaestio esse potest.*

In 41, 3, 21, *De usucapionibus*, the same principle is laid down, and the reason for the law is explained thus: *Sed potius in gratiam ementium a Fisco vel Principe constitutum, ut statim securi sint, nec amplius, ut ante, rerum emptarum nomine vel justas vel iniquas lites patiantur.*

Voet in these passages cites the Roman law as his authority, but he does not indicate that there was any question as to the rule being in force at the time he wrote. He would have done so had such been the case. See Sir E. Creasy's remarks on page 1, in the report of the Plumbago Case, Grenier D. C. 1873, 129.

Groenwegen, ad Digest 49, 14, 5, states the rule similarly in forcible and unequivocal terms as prevailing in his day: *Qui a Fisco rem quamvis alienam emit hodie statim securus est.* Groenwegen.

Thomson, Inst. II. 509, lays down the proposition that the action *rei vindicatio* does not lie against those who have purchased from the Crown, and cites as his authority Voet 6, 1, 23, the title *Rei Vindicatio*, where it is laid down: *Non tamen hanc patiuntur actionem qui rem alienam a Fisco emerunt aut a Principis vel Augustae domo, eo quod hi statim securi sint: sola adversus Fiscum actione intra quadriennium indulta iis, qui pro rei alienatae dominio mutaverint aliquam sibi competere petitionem:* cited by Bonser C.J. in *Sanford* v. *Waring*. Voet 6. 1. 23.

Voet bases this on Institutes 2, 6, 14, which I have quoted above, and also on a judicial ruling in Holland on the point. Hollandsche Cons. iv. 128. There is Holl. Const. 4, 128.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

reported in Noestadius, for the reference to, and a translation of, which I am indebted to Mr. F. H. de Vos, decision No. 15 of the Court of Holland in the case of *Dirk Harwayer* v. *Adrian Jacob Bruijus* of the year 1582, regarding land that the Prince had first hypothecated as security for an annuity to the assignor of the plaintiff and afterwards sold to the defendant. The question was debated whether the sale prevailed and passed the land free of the encumbrance, as pleaded by the defendant on the strength of the constitution of the Emperor Zeno, Code vii. 37, and Inst. ii. vi. 14 already mentioned. The court upheld the general rule that sale by the Prince prevails over any privately created title or encumbrance, and only after contest distinguished the case of an encumbrance created by the Prince himself, and held that the encumbrance still attached notwithstanding the sale.

The decision constitutes an exception which proves the rule in question. It also recognizes the right of the subject to sue the Prince, for the concluding words of the judgment expressly reserve to the defendant his warranty against the Prince.

It thus seems amply clear that the Roman-Dutch law maintained the principle in question, that Crown grant conveys absolute *dominium*.

II. The next point to be established is that this principle of Roman-Dutch law was portion of the laws and institutions which subsisted under the Dutch Government in Ceylon. If so, it continued to have effect under the British Government by virtue of the second para of the Proclamation of 23rd September, 1799, until it might be otherwise ordained by lawful, *i.e.*, legislative, authority.

How far Roman-Dutch law in force in Ceylon: *per* Creasy, C. J.

The rule in this matter is laid down in the Plumbago Case, D. C., Colombo, No. 60664, 26th November, 1873, Grenier p. 129 M. as follows: "That the law of Holland in general became the law of Ceylon when occupied by the Dutch settlers, is admitted by all.....Undoubtedly if it can be shown that any particular portion of the Roman-Dutch law, as prevalent in Holland, was essentially a local law of the mother country and entirely unsuited for the position of Dutch colonists here, the presumption would follow that such particular portion of Dutch law was not introduced in Ceylon," &c.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

And further it is pointed out in Creasy's Reports p. 162: "The case of *Turburn* v. *Stewart*, 7 Moore, P. C. cases p. 333, established the doctrine that, in ascertaining what portions of the law of Holland the Dutch settlers brought with them to their colony at the Cape, the same rules must be used which have been established in the numerous judicial investigations that have become necessary as to the amount of the English law which has been brought by English settlers to English colonies."

The same Reports at p. 164 quote the judgment of Sir Benson Maxwell, which the Privy Council eulogised and adopted as correctly expressing the rules of English law and the degree to which regard should be had to the habits and usages of the various persons residing in a colony. The question was, whether the English common law against perpetuities, other than in favour of charitable uses, was in force in the Colony of Hongkong, where English law generally had been introduced. Sir Benson Maxwell's statement of the principles of the law was as follows:— Application of English law.

"In this colony so much of the law of England as was in existence when it was imported here, and is of a general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus, in questions of marriage and divorce it would be impossible to apply our law to Mohamedans, Hindoos, and Buddhists without the most absurd and intolerable consequences, and it is therefore held inapplicable to them. Tested by these principles, is the rule of English law which prohibits perpetuities either of local policy and unsuited to the infant settlement, or inapplicable by reason of the harshness of its operation to people of Oriental races and creeds?"

He goes on to find the rule against perpetuities to be generally applicable to all sections of the community at Hong-Kong.

Tested by the same principles, is the rule of Roman-Dutch law under which a Crown grant confers the absolute *dominium*, either of local policy (*i. e.* in Holland) and unsuited to Ceylon, or inapplicable by reason of the harshness of its operation to the people of Ceylon? There can be but one answer, and that in

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the negative; so that the principle in question must be held to have been part of the laws and institutions which subsisted under the Dutch Government in Ceylon.

Crown grants not challengeable under the Dutch Government in Ceylon;

That the Dutch Government in Ceylon was not likely to allow its grants of land to be challenged by the assertion of counter private claims is apparent from some of its regulations. See the Index of its Legislative Acts published at the end of vol. i of the 1853 edition of the Ceylon Legislative Acts. Advertisement of 8th April, 1744: all European possessors of private land to produce their titles for registration on pain of forfeiture. Advt. of (no date) 1744 (p. 95 vol. iii.): similar order applicable to other inhabitants. Proclamation of 15th November, 1745: owners of land required to bring it under cultivation within 3 years on pain of the land being given to other active persons. Ordinance 15 of 1746: similar enactment to the two advts. cited above. So that, even where the Government did not claim the land, the owners of it were hardly allowed to call it their own, unless they complied with the policy and purposes of the Government. *A fortiori* the Government would not have tolerated any interference with its own grants of land.

And so remained when Ceylon came under British rule.

If a Crown grant conferred absolute *dominium* when Ceylon came under the British Crown, it still retains that privileged character, for no legislation has taken it away.

Common law cannot be altered by judicial decision; *per* Esher, M. R.

Nothing short of a legislative act can alter the common law. Lord Esher, M. R., in *Cochrane* v. *Moore*, 1890, 25 Q. B. 74, said: "The Common law could not, and cannot, be altered by mere judicial decision, but only by Act of Parliament. The authority of any judicial decision to the contrary would be overruled at any time, however remote, by a competent court."

There has been no such act passed by the Legislature of Ceylon; and I am not aware of any alteration of the law on this point by the Crown itself, or with the advice of the Privy Council under the power it has always reserved to legislate directly for Ceylon, from the time of the Charter of 18th April, 1801, sec. 96, down to the Letters Patent of 16th June, 1877, sec. 3. (See Pereira's Institutes, p. 69.)

Crown grants under the English Government.

A Crown grant, as its wording expresses, is described as Our Letters Patent. It is executed in the name of the Sovereign, and is passed under the Public Seal of the Colony.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The sale of land in Ceylon by the Crown has to be carried out by public auction, after survey and public notification in accordance with regulations made by the Governor and Executive Council and duly published. This procedure is prescribed and required by Letters Patent and the Royal Instructions (see Pereira's Institutes, I. 55).

Ordinance 12 of 1840 sec. 8 enacts that a person who has had possession for not less than ten years of Crown land, and has improved it, shall be entitled to a grant at half the improved value; while a person claiming to have acquired a good title against the Crown is furnished by sec. 7 with a mode of procedure for obtaining the Government Agent's certificate to that effect. Ord. 12 of 1804.

The view that I humbly venture to take of these provisions is that they are directions for the guidance of the Government Agent in coming to a determination as to what a claimant is entitled to, and nothing more. So long as a claim is the subject of enquiry by the Government Agent, it is open to a claimant to urge that he is entitled to a grant at half improved value, or to a certificate of no Crown claim, as the case may be, and to prove it if he can; but once the Government Agent has come to a decision, these provisions have served their purpose, and can no longer be appealed to by the claimant, unless of course he has recourse to the head of the Government against the Government Agent's decision. I put forward this view with submission, in view of Chief Justice Bonser's intimation that he favoured the contrary view in 2 N. L. R. 33.

These provisions of Ordinance 12 of 1840 are the safeguards provided for private rights by the Legislature; but the scope of the Ordinance seems to me to require that a claimant must utilize these provisions, and must do so when Government calls upon him, if he desires to press his claim at all, and that he is bound to abide by the decision of the Government Agent, so far as his claim on the land is concerned. His right to claim damages, if his land is wrongly sold, is another matter; but the purpose of the Ordinance is the determination once and for all of claims to the land. Procedure, and safeguards of private rights, under the Ordinance.

It has for its purpose the protection of the Crown by the prevention of the encroachments on Crown lands (see the preamble). Put shortly, the benefit of the Crown and its provisions will be rendered illusory for the benefit of the Crown, if persons purposing to make

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

a claim to Crown land are allowed to go outside its provisions as to the way in which they shall obtain a decision on their claim.

For instance, if a person, conceiving that he has acquired a title against the Crown, does not come forward and assert it when the Crown has advertised the land for sale by public auction, but is allowed to assert it afterwards against the purchaser from the Crown, the procedure of sec. 7 of the Ordinance, introduced for the very purpose of settling such claims, and for deciding whether the land can be set free for public sale, is rendered futile. The Crown would be in no better position than it was before the enactment of the Ordinance.

In such a case as this the interpretation to be put upon the words "it shall be lawful," at the beginning of sec. 7, is that it shall not be lawful to do otherwise than as there directed. That is to say, the claimant must assert his claim in the way there laid down, namely application to the Government Agent, of course before the Government Agent has sold the land to another, and in no other way. In view of the full publicity that is given to every proposed sale, there is no reason why a claimant should not be debarred from asserting such claim afterwards.

And if he asserts it before the sale, there is a presumption that the Government Agent, in his decision on it, did his duty impartially and legally, such decision being of a judicial character.

Can it be supposed that the Legislature intended that the Government Agent's decision, in carrying out the provisions of this Ordinance for the benefit of the Crown, should have no legal import whatever? His decision must be either operative or not, either conclusive or not. If it is to be operative, it follows that the sale by the Crown, in cases where a private claim is made but is not admitted, must be upheld, and the claimant be left to his remedy in damages against the Crown. That squares with the law that a Crown grant confers indefeasible title. I cannot believe that the Legislature intended anything so unbusinesslike as to give an option to a claimant whether to abide by the Government Agent's decision or not, and to leave it open to him to challenge that decision after a sale by the Crown.

There is ample machinery for the investigation of claims; and in the majority of cases it is utilized, and

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the Government Agent's decision is acquiesced in. It is highly inconvenient that it should be open to a stray claimant here and there, years after a Crown sale, to come forward and adduce evidence in support of his assertion of possession or cultivation for so many years before the sale, facts which could so much better have been tested before the sale.

Crown grant gives absolute title,

There is, it must be remembered, as already pointed out, recourse to the head of the Government against the Government Agent's decision, before the issue of a Crown grant followed by the Crown grant; but, subject to that, the Government Agent's decision, followed by Crown grant, must be taken to conclude all questions of private title to the land at the time of the Crown sale.

subject to action for damages against Crown.

If, notwithstanding the decision of the head of the Government, the claimant still thinks he has been wronged by the sale, he has his remedy in damages against the Crown.

The Privy Council in *Siman Appu* v. *Queen's Advocate* (App. Cas. 9. 571) enquired for Roman-Dutch law authorities, and was ready to act on them if forthcoming, to show that such right of action against the Crown existed, and they are supplied in the judgment of Chief Justice Bonser in *Sanford* v. *Waring*, 2 N. L. R. 361, 15th October, 1896. The law enunciated in that case was repeated by him in *LeMesurier* v. *Attorney-General*, 3 N. L. R. p. 227.

Bonser, C. J.

Perezius 10, 1, 46.

I may add the authority of Perezius, who in 10, 1, 46 says simply and without qualification that the right of action against the head of the state is not done away with. His words are: "*Moribus autem nostris actiones et litium instantiae adversus supremum principem non perimuntur.*"

Holl. Const. 4, 128.

I have already mentioned that the right is recognized in the decision quoted from Noestadius.

The obligation of the Fiscus to make compensation when disposing of the property of a subject seems to be fully recognized by Roman-Dutch law. See Perezius 10, 5, 13 and 10, 4. Similarly, the Crown's right to sell the entirety of a thing it holds in common with a subject, which is allowed by the common law, Voet 18, 1, 14, "*quo magis quoque facilius res fiscales emptorem inveniant*," is given subject to the obligation of refunding to the co-owner his proportionate share of the price.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

This right of action would only in very rare instances have to be resorted to. This rare result of holding a Crown grant to confer absolute *dominium* would be very greatly outweighed by the advantages pointed out by Chief Justice Bonser in 4 N. L. R. 343, namely the security of all titles conferred by the Crown and the diminishing of litigation; while to allow a claimant to assert a claim after the issue of Crown grant is attended with great inconvenience to all concerned, possible hesitation to give full value for the land at the Crown sale, possible litigation with some claimant undisclosed till after such sale.

All this confusion and loss will be obviated by maintaining the principle I find to be the law. It will substitute a definite and clear system for uncertainty and litigation.

I find that the law in Ceylon is that a Crown grant confers the absolute *dominium* on the purchaser, superseding all other title existing at the date of the grant, unless such title has been derived from the Crown itself, and that the remedy of any person claiming to have had, at the date of the grant, better title than the Crown, is by action for damages against the Crown, which action is maintainable as is demonstrated by Chief Justice Bonser, in *Sanford* v. *Waring*, and by the other authorities I have cited.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ADDENDA ET CORRIGENDA.

Page xix, Art. 194, *after* damage *insert* for acts under the Ordinance.

Page xxiv., col. 2, line 11; *omit* "Magistrates' Cases 236."

Page 5, *add before Article 4:* A further retreat from the doctrine in *Sottomayor* v. *De Barros* was made in *Chetti* v. *Chetti*, 1909, P. 67. See Dicey on this case in the Law Quarterly Review XXV., 202; also Halsbury, Laws of England, VI. 254 *et seq.*

Page 17, at the end *add:* See Halsbury, Laws of England, VI. 263:—"The matrimonial domicil differs in no degree from domicil as ordinarily defined (*Le Mesurier* v. *Le Mesurier*, 1895, A. C. 517). It is the domicil of the husband; and the wife cannot acquire a domicil separate from that of her husband. But (probably) the English Courts may decree a divorce in favour of a wife who has been deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, provided that at the moment when the desertion or separation took place she was domiciled with her husband in England and at the time of the commencement of the suit she is still in England." It is added that there is no direct decision to this effect, but that it is supported by several *dicta*.

Page 22, fourth line from bottom: *for* 54 and 55 Ket. c. 29 *read* 54 and 55 Vict. c. 29.

Page 32, after line 2 *add:* (22) Palmer's Company Precedents.

Page 33, line 6, *after* suppressed *add:*—evidence of the jealousy with which the ruling powers regarded all combinations.

Page 38, 15th line, *after* 2 Balasingham, *add:* 49.

Page 42, at the end *add:* For the Fisc, see page 86 and pp. 207 *et seq.*

Page 45, line 3 from bottom, *after* Foundations *insert:* pages 193 *et seq.*

Page 54, line 12, *after* property, *add the following quotation from Coke:* The lands were said to come to dead hands as to the lords, for that by alienation in mortmain they (the lords) lost wholly their escheats and in effect their knight's services for the defence of the realm, wards, marriages, reliefs and the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

like, and therefore it was called a dead hand, for that a dead hand yieldeth no service.

line 6 from bottom, *after* Attorney-General v. Stewart Meriv. 143, *add:* the object of the statute of mortmain was wholly political, it grew out of local circumstances and was meant to have merely a local operation: *per* Sir W. Grant.

last line, *after* Island *add:* In the 'Mortmain case', D. C. Colombo, 3627, it was expressly decided by the Supreme Court that neither the English nor the Dutch Mortmain laws ever came into force in Ceylon. Grenier, 1873, Part 3, p. 59.

Page 82, line 6, *omit* real

line 8, *omit* and the personal property on the crown.

lines 11 & 18, *omit* real

Page 84, line 6, *after* passes *insert* in England: *also in the marginal note.*

Page 90. To the Acts enumerated in this page add the Companies Act, 1908 (8 Edw. 7, c. 12). All these Acts have now been consolidated by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), which came into force on 1 April, 1909, after the pages 1 to 96 had been printed. In pages 39, 40, 52, 55, 72, 80, 90, 92, 93, 94, 96 reference should be inserted, where necessary, to the provisions in the Companies (Consolidation) Act, 1908. For complete references see Appendix pp. ii to lxiii.

Page 92, at the end of the comment on Article 68 *add:* A Company, registered in the United Kingdom or incorporated by Royal Charter, need not be registered in Ceylon.

Page 103, line 12, *for* L861 *read* 1861.

Page 112, at end of para 2 *add:* Romer L. J. playfully suggested a clause in this form: 'Caution! Remember the power of the Company, by altering its Articles, to extend its lien.'

Page 116, line 3 from bottom, *for* founders' *insert:* founders' and deferred.

Page 117, at the end of comment on Article 82 *insert:* The rights and liabilities of a shareholder are usually defined in the memorandum and articles of association. The main privileges attaching to a share are (1) the voting power given by it, (2) the dividend payable to the holder of it, (3) his rights in the distribution of assets on a winding up. The liability

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

attaching to a share is the liability to pay the debts of the Company according to the memorandum and articles of association and, when wound up, according to the provisions of the Companies Acts as to Contributories. (See pages 102 to 105 *supra* and 172 to 175 *infra*.)

Page 128, in line 20 from bottom *after* in which statement *and before* the words *insert* for.

Page 136, at end *insert:* and notice of such registration shall be published in such manner as the Court may direct.

Page 137, line 2 of comment, *for* 13 *read* 16.

Page 181, 2nd line from bottom of 1st para, *for* deshr *read* des h. r.

Page 200, line 2, *before* Municipalities *omit* Fiscal.

Page 201, line 1, *for* Municipal Councils Ordinances 1887 to 1907 *read* Municipal Councils Ordinance 1910.

line 7 of comment, *after* Legislative Council *insert:* The consolidating Ordinance has now been passed (No. 6 of 1910) and should be substituted for the earlier Ordinances where they are cited.

Page 214, line 14, *for* times *read* time.

Page 229, line 22, *after* which was enacted *insert:* (in consequence of the Supreme Court decisions in *Queen* v. *M. Appu*, 8 S. C. C. 51,102).

Page 233, marginal note: *for* Dutch *read* Roman Dutch.

Page 236, last para, line 3, *for* R. v. Kean *read* R. v. Keyn.

Page 244, line 5 from bottom, *add:* See also *Denaby and Cadeby Main Collieries Ltd.* v. *Anson*, 1910, 26 Times L. R. 310.

Page 277, line 7 from bottom, *for* Article 202 *read* Article 207, p. 360.

Page 287, line 3 *for* Ceylon Stamp Duty *read* Ceylon Stamp Duty only.

Page 297. For the history of the Ordinance No. 12 of 1840 see the judgment of Wood-Renton J. in *Babappu* v. *Don Andris*, Leader Law Reports (*Morning Leader*, 3rd December, 1910). The decision in that case revolutionizes the practice that has grown up under the Ordinance of acknowledging a statutory interest under § 8 as a matter of strict legal right.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Appendix.

Page lxviii, line 4, *for* 184 *read* 1840.*
" line 5, *for* 1903 *read* 1903.†
" line 15, *for* 1843 *read* 1843.‡

Page xcv, para 3, line 1, *for* 95 *read* 98.

Page cxxxviii, lines 16 & 17 from bottom, *for* which has recently come into *read* in.

lines 12 & 13 from bottom, *omit* at the Hague and acquired by the Ceylon Government, *and add:* The map was probably presented to the Surveyor-General's Office by Captain Schneider. It was found recently in a loft in the office.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

INDEX.

[Arabic numerals indicate the pages in the Text; Roman numerals the pages in the Appendix.]

ABANDONED LANDS, 324-326, 328

ABSENCE OF SEVEN YEARS,
- presumption of death from, 24

ACQUISITION OF LAND FOR PUBLIC PURPOSE.
- Compensation
  - award by Government Agent where parties agree, 336
  - matters to be considered in awarding, 336
  - reference to District Court where parties do not agree, 337
- Expropriation under Roman and Roman-Dutch Law, 338
- Land Acquisition Ordinances, 339, xc
- Order to take possession of land, 337
- Possession in case of urgency, 337
- Procedure under Ordinance 3 of 1876, 335-338
- Vesting of land in Crown, 338

ACT OF STATE, 373

ACT OF INDEMNITY, 375

ADIPPOLA SANNAS CASE. (See WASTE LANDS).

ADULTERY,
- child born in, 221-223

AGENCY, (See also CORPORATIONS, Agent, Director.)
- rule of, 60

AGE OF MAJORITY. (See MAJORITY).

ALAKESWARA, cxvii-cxxiv

ALLUVION. (See FISC.)

ANTIQUITIES. (See FISC.)

ATTANAGALA WANSA, cxxi

AVULSION. (See FISC.)

BAUMGARTNER. (See FISC, Crown-Grants.)

BERWICK, 264, 345, cxlii-cxlvii

BEST, 22, 28, 49

BIRTH,
- beginning of legal capacity, 1
- defined, 2
- essentials to constitute, 2
- of fœtus, 3

BLACKBURN J., 57, 62, 118, 381

BLACKSTONE, 78, 83, 209, 211, 212, 213, 219, 220, 229, 260, 261, 263, 268, 351, cxlv

BONA VACANTIA. (See FISC.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

BOWEN, 65, 113
BRAMWELL, LORD, 58, 89
BROOM and HADLEY, 3, 31, 43, 45, 46, 49, 54, 62, 68, 79, 86, 211, 222, 233, 261 263, 278, 361
BROUGHAM, LORD, 369
BUDDHIST TEMPORALITIES ORDINANCE,
vesting of property under, 38. (See also CORPORATION.)
BURGE, 4, 5, 10, 12, 14, 16, 22, 23, 25, 26, 27, 28, 54, 347, cxlii-cxliii
BYE-LAWS. (See CORPORATION.)
CAIRNS, LORD, 44, 113, 148, 170
CAMDEN, LORD, 373
CAPACITY
for enjoyment of rights, 1
for exercise of rights, 1
in regard to *lex domicilii*, *lex loci contractus*, *lex loci rei sitæ*, 4, 5
CHARITIES. (See FOUNDATIONS.)
CHARTERED COMPANIES, 39
CHELMSFORD, 12, 13, 20
CHENA. (See FISC.)
CHILD,
en ventre sa mere, 2
CHINA, deportation of Ceylon King to, cxvii-cxxiv
CHITTY on PREROGATIVE, 185, 210, 211, 212, 213, 220, 263, cxlvi
COCKBURN C. J., 352, 381
CODEX, 2, 9, 19, 207, 263, 264, 338, 340, 347, 351, 354, 371, 384
COKE, 30, 31, 34, 41, 42, 46, 47, 54, 57, 65, 77, 78, 82, 83, 182, 183, 184, 185, 212, 214, 217, 344, 351, 387, cxv
COLONIES. (See FISC.)
COMMORIENTES,
presumption of survival among, 26
COMPANIES. (See JOINT STOCK COMPANIES.)
CONFLICT OF LAWS,
meaning of, 9
CO-OPERATIVE SOCIETIES, 40
CORPORATIONS. (See also JOINT STOCK COMPANIES, FOUNDATIONS, MUNICIPALITIES and LOCAL BOARDS.)
Agent,
appointment of special, 67
essential for corporation to contract, 57
Amotion from membership, 76
Authorities, 31
Buddhist
priest, succession to, 37
temples, licence for acquisition of lands by, 55
Temporalities Ordinance, effect of, 38
Vihare, incumbent of, not a corporation, 37
Sisyanu Sisya, and Siwuru, Paramparawa, 37
Bye-laws,
corporation has power to make, 47
should not be contrary to law, reason, or objects of corporation, 47
Civilization, factor in, 30
Classification of, 39

Digitized by Noolaham Foundation.
noolaham.org | aavahaham.org

CORPORATIONS.—Continued.
Coke, 34, 41, 46
Common seal,
corporate acts should be under, 48
corporate character, not conclusive of, 33, 204
how affixed, 52
rule relaxed in certain cases, 48, 49-52
use of seal does not validate *ultra vires* act, 52
why necessary, 49
Constitution of, 43
Contract affecting land, formalities necessary, 52
between member and corporation, 53
Corporate meeting, 69
Corporation
aggregate of English law, 34
distinct from its members, 53
sole of English law, 34
"a juristic abortion," 35
none in Ceylon, 37
Prof. Maitland on, 35
the King, 35
the parson, 35
Creation of, 41, 42
Crown,
authority of, necessary for creation or dissolution of corporation, 41, 86
devolution of property of corporation to, 78, 82
licence to corporation to hold land, 53
Cy-pres, 45, 86 (See also under Foundations.)
Debts due to or from corporation cannot be recovered after dissolution, 78
Definition of, 31, 34, 42
Delict, liability for, 63
Dissolution
compulsory, 79, 81
Crown's authority express or implied necessary, 78, 80
devolution of property on, 78, 82, 84
effect of, 78, 80
escheat to Crown under what circumstances, 86
modes of, 80
reasons for, 79
voluntary, 79, 81
Director
actual authority, 65
apparent authority, 65
appointment of, 66
as agent, 65
as trustee, 65
decision of, how taken, 67
essential to corporation, 64
general meeting to be called by, 75
interested director cannot vote, 73
liability of, 65
negligence, liability for, 66
no liability for error of judgment, 65
powers of, 64, 65
vote of interested director, 73
Domicile of, 77
Donation to, 184
Election, questions as to validity of, 71
void if made after secession of integral part of assembly, 69

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CORPORATIONS.—Continued.
Endowment of, (See Foundations.)
English law of corporations, 33
introduced into Ceylon by Ordinance, and in what matters, 32
liability of corporation for delict, 63
Escheat, 82, 86
Essentials of, 33, 45, 46, 64
Fisc as a corporation, 36
Function of, 43
Fundamental idea of, 33
Government of, 67
Grant of, 30, 34, 46, 47, 69, 72
Hindu temple, status of deity or manager of, 38
Incorporation,
express words not necessary, 205
how made, 41, 42
Incumbent of Buddhist Vihare not a corporation, 37
Indictment of corporation, 62
Injunction for act *ultra vires*, 43-45
Inns of Court,
not corporations, 33, 204
origin and purpose of, *ibid*
Inspectors,
appointment of, 78
duties of, 78
King as corporation, 35
head of corporation aggregate *viz.* the State, 36
Land, formalities for contracts affecting, 52
gift of, to corporation, 54
on dissolution of corporation reverts to grantor or heirs, 78, 82
Liability of corporation, 56, 63
for acts within apparent authority of directors, 66
for delict, 63
Libel, can a corporation sue for ? 62
Liquidation, 87
Liquidators
appointment of, 87
duties of, 87
Majority
legal majority, what is, 70
unanimity when required, 71
will of, does not validate *ultra vires* act, 68
will of majority, will of corporation, 68
Meeting
adjournment, 70
chairman cannot stop meeting at his pleasure, 70
closure, 70
constitution of, 69
general, when it may be called, 75
general, court may authorize calling of, 75
minimum of members required, 70
mode of voting, 70
notice of meeting essential, 69
only decision for which meeting met binding, 70
secession of integral part during meeting, 69
unanimity when required, 71
Member
cannot transfer right of membership, 76
distinct from corporation, 53

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

CORPORATIONS.—Continued.
Member—Continued.
notice of corporate meeting must be sent to, 69
reservation of member's rights, 74
right of withdrawal, 77
rights of member, 76
vote of interested member, 73
Minority, preservation of rights of, 72, 74
Mortmain
licence from Crown necessary to alienate land in, 53-55
mortmain acts in England, 54
how far applicable in Ceylon, 54, 55
Name
change of, 46
essential to corporation, 45
should sue and be sued by, 46
Number of persons required for trading corporation, 40
Objects, 43
abandonment or restriction of, 72
failure of; doctrine of *cy-pres*, 86, 193-197
violation of; reason for dissolution of corporation, 79, 81
Origin of, 30
Perpetual succession, 46
Powers and liabilities of, 56-64
Quorum, 70
Quo Warranto, 71
Remedy against, 56-64
when no remedy against, 62
Resolution of corporate meeting, will of corporation, 68
Restrictions on dealing with property, 55
Roman law of, 32
Sohm, 33, 41, 249
State as corporation, 36
Sutton's Hospital case of, 30, 31, 34, 41, 42, 46, 47, 65, 77
Torts, liability of corporation for, 41, 57-60
Trade-unions, liability for torts of servants, 41
Trading corporation, number required for, 40
Transactions pending liquidation, 88
Ultra vires, 43-45
act cannot be validated by will of majority, 68
Unanimity when required, 71, 72, 79
Unincorporate associations, status of, 40, 88
Vote of interested director, 73
of interested member, 73
Voting, mode of, 70
CRANWORTH, LORD, 16, 187
CROWN. (See CORPORATION, FISC and FOREST.
CUSTOMS. (See FISC.)
CY-PRES. (See CORPORATIONS and FOUNDATIONS)
DEATH,
adjudication of death of untraceable person, 22
adjudication of death when made, 22, 23
burden of proving, 22
presumption of, after seven years' absence, 24
revocation of adjudication of death, and effect thereof, 26
survival among commorientes, 26, 29
time of, 25
Wing v. *Angrave*, 29

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

DIRECTOR. (See CORPORATIONS and JOINT STOCK COMPANIES.)
DOMAT, 187, 194
DOMICILE
Adopted child's, 18, 19
Age of majority determined by law of, 4
Ambassador's, 12
Area of, 10
Authorities on, 9, 10
Capacity to contract, 5
Change of, 13, 20
animo et facto by husband, 15, 16, 20
by parent or guardian, 14, 18, 19
mala fide, 14, 16, 18, 19
political status not affected by, 12
presumption of, 20
Civil domicile, 10
Constrained residence, 12
Corporation, 77
Divorce suits, law of domicile in, 16-18
Divorced wife's, 16
Essential elements of, 12
Establishment of, 11
Exile's, 12
Extinction of, 13
Forensic, 10
Illegitimate child's, 11, 18
Judicial separation, effect of, 16
Law of domicile, to what matters applicable, 10
Legitimate child's, 11, 18
Lunatic's, 15
Mala fide change of, 16, 18
Marriage, capacity to contract, 5
Married woman's, 11, 15, 18
Minor's, 14
More than one, 11
No person without a, 10
Non sui juris person's, 14
Official residence, effect of, on, 12
of choice, 11
of origin, 11, 19
Political, 10
Political status, 12
Presumption of change of, 20
when domicile not known, 21
Prisoner's, 12
Proof of change of, 20
Retention of, 13
Revival of, 20
Sailor's, 12
Soldier's, 12
Special purpose, for, 21
Widow's, 16
DONATION, 184
D'OYLY, 297, 349, 350, cxxx.
ENDOWMENT. (See CORPORATION and FOUNDATION.)
ELDON, LORD, 187, 189, 190
ESCHEAT. (See FISC.)

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

ESHER, clv. 355
EXPERT EVIDENCE, value of, cxv.
FISC, LAW OF THE
Actions against Crown
ex contractu, 360
for recovery of land, 360
ex delicto, 360, 363-366
for dismissal of public servants, 366
Act of state, 373
Act of indemnity, 375
Actions by Crown, 359
Adultery, child born in, 221-223
Alluvion, right to land formed by, 253-262
Antiquities,
meaning of, 229
share of finder or land owner, 230
what antiquities absolute property of Crown, 230
Arrack, export duty on, 267
right of manufacture and sale exclusively in Crown, 271
Avulsion, right to land formed by, 253-262
Berwick, 264, 345, cxlii-cxlvii
Bona vacantia
belong to Crown, 218
what are under English and R. D. law, 2, 219
Chena. (see WASTE LANDS.)
Colonies,
prerogatives existing in England, extension of, to, 210
prerogatives incident to sovereignty, 210
Crown, actions by and against. (see above under Actions.)
Crown Debts Ordinance, 347, xci-xciv
preference of, over private debts, 212, 345-348
no preference under Kandyan Law, 349
Crown grants, construction of, 351
title on, 352-355, cxlix
Baumgartner, judgment of, (C. R. Galle, 2366), 354, cxlix-clix.
no warranty of title implied, 352
Crown Land, (see also FOREST and WASTE LANDS.)
boundaries Ordinance, lxxxvi-lxxxix
encroachment Ordinance, lxviii-lxxii
landmarks, lxxxix
presumption as to, 295-304, 327
sales, xc
Crown servants,
action for dismissal of, 366
responsibility for executive acts, 218
for act of subordinates, 382-388
when liable *ex contractu*, 379-380
when liable *ex delicto*, 380
Customs duties,
history of, in Ceylon, 268
right of Crown to levy, regulated by Ordinance, 266
Diluvion, 253
Derelict river-bed, right of Crown to, 259
Dismissal of public servants, no right of action against Crown for, 366
Escheat to Crown
of illegitimate child's estate, 221
of illegitimate child's parent's estate, 221
of intestate's estate on failure of heirs, 220
Export duty, 267

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

FISC.—Continued.

Fisc
developed into a juristic person, 207
functions of, 208
history of term, 36, 207
law applicable in Ceylon, 208
originally outside scope of private law, 207
privileges of, 208
Fishing,
right of, in sea, rivers, &c., 250
pearl fishing, 233-239
Flotsam, 232
Foreshore
limit of, 247, 248
meaning of, 247
rights of Crown and public in, under Roman, R. D., and English law, 242-252
Forests, waste lands, &c. (see FOREST.)
Governor of a colony
can be sued in the courts of the colony in his private or public capacity, 370
liability for acts done as, 371-378
powers limited by terms of commission, 369
whole royal authority not delegated to, 368
Habeas Corpus,
power of Supreme Court to issue, 217
Heirs, failure of; limitation of period of claim, 220
Illegitimate child
cannot inherit from his father, 221
definition of, 221
escheat, 221
legitimation, 222
succession of and to, 221-223
when he can inherit from mother, 221
Insured article, loss in post, liability for, 276
Intoxicating liquor, Crown's exclusive right to manufacture and sale of, 271
licences for manufacturing and selling, 271
penalty for unlicensed manufacture of, 271
Islands, property in islands in sea and river, 253-262
Jetsam, 232
Judge, no action against, for act or speech in judicial capacity, 383-386
Judgment against Crown not enforceable by writ, 213
satisfaction matter of grace only, 213, 362
Kandyan law,
right of Crown in regard to debts, 349, 350
inhibition of debtor, 350
King
can do no wrong, meaning of, 212
executive authority of, 215
fountain of justice, 216
laches not attributable to, 214, 343, 344
liability of, to statute, 211, 216
never dies, 214
no court has jurisdiction over, 211
not a corporation sole, 36, 215
pardon by, 217
veto of, 217
Laches not attributable to the sovereign, 214, 343-344
Lagan, 232

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

FISC.—Continued.
Land
formed by alluvion, right to, 253-262
formed by avulsion, right to, 253-262
under bed of river, 249-252
under sea, 242-252
Legacies void
according to Voet, 225-226
according to Grotius, 224
devolve on Crown on failure of heirs, 223
Legislative authority of Crown in Ceylon, 215
once parted with cannot be afterwards exercised, 216
Legitimation under Ceylon law, 222
Liability of fisc
for loss or damage caused by telegraph officer, 281
for money and postal orders, 277
for torts, 213, 360
in respect of property, 213, 360
on contract, 213, 360
Liability of ministers for executive acts, 218
Limitation of actions against the Crown, 214, 344
Mines
licence required for working, 262
on Crown land, 262
on private land, one-tenth share to Crown, 262
plumbago, royalty on, 262, 270
under sea within three-mile limit, 262
Ministerial officers of court, liability of, 386
Ministerial responsibility, 212-218
Navigable rivers, right of Crown and public in, 243
Pearl fishery, exclusive right of Crown, 233-239
beyond the three-mile limit, 237, 236, 238
history of legislation, 234
unlicensed fishing, penalty for, 234
Petition of right, 212, 361
Port dues, right of Crown to levy, 266
Postal service, Crown's exclusive privilege, 275
liability for damage or loss of postal article, 276
Prerogative,
authorities on, 211
definition of, 209
extends to the colonies, 209
extent and legality of, determined by court, 209
limits of, 209, 217
list of, 211-218
objects of, 209
Prescription against Crown, 344
alienable lands, 345
Berwick D. J., judgment of, in Colombo D. C. 1245, cxlii-cxlviii
non-alienable lands, 208, cxliii
what rights prescribable, cxliii
Res nullius, Crown owner of, 218
what is included under, 218-220
Restitutio in integrum in favour of Crown, 208, 339-343
Rivers and lakes, rights of Crown and public to, 249-252
Salt collection and manufacture, a government monopoly, 240-242
districts of manufacture, 242
history of legislation, 242
license, 240

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

FISC.—Continued.
modes of manufacture, 241
penalties, 240
Sea,
incapable of appropriation as a rule, 235
area within cannon shot may be appropriated, 237
right of Crown and public in sea and foreshore, 242
sand, removal of, 252
Stamps, law relating to (see under STAMPS.)
Statute law,
not as a rule binding on the Crown, 211, 356-358
when Crown liable to, 216
Taxation,
Crown property exempt from, 358
without sanction of legislative council invalid, 218
Telegraph, Crown's exclusive privilege, 280
Torts,
liability of Crown for, 360, 380
liability of Crown servant for, 380
Treasure-trove,
duty of finder, 227
meaning of, 228
penalty for concealment of discovery, 228
property of Crown, 227
share allottable to finder, 227
Wrecks,
duty of person to deliver wrecked goods to Receiver of wrecks, 231
meaning of, 231
unclaimed wrecks property of Crown, 232
under Roman, R. D. and English law, 232, 233

FISHING. (See FISC.)

FORESHORE. (See FISC.)

FOREST. (See also WASTE LANDS and WASTE LANDS ORDINANCES.)
Administration and legislation in Ceylon, 328
Burden of proof in prosecution, 332
Claims, enquiry into, 334
Crown,
land at disposal of, 327
liability of, 335
presumption in favour of, 334
District Court, jurisdiction of, 189, 195
Drift timber, 333
"Forest," meaning of, 327, cviii-cix
Forest Ordinance No. 16 of 1907, 329
effect of decisions under, 333
title, how decided, 333
Land at disposal of Crown, meaning of, 327
Presumption as to timber, &c., 333, 334
Reserved forest, meaning of, 328
proclamation of, 330
acts prohibited in, 331
penalties, 331
Rules by Governor in Executive Council, 332
Village forest,
acts prohibited in, 331
constitution of, 332
scheduled trees in, 332

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

FOUNDATIONS. (See also CORPORATIONS.)
Actions *re* public charities under Civil Pro. Code, sec. 639, 198, 199
Charitable objects according to the statute of Elizabeth, 187
Charitable trusts, the Crown is protector of, 187
Constitution of, 185
alteration of, 194
Construction of charitable bequests, benignant, 187
Cypres,
failure of machinery, 197
initial failure of purpose named, 196
settlement of schemes, 189, 195
subsequent failure of particular purpose, 197
surplus income, 197
when applicable, 196
when not applicable, 197
Devolution of property, 193
District Court,
actions *re* public charities, 198, 199
settlement of schemes, 195
Endowment,
by deed *inter vivos*, 184
by last will, 185
defect in, 186
donation incomplete until acceptance, 184
instrument of, 184
mode of, 182
revocable until incorporation, 184
Founder,
obligation of, 185
statutes of, 186
Incorporation,
incorporating words, 183
king alone can incorporate, 183
modes of, 183
obligation of founder on, 185
Intention, ascertainment of donor's, 189
Objects
change of (see *cypres*). 193
charitable objects according to statute of Elizabeth, 187
must be of a public nature, 188
objects "within the spirit and intendment of the statute," 188
Patronage, 191
Private charities void, 188
Suppression of foundation, 193
Visitor's duties, 192
jurisdiction, 192
GIERKE, 31, 35
GNEIST, 47
GOVERNOR. (See FISC.)
GRANT on CORPORATIONS, 31, 34, 43, 46, 47, 48, 49, 52, 54, 62, 69, 70, 72, 78, 79, 80, 84, 183, 184, 186, 191, 192, 193, 205
GROTIUS, 3, 7, 8, 23, 204, 219, 220, 222, 223, 224, 225, 226, 229, 235, 245, 250, 255, 257, 259, 338, 341, 342, 343, 345, 347, 351
HALE, 247, 261
HALSBURY, LORD, 13, 20
HERSCHELL, LORD, 114, 129

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

HINDU TEMPLE,
legal status of deity of, 38
de facto manager of, 38
INCAPACITY,
of prodigals, inebriates, mentally unsound persons, 6
INDEMNITY, ACT OF, 375
INNS OF COURT,
not corporations, 33, 204
origin and purpose of, *ibid*
INTERDICT,
of prodigals, mentally unsound persons, &c., when granted and removed, 6, 7, 8
ISLANDS. (See FISC.)
JESSEL, 138
JOINT STOCK COMPANIES. (See also CORPORATIONS.)
Accounts
audit of, 159
balance sheet, 158
directors to keep, 157
Action
change of company's name does not abate, 107
rectification of register, for, 126
Alteration
of articles of association, 110-112
of capital, 98
of company's objects, 108
of memorandum of association, 106
of name, 107
Articles of association
adoption of Table C of Ordinance 4 of 1861, 99
alteration of, 100-102
contract, how far they constitute a, 104
effect of, 104
inconsistent with memorandum are invalid, 111
knowledge of, imputed to persons dealing with company, 104
registration of, 100
stamp on, 102, vi, lxvi
Audit
accounts of company, 159
Auditors
duties of, 160
liability of, 160
Balance sheet, 158
auditors must sign, 159
preparation and transmission of, 158
prescribed form of, xliv-xlv
Banking Ordinance, Joint Stock, text of, lx-lxv.
Bills of exchange, 148
Borrowing
by company, 149
debentures, 151
debenture stock, 152
floating charge, 152
powers of directors, 150
restrictions on exercise of power, 150
ultra vires, 151

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

JOINT STOCK COMPANIES.—Continued.
Calls, 155
forfeiture for non-payment of, 157
irregularity in, 157
power of court to make, on winding up, 175
Capital, 98
alteration of, 98, 131
increase of, 98, 131
reduction of, 135-137
conversion of shares into stock, 133
dividend may not be paid out of, 160
summary of capital and shares, 123, xlv
fixed, 164
floating, 164
Certificate
conclusiveness of, 102
of incorporation, 103
of shares and stock, 117
prima facie evidence of title, 117
Consolidation of shares, 98, 131
Contract
disclosure of, in prospectus, 114-115
how made, 147
Contributories, 103, 172
Co-operative principle, 89
Creditors, rights of, on winding up, 180
Debentures, 151-153
Debts
inability to pay, winding up on ground of, 167
Directors
liability for prospectus, 115
meeting of, 146
(see also CORPORATIONS.)
Directors Liability Act, 115
Discount
share of limited company not to be issued at, 117
Dissolution of company, 175-178
Dividends, 161
may not be paid out of capital, 160
English law of companies, 90
how far applicable in Ceylon, 91
Fees, table of, under local ordinances, xxxv., lxvi., lxvii.
Forms prescribed under local ordinances, xxxv-xlvi., lxiii-lxv
Founders' shares, 117
Injunction to restrain misleading use of name, 107
'Limited'
must be part of name, 96
penalty for omission of, 96
Liquidation (See also Winding up.)
winding-up by court, 168
appointment of official liquidators 169
duties of do 169
powers of do 170
transactions of company in liquidation, 88
voluntary winding up,
consequences of, 177
duty of liquidator, if not wound up in a year, 179
effect of, on company's status, 176
grounds for, 176
rights of creditors, saving of, 180

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

JOINT STOCK COMPANIES.—Continued.

Local ordinances *re* companies, 91
Do do , text of, i—lxvii
Meetings
company, 144
annual, 144
extraordinary, 144
general, 144
statutory, 144
directors', 146
Members
agreement to become, 121
definition of, 119
liability of past and present, 172
list of, 123
minimum number of, 93, 161
register of, 120, 122
Memorandum of association
amount of share capital to be specified in, 95
alteration of, 106
consolidation of shares, 98, 131
conversion of paid up shares into stock, 98
increase of capital, 98, 131
essential contents, 95
how far alterable, 98, 106, 108
knowledge of, imputed to persons dealing with company, 104
name of company to be stated in, 95, 96
how changed, 107
objects of company to be stated in, 95-97
how changed, 98
prescribed form of, xxxv—xlviii
registration of, 100
relation of, to articles, 100
subscribers of, are members of the Company, 119
Misrepresentation, 128
Mortgage
debentures, 151-153
form of, xlvi
register of, to be kept by company, 154
Name of Company, 96
addition of the word "limited" to, 96
do. words "and reduced," 135
change of, 107
injunction against use of, 107
memorandum to be stated in, 95
penalty for omission of "limited," 96, 143
similarity of, prohibition of, 107
Objects of a company, 97
alteration of, 98, 108
discretion of court, as to, 109
special resolution for changing, 108
main object, 97
memorandum of association must specify, 95
power of company is limited to objects specified in memorandum, 95
Office. (See Registered Office.)
"One Man Company," 93
Ordinances (Ceylon), 1861-1909, text of, i—lxviii
Origin and history of, 89

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

JOINT STOCK COMPANIES.—Continued.
Payment
for shares, 117, 118
in cash, 118
otherwise than in cash, 118
Penalty for
carrying on business without registered office, 139
carrying on business without giving notice of change of office, 140
carrying on business with less than seven members, 165
issuing copy of memorandum of association without showing alteration of conditions or of office, 133, 141
non-delivery to Registrar of Court order changing company's object, 110
non-delivery to Registrar of special resolution, 145
not giving Registrar notice of increase of capital, 132
not giving Registrar notice of conversion of shares into stock, 134
not keeping proper register of members or sending list to Registrar, 124
not keeping proper register of mortgages, 154
non-publication of name in prescribed manner, 143
omission of "limited" in name, 96, 143
refusing inspection or copy of register of members, 125
refusing inspection of mortgage register, 154
use or issue of documents without name being properly exhibited, 143
use of seal without name being properly engraved, 143
Preference Shares, 117
capital, preference as to repayment of, 117
cumulative, 117
dividends, preference as to, 117
Promissory notes, 148
Promoters,
definition of, 113
duty of disclosure, 113
fiduciary position of, 112
liabilities of, 113
secret profit by, 112
Prospectus
action for false statements in, 115
Companies' Act, 115
concealment in, 114
definition of, 114
Directors Liability Act, 1890, 115
particulars to be contained in (Companies Act, 1900, sec. 10), 115
Rectification, 126
of register of members, 120, 122
Reduction of Capital,
"and reduced," addition of, to company's name, 135
cancellation of unissued shares, 135
sanction of court, when required, 136
Register of members,
company must keep, 122
copies of, right to take, 125
inspection of, 125
power to close, 125
prima facie evidence, 120, 130
public, open to the, 125
rectification of, (See Rectification of register.)
transferee not entered in, may be a member, 120
trusts not to be entered in, 124
where to be kept, 125

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

JOINT STOCK COMPANIES.—Continued.
Register of mortgages and charges, 154
Register of shareholders, 122, ix
Registered office of company, 139
change of, 140
name of company to be exhibited at, 142
penalty for carrying on business without, 139
service of notices at, 139
Registrar of Joint Stock Companies, 91
Registration,
articles of association, 100
change of name of company, 107
company, effect of registration of, 102
fees for, xxxv, lxvi,
memorandum of association, 100
Rescission
of contract on account of secret profit by promoter, 115
Resolutions of general meeting of company, special, 145
Secret profit, liability of promoter to refund, 115
Share certificate,
prima facie evidence of title, 117
Shareholders, register of, 122, ix
Shares, 116
allotment of, 121
certificate of, 117
company may not purchase its own, 137
conversion of, into stock, 132
discount, may not be issued at, 117
founders', 117
kinds of, 116
movable property, is, 116
numbered, to be, 116
payment for, how, 118
preference, 117
summary of shares and capital, prescribed form of, 123, xlv
transfer of, 118
Signature to bill of exchange or pro-note, 148
Special resolutions, 145
Stamp duty, on transfer of shares, compounding, 286, xlviii
Stamp duties, Table of, lxvi
Stock, conversion of paid-up shares into, 133
Transfer
power to refuse registration of, 119
restrictions on, 118
Trusts, notice of, not to be entered on register, 124
Ultra vires, borrowing, 151
Unincorporated companies,
prohibition of partnership exceeding certain number, 92
Unlimited company, 94
Voluntary winding-up, 165
commencement of, 166
consequences of, 177
effect of, 176
Winding-up by Court, 165
commencement of, 166
contributories, 172
dissolution of company, 175
effect of, 169
grounds for, 166

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

JOINT STOCK COMPANIES.—Continued.
Winding-up by Court—Contd.
liquidator. (See Liquidator.)
order for, 168
petition for, 168
(See also Liquidaton.)
JUDGE. (See FISC.)
JURISTIC PERSONS. (See CORPORATIONS)
JURISTIC PERSONS OF PUBLIC LAW. (See FISC, MUNICIPALITIES)
KANDYAN KINGDOM, constitution of, cxxx
KANDYAN PROVINCES, 295, 300, cxxvii-cxl
KING. (See CORPORATION and FISC.)
LAND ACQUISITION. (See ACQUISITION OF LAND)
LAND AT DISPOSAL OF CROWN, 327, 328
LAND RESUMPTION ORDINANCE, 324, 326, 330
LAND SETTLEMENT, 311-313
LINDLEY, LORD, 21, 53, 59, 65, 66, 97, 151, 152, 163
LOCAL BOARDS. (See MUNICIPALITIES)
LOCKE ON GOVERNMENT, 209
LUNATICS,
incapacity of, 6
MAHAWANSA, cxviii, cxix, cxx, cxxi, cxxii
MAITLAND F. W., 31, 35, 53
MAJORITY,
age of, 3
computation of age of, 4
determined by law of domicile, 4
legal effects of, how determined, 4
in regard to contracts, 5
in regard to real property, 4
MANSFIELD, LORD, 69, 76, 216
MINES. (See FISC.)
MOORE on FORESHORE, 247, 261
MUNICIPALITIES AND LOCAL BOARDS. (See also CORPORATIONS.)
Ceylon Municipal Council's Ordinances, 201
Chairman of Municipal Council, powers of, 201
Local Boards, 203
constitution of, 203
express words of incorporation unnecessary, 205
powers of, 204
Municipal corporation in Ceylon, 201
do. England, 201
Municipal Council,
liability for contracts and torts of its officers, 203
powers of, 202-203
Road Committees, 205
NIKAYA SANGRAHA, cxx
OCCUPATION. (See WASTE LANDS ORDINANCES.)
Primitive rule of title by, 218

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

PANDECTS. 2, 3, 4, 7, 9, 12, 13, 16, 19, 31, 32, 33, 41, 47, 65, 68, 78, 79, 184, 194, 218, 232, 245, 254, 263, 338, 340, 347, 351, 354, 371, 384, 386
PEARL FISHERY. (See FISC.)
PERSON, NATURAL AND JURISTIC,
how distinguished, 1, 33
subjection of, to territorial law, (see DOMICILE)
PETITION OF RIGHT. (See FISC.)
PHILLIMORE, 236, 237, 249
POSSESSION. (See WASTE LANDS ORDINANCES.)
POTHIER, 3, 7, 10, 13, 14, 15, 19, 20, 22, 23, 25, 26, 27, 31, 54, 57, 62, 185, 193
PREROGATIVE. (See FISC.)
PRESUMPTION. (See WASTE LANDS.)
PRESCRIPTION. (See FISC.)
PRODIGALS,
incapacity of, 6
PUBLIC SERVANTS. (See FISC.)
PUFFENDORF, 213
RIDGEWAY, GOVERNOR, 307, 308, 315, 323
RESTITUTIO IN INTEGRUM. (See FISC.)
RIVER BED. (See FISC.)
ROAD COMMITTEES, 205, 206
SADDHARMALANKARA, cxx
SALT. (See FISC.)
SAVIGNY, 2, 3, 4, 10, 11, 12, 21, 22, 27, 31, 36, 57, 68, 72, 77, 78, 79, 80, 181, 182 207, 208
SEA. (See FISC.)
SELBORNE, LORD, 28, 44, 45, 59, 60, 106, 149
SISYANU SISYA, AND SIWURU, PARAMPARAWA, 37
SOHM, 7, 31, 33, 41, 46, 68, 181, 182, 208, 223, 249
STAMPS.
Cancellation of stamps by whom and how, 288
Commissioner of stamps, adjudication as to proper stamp, 292
Consideration, &c., affecting duty chargeable should be set forth, 285, 288
Instruments chargeable with duty, 285
duly stamped, when considered, 289
exemptions in favour of Crown, 285
not duly stamped, 290
impounding of, 291
inadmissible in evidence, 290
when once admitted by court cannot be questioned, 292
exceptions to this rule, 290, 293
bearing stamp of improper description, 292
not duly stamped by accident, 292
penalty for issuing etc., negotiable instruments not duly stamped, 294
re-stamping on payment of penalty, in what cases, 291
time of objecting to want of stamps, 292
Negotiable instruments not duly stamped, penalty for issuing, &c., 294
Presumption as to stamp on document not produced, 294
Receipts, obligation to give in certain cases, 287

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

STAMPS.—Continued.
Stamp duty, Crown's right to levy, 282
by whom payable, 287
Stamp legislation, history of, in Ceylon, 283-284
Stamp Ordinance 1909, 284-295
Stamps, judicial, abolition of, proclamation, cxli
Stamps, prescribed, 286
STORY, 5, 10, 14. 16, 19, 21, 31, 86. 87, 187, 188, 194, 197, 211
STOWELL, 239
SUCCESSION.
pupillary, 37
THIBAUT, 2, 22, 23, 27, 31, 57, 65, 68, 74
TREASURE-TROVE. (See FISC.)
UN-INCORPORATE ASSOCIATIONS.
legal status of, 40, 88
VAN DER KEESEL, 222, 225, 255, 343, 347
VAN DER LINDEN, 6, 185, 220, 222, 224, 225, 229, 233, 250, 340, 341, 351
VAN LEUWEN, 185, 220, 222, 225, 226, 229, 259, 341, 345, 347, 386, cxlv
VATTEL, 235, 236, 238
VENIA AETATIS.
effect of letters of, 6
letters when and by whom granted, 5
VOET, 2, 3, 4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 19, 20, 22, 23, 27, 31, 36, 54, 62, 68, 74, 87, 185, 193, 207, 208, 212, 214, 220, 222, 223, 225, 226, 227, 228 229, 233, 245, 246, 257, 258, 259. 260, 263, 264, 338, 340, 341, 342, 344, 345, 347, 351, 354, 362 363, 366, 384, 386, cxliii, cxliv, cxlv, cxlvii, cli, clii, clviii
WASTE LANDS.
Abandoned lands, resumption by Crown, 324
procedure under Ordinance 4 of 1887, 324-326
Adippola Sannas Case, 298, 303, 309, 310, 317, 318, 323, xcix-cxxvi
Arunachalam, *ibid*
Chena
appurtenant to paddy field, 301
asweddamizing, 297
cultivation, 297, cvi
definition of Sir John D'Oyly, 297
evidence of possession of, in Kandyan and other districts, 295, 301
lowland appurtenant to, 301
origin of term, 298
"Chenas and other lands which can only be cultivated after intervals of several years," meaning of, 299
conflicting decisions, and observations thereon, xcv-xcviii
Crown
certificate of no claim, 297, lxxi
grant on payment of half improved value, 297
presumption in favour of, 295, 300, 302, 322
Crown land, ejectment from,
summary proceeding (Ord. 12 of 1840), 296, 304
summary proceeding (Ord. 1 of 1897), 320
Decisions on Waste Lands Ordinance, 299, xcv-xcviii
Gabadagama land, 300
Kandyan provinces, Districts formerly comprised in, 300 cxxvii-cxl
Land Settlement, history of, in Ceylon, 311

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Ordinance 12 of 1840, object of, 296
"probable," meaning of, 296
summary proceedings for ejectment (Sects: 1—4), 296-304
text of, lxviii-lxxii
presumption as to forest, waste lands, &c. (Sec: 7), 296-297

Presumption in favour of Crown, 295
chenas in Kandyan Districts, 295
in non-Kandyan districts, 296
in what suits presumption applies, 298
not confined to cases under Ord: 12 of 1840, 299-301
what evidence required to raise presumption, 299
reason for presumption, 299
how rebutted in Kandyan districts, 300
do. in non-Kandyan districts, 300
when it does not arise, 302
passes to grantee of Crown, 302

Presumption as to forest, 302
Presumption as to old deeds, cxiv
Presumption under Waste Lands Ordinance as to forest, waste land and chena, 322
Sannas, or royal grant, history of, 302
questions arising on, 303
not admissible unless registered before 1st Feb. 1875, 303
Unoccupied, uncultivated, meaning of, in Ordinanee 12 of 1840, 302
Village community in Europe and India
history of, ciii-cvii
possession by, 323, civ, cvi
'town' and '*grama*' meaning of, civ

WASTE LANDS ORDINANCES.

Admission of claim, 313
Agreement with claimant, 313
order conclusive on publication in Gazette, 314
Claimants against Crown, position of, 309
Claim, limitation of time of, 319
Default of claim, land, declared property of Crown, 306
order how far conclusive, 306
Default or withdrawal of claim, land declared property of Crown, 313

Disputed claims
reference to District Judge or Commissioner, 314
procedure in court on reference, 315
on default of appearance, 316
on appearance, 316
on late appearance within a year, 319-320
adjudication on default, no appeal, 316
after hearing, subject to appeal, 316
observations on procedure, 317

Enquiry into claims, 313
Explanation of objects of, by Governor Ridgeway, 307
Form of notice, 305
Land, meaning of, 323
Notice to claimants, 305
irregularities cured after appearance of claimant, 318
Object of Ordinance, 307
Occupation,
of part of land, 322
under Roman-Dutch Law, cxi
Possession under Roman-Dutch Law, meaning of, cxi, cxii

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

WASTE LANDS ORDINANCES.—Continued.
Prohibition of building, &c., pending inquiry, 320
limit of time for prohibition, 321
compensation for loss due to, 321
Proof of notice, 306
Publication and service of notice, 305
Time for preferring claim limited to a year, 319
Unoccupied, uncultivated, &c., meaning of, 322
Waste Lands Ordinances 1897-1903, lxviii-xc
WESTBURY, 4, 11, 12, 16, 21, 174
WHEATON, 236
WRECKS. (See FISC.)

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org