CIVIL PROCEDURE IN CEYLON

WIKRAMANAYAKE

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

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

CIVIL PROCEDURE IN CEYLON.

A Commentary on the Civil Procedure Code of Ceylon No. 2 of 1889.

BY

E. B. WIKRAMANAYAKE, B. A.
Advocate of the Supreme Court

with

A FOREWORD

BY

MR. JUSTICE E. W. JAYEWARDENE, K.C.

FIRST EDITION.

Copyright Reserved

1932.

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

PRINTED AT
THE WEBCO PRESS
OF
W. E. BASTIAN & Co.,
COLOMBO.

FOREWORD.

Mr. E. B. Wikramanayake deserves the congratulations of both the Bench and the Bar. The Civil Procedure Code has been in force since 1890 but no work on it of this magnitude or importance has yet been produced. Procedure is the machinery of the law—the channel and means whereby the law is administered and justice is reached. This book is a careful compilation showing signs of deep study and critical research and contains a lucid exposition of the law. The principles bearing on each subject have been formulated and discussed and all the important cases collected, a substantial synopsis being given of each decision.

In India there are valuable commentaries on the Civil Procedure Code and in England there are the Annual and the Yearly Practice. This book will supply a long-felt want and will be welcomed by all engaged in the practice and administration of the law.

It is to be hoped that other members of the Bar will follow the example of Mr. Wikramanayake. There are many subjects awaiting exploration.

Vaijayantha, E. W. JAYEWARDENE.
27th August, 1932.

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

PREFACE.

In this little book I have attempted to put together in a coherent and consecutive form the interpretations placed by the Supreme Court upon the various sections of the Civil Procedure Code. It will, I hope, be useful particularly to law students who in their study of the Code generally find themselves lost in a maze of verbiage unless they have a clue of some sort to guide them. And those of my colleagues at the Bar who are generous enough to overlook its shortcomings may find it a useful book of reference. In order to facilitate reference I have provided, in addition to the general index, an index of the sections referred to as well.

I have to thank my wife both for her encouragement and for her assistance in typing the manuscript and correcting the proofs.

E. B. WIKRAMANAYAKE.

Kelaniya,
5th September, 1932.

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

TABLE OF CONTENTS.

				Page
FOREWORD				
PREFACE				
LIST OF ABBREVIATIONS				
TABLE OF CASES				
CHAPTER I.				
The institution of an action		...	...	1
CHAPTER II.				
The Trial	....	...	...	35
CHAPTER III.				
Execution of decrees		....	...	57
CHAPTER IV.				
Pauper actions...		...	...	115
Actions by the Crown		...	...	116
Interpleader actions		....	...	117
Actions by Minors		...	...	119
The appointment of guardians		...	....	123
Actions in Lunacy		...	...	125
Matrimonial actions		...	...	128
Testamentary actions		...	...	134
CHAPTER V.				
Arbitration	...	...	...	157
Summary procedure on liquid claims			...	163
CHAPTER VI.				
Incidental proceedings		...	...	167
CHAPTER VII.				
Arrest and Sequestration before judgment			...	177
CHAPTER VIII.				
Actions in a Court of Requests...			...	185
CHAPTER IX.				
Appeals	...	...	...	195
GENERAL INDEX	...	...	...	217
INDEX OF SECTIONS	...	...	...	235

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

LIST OF ABBREVIATIONS.

A. C.	Appeal Cases (*English*)
A. C. R.	Appeal Court Reports
Bal.	Balasingham's Reports
Bal Notes.	Balasingham's Notes of Cases
Br.	Browne's Reports
C. A. C.	Court of Appeal Cases
C. L. R.	Ceylon Law Reports
C. L Rec.	Ceylon Law Recorder
Cur. L. R.	Current Law Reports
C. W. R.	Ceylon Weekly Reporter
Koch.	Koch's Reports
Lead.	Leader Law Reports
Lem.	Lembruggen's Reports
N. L. R.	New Law Reports
S. C. C.	Supreme Court Cicular
S. C. R.	Supreme Court Reports
Tam.	Tambyah's Reports
Times.	Times Law Reports

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

TABLE OF CASES.

PAGE

A

Abanchi Appu vs. Fernando 209
Abaran Appu vs. Banda 117
Abbubakker vs. Ismail Lebbe 4, 5, 98
Abbubakker vs. Tikiri Banda 68
Abdulla vs. Menika 83
Abdul Aziz vs. Abdul Rahiman 211
Abdul Cader vs. Annamalay 69
Abdul Cader vs. Valiappa Pillai 79
Abdul Rahiman vs. Abbubakker Lebbe ... 75
Abeydeera vs. Hamine 2
Abeydeera vs. Soysa 56
Abeyratne vs. Perera 86
Abeysekera vs. Allahakoon 214
Abeysekera vs. Gunasekera 52
Abeysekera vs. Haramanis Appu 33
Abeysinghe vs. Siriwardene Hamine ... 123
Abeysundere vs. Babuna 2, 27
Abraham vs. Nonno 88
Adappa Chetty vs. Kurera 55
Adaicappa Chetty vs. Thos Cook & Son ... 5, 45
Adoris vs. Perera 141
Agonis vs. Nona Baba 193
Agris Appu vs Davit Appu 196
Ahamedu Marikar vs. Velupillai 68
Aitken Spence & Co., vs. Fernand... ... 157, 161
Aiyampillai vs. Kurukal 7
Aiyar vs. Tambyah 199
Albrecht vs. Grebe 63
Alibhoy vs. Mohideen.... 179
Ali Marikar vs. Omardeen 207, 208
Allagakarandi vs. Muttumal 144
Allagasamy vs. The Kalutara Co. Ltd., ... 33, 25
Allan vs. Pratt 210
Allapitchai vs. Sinna Markayar 74
Allie vs. Mohideen 164, 166
Allis vs. Babunhamy 5
Allis Appu vs. Anderson 87
Alwis vs. Goonetilleke.... 129
Amarasekera vs. Amarasekera 127
Amarasekera vs Mohamedu Umma ... 192, 208
Amarasekera vs. Palaniappa 42
Amarasekera vs. Punchi Banda 32
Amarasuriya vs. Silva 25
Ambalavanar vs. Kandappa 58
Ambalavanar vs. Wanduragala 56

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

Case	Page
Ammanulla vs Sinnatamby	104
Andiappa Chetty vs. Sanmugan Chetty	37, 191
Andris vs. Siriya	187
Andris Appu vs. Kolande Asari	60, 61, 103
Andrado vs. Silva	139
Annamalai Chetty vs. Menika	11
Annamalay Chetty vs. Carron	36
Annamalay Chetty vs. Gunaratne	59
Annamalay Chetty vs. Thornhill	195
Anthonisz vs. Derolis	196
Appuhamy vs. Abeyewardene	63
Appuhamy vs. Adirian	67, 107
Appuhamy vs. Agidahamy	189
Appuhamy vs. Appuhamy	42, 51, 202, 207
Appuhamy vs. Corea	211
Appuhamy vs. Deonis	4, 29
Appuhamy vs. Gunasekera	19, 189
Appuhamy vs. Julihamy	130
Appuhamy vs. Kiriheneya	43
Appuhamy vs. Lokuhamy	14
Appuhamy vs. Manika	136
Appuhamy vs. Menikhamy	129
Appuhamy vs. Nona	204
Appuhamy vs. Sarahamy	137
Appuhamy vs. Silva	142
Appunaide vs. Sinnappuhamy	190
Appu Sinno vs. Appuhamy	42
Appu Sinno vs. de Silva	56
Arachi Appu vs. Mohottu Appu	157
Armugam vs. Thampu	195
Arnolis vs. Dias	203
Arnolis vs. Lewishamy	207
Arunachalem vs. Mohamedu	33
Arunasalem vs. Ramanathan	69
Arunasalem vs. Somasunderam	195
Arunasalem Chetty vs. Hamidoon	85
Arunasalem Chetty vs. Mootatamby	151
Aserappa vs. Weeratunga	89
Asia Umma vs. Abdulla	157
Assauw vs. Billimoria	196
Assistant Government Agent vs. Vellappuhamy	117
Assistant Government Agent Matara vs. Pedris	187
Attorney General vs. de Croos	204
Attorney General vs Nonnohamy	49

Case	Page
Attorney General vs. Perera	214
Attorney General vs. Ponniah	95
Avitchi Chetty vs. Ibrahim Natchia	67
Avva Umma vs. Casinader	4
B	
Baban Appu vs. Goonewardene	26
Banda vs. Anguahamy	136
Banda vs. Dharmaratne	14, 15, 48
Banda vs. Fernando	192
Banda vs. Mahatmaya	71
Banda vs. Menika	117
Banda vs. Siyatu	33
Bandara vs. Attygalla	172
Bandara vs. Elapata	123
Bandiya vs. Kiriya	15
Bank of Madras vs. Ponnusamy	179
Bank of Madras vs. Weerapen Chetty	211
Basnayake Hamine vs. Pathiratne	198
Bastian vs. Andris	86
Bastian Pillai vs. Anapillai	65
Bastian Silva vs. Mariano Silva	24
Boyagoda vs. Mendis	197
British Ceylon Corporation vs. Lionel Edwards Ltd.	30
Buyzer vs. Eckhart	33, 50
C	
Cader vs. Saibo	75
Canapathipillai vs. Adanappa Chetty	174
Canon vs. Telesinghe	191
Careem vs. Appuhamy	179, 180
Carim vs. Wahid	64, 131
Caro vs. Arolis	187
Caroline vs. Eddie	136
Carolis vs. Perera	88
Carolis Appuhamy vs. Ramanathan Chetty	105
Carpen Chetty vs. Majidu	49
Carpen Chetty vs. Mamlan	165
Carpen Chetty vs. Ossen	121
Caruppen Chetty vs. Habibu	80
Cassim vs. Abdeen	192
Cassim Lebbe Marikar vs. Samel Dias	158
Catharina vs. Allis	53
Cathiravelu vs. Dadabhoy	43
Cave & Co. vs. Erskine	3

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

	PAGE
Ceylon Gemming & Mining Co. vs. Symons ...	31, 40
Charles vs. Jandris	199
Chellappa Chetty vs. Kandiah	60
Chellappa vs. Selvadurai	77, 80, 81, 82
Chelliah vs. Ponnasamy	29
Chelliah vs. Sinnacutty ...	70
Chinnadurai vs. Rajasuriya	4
Colombo Stores vs. Silva	85
Colombo Electric Tramways Co. vs Colombo Gas & Water Co.	47
Conderlag vs. Muttiah Pulle	40
Commissioner of the Admiralty of the U. K. vs. Vanderspaar	42
Cooray vs. Perera	94, 169
Cornelis vs. Silva	33
Cornelis Appuhamy vs. Appuhamy ...	136
Cornelis Appuhamy vs. Appuwa	171
Cornelis Appuhamy vs. Thoronie	50
Costa vs. Silva	162, 195, 199
Coudert vs. Elias	212
Creasy vs. Stephen	177
Croos vs. Croos	139
Croos vs. Gunawardene Hamine	2
Croos vs. Puncha	35
Culantavelu vs. Somasunderam	206

D

Dabera vs. Marikar	50
Daniel vs. Rasiah	98, 100
Dassanaike vs. Dassanaike	211
Davidson vs. Silva	3
Davith Appuhamy vs. Perera	189
Davith Singho vs. Podihamy	136
De Alwis vs. Appuhamy	210
De Alwis vs. Murugappa Chetty	62
De Croos vs. Saiya	13
Delmege vs. Delmege...	209
De Mel vs. Dharmaratne	83, 84
Demmer vs Goonewardene	197
Deonis vs. Samarasinghe	50
De Silva vs. de Silva	213
De Silva vs. Konnamalai	58
De Silva vs. Mendishamy	135
De Silva vs. Vaduganathan Chetty ...	18
De Zoysa vs. Mendis	205
De Zoysa vs, de Zoysa	152

	PAGE
Dias vs. Constantine	21
Dias vs. Perera	73
Dias vs. Wijesekera	81, 82
Didi vs. Didi	6
Dingiri Appuhamy vs. Siyatu	196
Dingiri Mahatmaya vs. Appuhamy ...	162
Dingiri Menika vs. Punchi Mahatmaya ...	19, 26
Dionis Appu vs. Arlis...	49
Doloswala vs. Amarisa	103
Doloswella Tea & Rubber Co. vs. Swaris Appu	204
Don Andris vs. Jameshamy	195
Don Mathes vs. Dissanayake	182
Duval & Co. vs. Gans...	21

E

Ebrahim vs. Raman Chetty	203
Eliyatamby vs. Gabriel	204
Elwes vs. Van Starrex	182
Endoris vs. Hamine	3, 74
Emalishamy vs. Ego Appu	197
Emalishamy vs. Kannangara	3
Eminona vs. Mohideen	65
Ephraims vs. Silva	95
Ephraims vs. Subasinghe	55

F

Fallaloon vs. Cassim	205
Faulkener vs. Soysa	106
Fernando vs. Ali Uduman	36
Fernando vs. Arunasalem Pillai	21
Fernando vs. Cadiravelu	87
Fernando vs. Curera	35
Fernando vs. De Mel...	161
Fernando vs. De Waas	4
Fernando vs. Dochi	142
Fernand vs. Fernando	32, 66, 73, 98, 107, 119, 137, 138, 139, 144, 153, 200, 207, 209
Fernando vs. Jamel	74
Fernando vs. Johannes Appu	48
Fernando vs. Latibu	101
Fernando vs. Matthew	16
Fernando vs. Mendis	105
Fernando vs. Menika...	25
Fernando vs. Migel Appu	161
Fernando vs. Mohammedu	15

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

	PAGE
Fernando vs. Nagappa Chetty	86
Fernando vs. Niculas Appu	198
Fernando vs. Palaniappa Chetty	11
Fernando vs. Perera	13, 48, 170
Fernando vs. Peris	52
Fernando vs. Silva	2
Fernando vs. Sirigoris Appu	16
Fernando vs. Soysa	4, 149
Fernando vs. The Syndicate Boat Co., Ltd. ...	48
Fernando vs. The Tea Plantation Co., Ltd. ...	33
Fernando vs. Totalihamy	55
Fernando vs. Unnanse	145
Fernando vs. Welenisappu	45
Fonseka vs. Cornelis	139
Fonseka vs. Ukkurala	70
Fradd vs. Brown	205
Francisco vs. Peresenty	142

G

Gargial vs. Somasunderam Chetty ...	38
Garvin vs. Abeywardene	11
Geeta vs. Fernando	7
George vs. Perera	170
Georgiana vs. Ensohamy	92
Ghouse vs. Beddawala	203
Girigoris vs. The Locomotive Superintendent ...	58, 59, 62
Girigoris Silva vs. Selohamy	78
Gonsales vs. Holsinger	158
Goonesinghe vs. Silva...	61
Goonetilleke vs. Goonetilleke	106
Goonetilleke vs. Jayasekera	105
Goonewardene vs. Goonewardene	161
Goonewardene vs. Orr	195
Gordion Appuhamy vs. Maria Culas ...	67
Gordon Brooke vs. Peera Veda	207
Government Agent Uva vs. Banda ...	55, 195
Government Agent W. P. vs. Vythianathan Chetty	91
Govin vs. Fernando	207
Gunaratne vs. Dingiri Banda	50, 95
Gunaratne vs. Hamine	144
Gunasekera vs. Abubakker	119, 123
Gunasekera vs. Don Andris	205
Gunasekera vs. Pompeus	33
Gunasekera vs. Rodrigo	89
Gunasekera vs. Senaratne	54

	PAGE
Gunawardene vs. Juwanis Hamy... ...	8
Gunawardene vs. Perera	16
Gunawardena vs. Rajapakse	29
Gurusamy Pillai vs. Meera Lebbe	60
Gurusamy Pillai vs. Palaniappa Kangany	62, 63

H

Habibu vs. Ali Marikar	136
Hadjiar vs. Mohamedu	57
Hadjiar vs. Raheem	162, 171
Haramanis vs. Haramanis	72
Hartley vs. Cassim	45
Hassan Hadjiar vs. Levane Marikar ...	144
Hay vs. The Administrator of Nunn's Estate ...	54, 134
Hayley and Kenny vs. Zainudeen	212
Heen Banda vs. Aluvihare	188
Heenhamy vs. Mohottihamy	6
Helenis vs. Hendrick...	198
Hendrik Appu vs. Juanis Naide	160
Hendrik Kure vs. Marikar	48, 54
Hendrik Singho vs. Kelanis Appu...	89
Herath Singho vs. Appuhamy	205
Hewavitarne vs. Marikar	187
Hing Appu vs. Donchamy	179
Hiniappu vs. Hendris...	115
Hollandie Anglo-Dutch Milk and Food Co. vs. The Anglo-Swiss Milk Co.	210
Holloway vs. Perera	29
Holmes vs. Alia Marikar	52
Holsinger vs. Nicholas	152

I

Ibrahim vs. Bawa Sahib	72
Ibrahim vs. Beebee	203
Ibrahim vs. Marikar	207
Ibrahim vs. Tillekeratne	58, 61
Ibrahim Baay vs. Abdul Rahim	26
Ibrahim Neina vs. Kosumma	200
Ibrahim Saibo vs. Silva	102
Idroos Lebbe vs. Tamby Marikar	104
In re. Ahammedu Lebbe	136
In re. Ferdinandus	138, 140
In re. Goonewardene	18, 199
In re. The Estate of Alim	171
In re. The Estate of Banda	138
In re. The Estate of Dhama Goonewardene ...	150

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

PAGE

In re. The Estate of Marikar Hajiar ... 148
In re. The Estate of Poothepillai 139
In re. The Estate of Pransappu 148
In re. The Estate of Rawter 210
In re. The Estate of Margaret Wernham ... 151
In re. The good and effects of Appuhamy Arachi 140
In re. The insolvency of Abdul Aziz ... 1
In re. The insolvency of Abdul Gaffoor ... 95
In re. The insolvency of Jayasekera ... 93
In re. The insolvency of W. P. Peris ... 93
In re. The last will of Baban 149
In re. The last will of Cornelis Dias ... 140, 147
In re. The last will of Hendriks 135, 136
In re. The last will of W. F. Morriss ... 138, 139
In re. The last will of Venasi Elupalayar ... 139
In re. Ukku Banda 136
Isaac Perera vs. Baba Appu 179, 185
Isohamine vs. Moonesinghe 70
Issan Appu vs. Cooray 209

J

Jafferjee vs. Pavin 180
Jaganadan Pillai vs Perera 47
Jalaldeen vs. Meerapulle 69
Jalaldeen vs The Colombo Municipal Council 2
Jaldin vs. Nurma 86
Jan Ali vs. Jan Ali Chowdray 84
Janis Apup vs. Baba Appu 189
Jayamaha vs. Singappu 8
Jayasekera vs. Korale 144
Jayasuriya vs. Kotalawala 39
Jayawardene vs. Fernando 211
Jayawardene vs. Karunaratne 56
Jayawardene vs. The Baptist Missionary Society 12
Jayawickreme vs. Amarasuriya 5
John Singho vs. Julis Appu 12
Joseph vs. Alexander Elizabeth 134, 199
Joseph vs. de Run 32
Joseph vs. Sockalingam Chetty 212
Julius vs. Hodgson 201
Jusey Appu vs. Ukkurala 187

K

Kadiravel vs. Ponnasamy 158

PAGE

Kaluhamy vs. Appuhamy 28
Kanagasabapathy vs. Kanagasabai ... 10, 28
Kanagasunderam vs. Sinniah 136
Kanapadian vs. Pietersz 3
Kanappa Chetty vs. Croos 108
Kanappa Chetty vs. Saibo 19
Kanapathipillai vs. Kannakai 200
Kandappa vs. Marimuttu 37, 191
Kandasamy vs. Sinnatamby 7
Kandavanam vs. Hoole 82
Kandaya vs. Sangarapillai 67
Kandiah vs. Carthigesu 145
Kangany vs. Ramasamy 199
Karonchi Appu vs. Don Simon 150
Karonissa vs Singho... 67
Karunawardene vs. Wijesuriya 25
Karuppen Chetty vs. Anthonayake ... 71
Katiratamby vs. Parupathi Pillai 26
Kekulawala vs. The Attorney General ... 199
Kenakal vs. Velapillai 45
King vs. King 130
Kira vs. Kira 15
Kiri Banda vs. Lebbe Amine 101
Kiri Banda vs. Sleema Lebbe 29
Kiri Etana vs. Kirihamy 70
Kitchen vs. Campbell... 23
Koelman vs. Amarasekera 80, 81
Komerappa vs. Muttiah 80
Konnamalai vs. Sivakolanthu 110
Konar vs. Govindan 159
Konnehamy vs. Silva... 109
Krause vs. Pathumma 142
Krishnapillai vs. Chellamma 141
Kuda Banda vs. Dingiri Amma 28
Kulasekera Appuhamy vs. Malluwa ... 169
Kumarappa Chetty vs. Kristnasamy Chetty ... 165
Kuppe Kany vs. Caliappa Pillai 107
Kurukal vs. Kanapathipillai 208
Kurukal vs. Kurukal 87, 210

L

Lallyett vs Negris 20
Lebbe vs. Banda 189
Lebbe vs. Christie 124
Lebbe vs. Samu 145
Lebbe Marikar vs. Manatchy 135
Lee Hedges vs. Seville 62

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

	PAGE
Leelawathie vs. Dingiri Banda	86
Le Mesurier vs. Layard	117
Le Mesurier vs. Le Mesurier	19, 128
Le Mesurier vs. Murray	117
Le Mesurier vs. The Attorney General ...	55
Lenohamy vs. Nonno	30
Letcheman vs. Christian	16
Letchimanen Chetty vs. Abdul	181
Letchiman Chetty vs. Abdul Rahiman ...	179
Letchiman Chetty vs. Hadjiar	36
Letchimanen Chetty vs. Muttusamy Pillai ...	181
Lewishamy vs. Cornelis de Silva	145
Lokuhamy vs. Sirimala	33
London vs. Lancashire Fire Insurance Co. vs. The P. and O. Co.	8, 28
Lorensu Appu vs. Paaris	168
Lowe vs. Fernando	2, 8
Lucyhamy vs Alwis	106
Lucyhomy vs. Hamidu	3
Lucy Nona vs. Bandara	211, 212
Ludovici vs. Nicholas Appu	2
M	
Macdonald vs. The Colombo Hotels Co. ...	43
Madar Saibo vs. Sirayudeen	12
Mahawoof vs. Marikar	124
Mamnoor vs. Mahomooth	54
Manchohamy vs. Appuhamy	207
Manicam vs. Sanmugam	204
Maria vs. Fernando	2
Maricar vs. Ismail	208
Maricar vs. Maricor	148
Maricar vs. Perera	70
Maricar vs. Velupillai	27
Marsden vs. Habibhoy	174
Marsial vs. Chenniah....	161
Mather vs. Peri TambyC hetty	29, 164
Mather vs. Thamotherampillai	157
Matthes vs. Rottan	206
Meedin vs. Banda	15
Meedin vs Meedin	208
Meenatchy vs. Gnanapragasam	69, 70
Meenatchi vs. Rengapulle	56
Meera Saibo vs Ayan Sinnavan	73
Meera Saibo vs. Omar Lebbe	54
Meis Singho vs. Josie Perera	171
Mell vs. Fernando	74

	PAGE
Mendis vs. Jinadasa	200
Mendis vs. Perera	19
Mendis vs. Peris	110, 111, 112
Menika vs. Dionis	48
Menika vs. Ukku Umma	158
Menikhamy vs. Pinhamy	200
Meyappa Chetty vs. Weerasooriya ...	111, 113, 196
Minga vs. Sendiriya	119
Missy Nona vs. Jayasuriya	108
Mohamedu vs. Abbubakker	165
Mohamedu vs. Perera	159
Mohamed Aliar vs. Mohamedu Marikar ...	40
Mohamed Bhai vs. Marikar	57
Mohamedu Cassim vs. Perinen Chetty ...	30
Mohamedu Haniffa vs. Levana Marikar	105
Mohamedu Ismail vs. Wijeya	188
Mohamedu Jan vs. Ussen Bebe	152
Mohomedu Khan vs. Mariamina	192
Mohamedu Lebbe vs. Ahamedu Ali ...	97
Mohamedu Lebbe vs Kiri Banda... ...	38
Mohomedu Meera vs. Ossen Saibo ...	19
Mohamedu Umma vs. Cader Mohideen ...	120
Mohideen vs. Gnanapragasam	4
Mohideen vs. Issay	88
Mohideen vs. Mohamedu	3, 174
Mohideen vs. Nallatamby	93
Mohideen vs. Sleema Lebbe	122
Mohideen vs. The proprietors of the Kellie group	209
Mohotte vs. Dissanayake	66
Mohotti Hamy vs. Lekam Mahatmaya ...	38
Moosajee vs. Carimjee	136
Mudaliyar East Girawa Battu vs. Wijesuriya	142
Mudiyanse vs. Appuhamy	161
Mudiyanse vs. Loku Banda	207
Mudiyanse vs. Siriya	3
Mudiyanse vs. Wilson	146
Mudiyanse Korale vs. Appuhamy... ...	143
Munampulle vs. Madar Saibo	210
Murugappa Chetty vs. Perumal Kangany ...	164
Muttar vs. Kathirasapillai	205
Muttiah vs. Baur	123
Muttiah vs. Fernando	78
Muttiah vs. Muttusamy	179
Muttiah Chetty vs. de Silva	51
Muttiah Chetty vs. Emmanuel	180

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

PAGE

Muttiah Chetty vs. Marikar 104
Muttiah Chetty vs. Mahamood Hadjiar ... 69
Muttu Carpen vs. Rankira 88
Muttu Carpen Chetty vs. de Mel 82
Muttu Menika vs. Appuhamy 70
Muttu Menika vs. Muttu Menika... ... 121
Muttu Nadar vs. Peris Appu 200
Muttupillai vs. Bowes 117
Muttu Raman Chetty vs. Mohamed ... 100
Muttu Raman Chetty vs. Suppramaniam Pillai 111
Muttusamy vs. Ponnen 44
Muttu Tamby vs. Jayaman 81
Muttuwa vs. Silva 80

N

Nachchiappa Chetty vs. Muttu Kangany ... 39
Nadar vs. Nadar 91
Nagalingam vs. Chittampalam 170
Nagar vs. Rodrigo 189
Naina vs. Sedembram 108, 109
Nalla Caruppen Chetty vs. Asana ... 172
Nanayakkara vs. Nanayakkara 92
Nanayakkara vs. Sulaiman 102
Nandias vs. Bastian Appu 79
Nanni vs. Murugen 192
Nannitamby vs. Vytilingam 171
Narayan Chetty vs. Azeez 195
Narayan Chetty vs. Fernando 21
Narayan Chetty vs. Jusey Silva 59
Natchia vs. Natchia 49
Natchiya vs. Abdul Cader 75
National Bank of India vs. Fernando ... 30
National Bank of India vs. Gill 17
National Bank of India vs. Ponnusamy 55
Neina vs. Neina 148
Nicholas vs. Walker Sons & Co. 122
Nonai vs. Appuhamy... 197
Nonnohamy vs. Divunahamy 193, 208
Noorbhay vs. Mohideen 164
Noordeen vs. Ukkuhamy 89
Northway vs. Natchia 207
Nugawela vs. Ratwatte 211
Nusserwanjee vs. Sherifeen 93
Nutter & Co. vs. Lebbe 31, 38

PAGE

O

Odris vs. Fernando 11
Omer vs. Fernando 105
Orathinahamy vs. Romanis 175
Orr vs. Orr 132

P

Palaniappa vs. Gomes 26, 173
Palaniappa Chetty vs. Arnolishamy ... 33
Palaniappa Chetty vs. Mortims 22
Palaniappa Chetty vs. Saminathan ... 23
Palaniappa Chetty vs. Seidik 112
Palaniappa Chetty vs. Usubu Lebbe ... 80
Paldano vs. Horatala 203
Palingu vs. Mudianse Banda 203
Paramanathan vs. Paramanathan... ... 121
Passe vs. Alvares 67
Parisohamy vs. Leana Appu 7
Pavistina vs. Veyrchechy 149
Pedris vs. Mohideen 188
Pedropullo vs. Dionisa 72
Perera vs. Aberan Appu 66
Perera vs. Abeyratne 107
Perera vs. Andris 157
Perera vs. Appuhamy 124
Perera vs. Avishamy 43
Perera vs. Brito 80
Perera vs. Cosmas 160
Perera vs. Don Manuel 56
Perera vs. Ekanayake 50
Perera vs. Fernando 7,25,70, 142
Perera vs. Francisco 159
Perera vs. Hendrick 198
Perera vs. Ibrahim 102
Perera vs. James 39
Perera vs. Krickenbeck 145, 146
Perera vs. Mudalali 66
Perera vs. Novishamy 102
Perera vs. Perera 56, 70, 118, 139, 196
Perera vs. Pesonhamy 32, 186
Perera vs. Ponnachi 62
Perera vs. Punchi Rala 171
Perera vs. Samarakoon 204
Perera vs. Silva 97, 185
Periacarpen Chetty vs. Mohamedu 55

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

			Page
Periar CarPen Chetty vs. Sekappa Chetty		....	60
Perichiappa Chetty vs. Jacolyn ...		...	102
Peris vs. Cooray ...	...	...	102
Peris vs. Fernando	...	...	37, 126
Peris vs. Perera ...	...	...	15, 43
Peris vs. Peris	...	...	139
Peris vs. PunchiapPu Hamy	...	...	33
Peris vs. Ranasinghe ...	...	...	53
Peris vs. Silva	....	...	106 ,201
Perumal Chetty vs. Goonetilleke ...		...	191
Philippu vs. Kanapathy	....	...	191
Pinto vs. Fernando ...	...	...	124
Pitche vs. Master ...	...	...	192
Pitche vs Mohamedu	...	....	109
Pitche Tamby vs. Cassim	...	....	43
Pitche Tamby vs. Cassim Marikar		...	210, 212
Pitche Tamby vs. Fernando	...	....	160
Pless Pol vs. Lady de Soysa	...	...	2, 20, 105, 169
P. L. K. N. M. K. Chetty vs. Perera		....	101
P. and O. Banking Corporation vs. Selvathurai ...	...	....	165
Ponnamma vs. Armugam	...	...	145
Ponnamma vs. Kasipathi Pulle	...	...	13
Ponnamma vs. Weerasooriya	...	...	88
Ponnambalam vs. Paramanayagam		...	67, 74
Ponnampalam vs. Murugasar	...	...	28
Prolis vs. Amerasuriya	...	....	162
Pullenayagam vs. Pullenayagam ...		...	62
Punchi Banda vs. Appuhamy	....	...	201
Punchi Banda vs. Noordeen	...	...	209
Punchi Banda vs. Perera	...	....	73
Punchi Menika vs. Sawsiri	....	...	168
Punchirala vs. Appuhamy	...	...	207, 208
Punchirala vs. Punchi Banda	...	....	47
Punchirala vs. Punchirala	....	....	14

R

Raheem vs. Usoof Lebbe	...	...	113
Rahiman Levy vs. Nagamany	...	...	191
Ramayah vs. Meera Lebbe	...	...	171
Raman Chetty vs Abdul Razak ...		...	2
Raman Chetty vs. Appuhamy	...	....	57, 105
Raman Chetty vs. Carpen Chetty...		...	25
Raman Chetty vs. Jayawardene ...		...	102
Raman Chetty vs. Mackwood Ltd.		...	12, 30
Raman Chetty vs. Mohideen	...	...	72

			Page
Raman Chetty vs. Marikar	...	...	38
Raman Chetty vs. Siriwardene	...	...	82, 106
Raman Chetty vs. Soysa	...	...	31
Raman Chetty vs. Vallipuram	...	...	177
Ramanathan vs. Don Carolis	...	...	17
Ramanathan vs. Fernando	...	...	165
Ramanathan Chetty vs. Fernando		...	54, 104
Ramanathan Chetty vs. Thambyah		...	62, 65
Ramasamy Chetty vs. Fernando ...		....	105
Ramasamy Pillai vs. Vengadasamy		...	144
Rambukpotha vs. Jayakoddy	...	...	182
Ranasinghe vs. Cooray	...	...	7
Ranasinghe vs. Henry	...	...	61
Ranasinghe vs. Perera	...	...	133
Ranasinghe vs. Silva ...	...	...	208
Ranatte vs. Sirimal ...	...	...	20
Ranahami vs. Kirihami	...	...	19
Ran Etana vs. Nekappu	...	...	44
Ran Menika vs. Dingiri Amma ...		...	27
Ran Menika vs. Dingiri Banda	...	...	91, 92
Ran Menika vs. Lewishamy	...	...	46
Ran Menika vs. Vanderput	...	...	13
Rasiah Joseph vs. Appuhamy	...	...	188
Ratnavira vs. Ensohamy	...	...	130
Raturala Korale vs. Nohottihami ...		...	36
Ratwatte vs. Appuhamy	....	...	190
Ratwatte vs. Owen	...	...	41
Read vs Samsudeen ...	...	...	12
Reddiar vs. Abdul Latif	...	...	59
Reginahamy vs. Jayasundera	...	...	196
Rein vs. Stein ...	...	...	21
Rengasamy vs. Pakeer	....	...	165
Riley vs. Warden ...	...	...	58
Rodrigo vs. Rodrigo ...	...	....	166
Rosenberg vs. Silva ...	...	...	76
Rupasinghe vs. Fernando	....	...	72

S

SabaPathipillai vs. Alagaratnam ...		...	87, 98
Sado vs. Nona Baba ...	...	...	13
Sadris Appu vs. Piyaratne Terunnance		...	190
Saibo vs. Beebi ...	...	...	175
Saibo vs. Marikar ...	...	...	150
Saibo vs. Senanayaka	...	...	21
Saibo vs. Saibo ...	...	....	64
Salgado vs. Peris ...	...	...	197
Salman Appuhamy vs. Punchi Appuhami		...	168

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

	Page
Samarakoon vs. Ponniah	178
Samaranayake vs. Dissanayake	77
Samaranayake vs. Mendoris	69, 71
Samarasinghe vs. Atchiy	172
Samichi vs. Peris	22, 27, 64
Sapramadu vs. Anthony Pulle	52
Saram vs. Martinahamy	27
Saravanamuttu vs. Teywane	162
Sarvai vs. Murray	95
Sathasivam vs. Cadiravel Chetty	197
Scharenguivel vs. Orr	35
Schrader vs. Joseph	191
Scriwen & Co. vs. Perera	170
Scott vs. Mohammedu	172
Sebastian vs. Gunaratne	173
Sellamma vs. Kathamuttupillai	96
Senanayake vs. Appu...	30, 31
Senanayake vs. Cooray	36, 37, 48
Senathirajah vs. Muttunayagam	214
Seneviratne vs. Ponishamy	129
Setna vs. Cassim Lebbe	169
Sevalingam vs. Kumarihamy	144
Shaik Ali vs. Jafferjee	51, 203
Sharieff vs. Marikar	169
Shaw & Sons vs. Sulaiman	113
Sherif vs. Pitche Umma	87, 98
Shell Transport Co. vs. Dissanayake ...	31
Sidamparam Chetty vs. Goonetilleke ...	109
Sidamparam Chetty vs. Jayawardene ...	101
Sidambaram Pillai vs. Anthonipillai	54
Sidappar vs. Appuhamy	5
Silindu vs. Akura	122
Silva vs. Abeyweera	74
Silva vs. Appuhamy	145, 182
Silva vs. Arnolis	35
Silva vs. Babahamy	31
Silva vs. Carlinahamy	131
Silva vs. De Mel	99
Silva vs. Dias	80, 81
Silva vs. Dinekhamy	74
Silva vs. Fernando	69
Silva vs. Goonesekera	166, 199
Silva vs. Goonewardena	69
Silva vs. Grero	39
Silva vs. Hadjira	171
Silva vs. Hendrick Appu	88
Silva vs. Ibrahim Rawter	70

	Page
Silva vs. Jonklass	117
Silva vs. Kindersley	45
Silva vs. Kirigoris	68
Silva vs. Lokumahatmaya	103
Silva vs. Missi Nona	130, 131
Silva vs. Nona Hamine	68, 88
Silva vs. Palaniappa Chetty	48
Silva vs. Perera	32
Silva vs. Punchiraia	13
Silva vs. Selohamy	78, 107
Silva vs. Singho	102
Silva vs. Silva 6, 37, 44, 50, 59, 98, 99, 133, 134, 142, 183,	203
Silva vs. Silva and King	213
Silva vs. Uparis	77
Silva vs. Wattuhamy	206
Silva vs. Weerasooriya	145
Singho Appu vs. Andris	49, 50
Sinnatamby vs. Kallamuttu	107
Sinnatamby vs. Nallatamby	32
Sinnatankam vs. Vairamuttu	130
Sinno Appu vs. de Silva	75
Sinno Appuhamy vs. Marthelis Rosa ...	6
Siriwardene vs. Banda	168
Sithambarampillai vs. Vinasitamby ...	51
Sithamparam vs. Paran	188
Siyadoris vs. Girigoris	206
Siyadoris vs. Hendrick	178
Sleema Lebbe vs. Banda	73
Sockalingam Chetty vs. Manicam	212
Soertsz vs. The Colombo Municipal Council ...	212
Somasunderam vs. Ibrahim Saibo... ...	16
Somasunderam Chetty vs Odayappa Chetty ...	104
Somethare Unnanse vs. Somaliya... ...	206
Sometare vs. Jasin	7
Sorlentina vs. de Kretser	142
Sosia vs. Sepohamy	4
Soysa vs. Abeydeera	146
Soysa vs. Manuel	63
Soysa vs. Sanmugam	2
Soysa vs. Soysa	32, 212
Stephens vs. Gaffoor	159
Subaneris Appu vs. Appuhamy	159, 160
Suberat Menika vs. Baron	203
Subramaniam Chetty vs. Curera	3
Subramaniam Chetty vs. Palaniappa Chetty ...	150
Subramaniam Chetty vs. Soysa	211
Suhudu vs. Sovena	165

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

PAGE

Sumangala vs. Dhammarakitta 26
Suppiah vs. Abdulla 171
Suppiah Pulle vs. Ohlmus 165
Suppiah Pillai vs. Ramanathan 52
Suppramaniam vs. Mohamedu 69
Suppramaniam vs. Symons 168, 169
Suppramaniam Chetty vs. Cave & Co. ... 63
Suppramaniam Chetty vs. Fernando ... 85
Suppramaniam Chetty vs. Kristnasamy Chetty 165
Suppramaniam Chetty vs. Maria 37
Suppramaniam Chetty vs. Mohamedu Bhai ... 113
Suppramaniam Chetty vs. Naidu 18
Suppramaniam Chetty vs. Rustomjee ... 53
Suppramaniam Chetty vs. Soysa 2, 82
Sura vs. Fernando 7
Swaris vs. Alwis 130

T

Tamel vs. Palaniappa Chetty 71
Tampoe vs. Murugesu 117
Templar vs. Seneviratne 14
Terunnanse vs. Silva 193, 208
Thamotheram Pillai vs. Ponniah 48
Thepanissa vs. Allissa 162
The Ceylon Tea Plantations Co., Ltd vs. Carry 211
The Colombo Hotels Ltd. vs. Topunsing Mootoomul 214
The Demodera Tea Co. vs. Pedric Appu ... 199
The King vs. Samaraweera 184
The King vs. Wijetunge 175
The O. B. C. Estate Co. vs. Brook & Co. ... 211
The Tasmania Case 204
Thiagaraja vs. Paranchotipillai 210
Thiakarajapillai vs. Ranganathan 64
Thigissa vs. Sandarissa 158
Thuraisami vs. Sellachi 175
Tikiri Benda vs. Jeelis Appuhamy ... 191
Tikiri Menika vs. Deonis 3
Tillekeratne vs. Marsel Appuhamy ... 25
Tillekeratne vs Samsideen 46
Tillekeratne vs. Wijesinghe 17
Times of Ceylon vs. Low 16
Tirignasambanthapillai vs. Namasivayam-pillai 171

PAGE

Toussaint vs. Alima Kandu 143
Treaby vs. Bawa 16
Tyagarajah vs. Letchiman Chetty ... 163

U

Udeappa Chetty vs. Appuhamy 78
Uduma Lebbe vs. Seyadu Ali 120, 123
Uduma Lebbe vs. Uduma Lebbe 126
Ukkuwa vs. The Alluta Rubber and Produce Co., Ltd. 199
Ukku Amma vs. Punchi Ukku 81
Ukku Banda vs. Lapaya 13
Ulaganathan Chetty vs. Vavassa 164
Uparis vs. Subasinghe 62
Usoof vs. Sinna Umma 63
Usoof vs. Zainudeen 188

V

Valiappa vs. Peris 94
Vanniah vs. Marikar 147
Vanniah vs. Veemanathan 75
Van Twest vs. Goonewardena 18
Vander Poorten vs. Amarasekera... ... 98
Veeravaku vs. Suppramaniam 32
Velaiappa Chetty vs. Pitche Maula ... 113
Velan vs. Ratnasingham 55
Velupillai vs. Marimuttu 67
Velupillai vs. Sunderapandian Pillai ... 107
Vengadasalem vs. Chettiyar 57
Vengadasalem Chetty vs. Rawter 197
Victoria vs. Fernanda 42
Victoria vs. Attorney General 30, 39
Vinary Putan vs. Nakan Putan 157
Virasingam vs. Jathiravelu 108
Vytialingam vs. Karunakarar 11

W

Wastuhamy vs. Banda 145
Weeraman vs. Silva 77
Weerasinghe vs. The Kandy Municipal Council 208
Weerasooriya vs. Weerasooriya 145
Werthelis vs. Daniel Appuhamy 4
West Derby Union vs. The Metropolitan Life Assurance Society 85
Wettachi vs. Alwis 206

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

			Page
Wickremenaike vs. Kiri Banda	....	...	121
Wickremeratne vs. Fernando	...	...	200
Wickremesinghe vs. Jevath Hamy		...	82
Wijesekera vs. Daberera	...	...	48
Wijesekera vs. Fernando	...	...	143
Wijesekera vs. Kaluappu	...	...	56
Wijesekera vs. Perera	...	...	59
Wijekoon vs. Perera ...	...	...	108
Wijewardene vs. Maitland	...	...	71
Wijewardene vs. Schubert	...	...	60, 67
Wiraratne vs. Ensohamy	...	...	14
Witham vs. Pitche Muttu	...	...	165
Wright vs. Wright ...	....	...	19, 132

Z

Ziegan vs. Ziegan ...	....	...	129, 131

CHAPTER I.

THE INSTITUTION OF AN ACTION.

The Civil Procedure Code.

The Civil Procedure Code

The Civil Procedure Code, as Ordinance 2 of 1889 is commonly known, now regulates the procedure to be adopted by our Courts in every action from its commencement till the final step in execution. Previous to the passing of the Code, the Judges of the Supreme Court collectively had been empowered to frame at any general sessions, and subject to the approval of the Crown, rules and orders with regard to the time and place of holding the several District Courts, the form and manner of proceedings to be observed therein and the practice and pleadings upon all actions, suits, and other matters both civil and criminal in such Courts. By section 23 of Ordinance 10 of 1843 and section 15 of Ordinance 11 of 1843 the Judges of the Supreme Court were given similar powers with reference to Courts of Requests. Subsequently, by Ordinance 8 of 1846, the operation of those rules was made contingent on their enactment by the Legislature. Most of the old Ordinances regulating procedure have now been repealed by the Civil Procedure Code which, compiled after the model of the Indian Code of Civil Procedure, was brought into operation as Ordinance 2 of 1889 (*a*)

Action and Cause of Action.

Action defined

An action is defined in the Civil Procedure Code as a proceeding for the prevention or redress of a wrong (*b*). This definition is later extended to include every application to a Court for relief or remedy obtainable through the exercise of a Court's power or authority or otherwise to invite its interference (*c*). The term *action* is not a fit one to describe *insolvency* proceedings (*d*). It would include, however, proceedings

(*a*) Walter Pereira 133.
(*b*) Section 5.
(*c*) Section 6.
(*d*) In *re* the Insolvency of Abdul Aziz I. N. L. R. 197.

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

to reduce the assessment of rates by the Municipal Council (e); for the definition of boundaries (f); for the appointment of a guardian *ad litem* (g). The term also includes *quia timet* actions, *i.e.*, actions for the prevention of threatened wrongs (h). An application made to a Court in the course of and incidental to an action, in summary procedure is regarded by the Code as being itself an action (x).

Cause of action defined

Every action presupposes a *cause of action* which term is also defined as the wrong for the prevention or redress of which an action may be brought and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury (i). The word *includes* has the meaning given to it in the Ordinance as well as its popular meaning, so that the definition is not exhaustive of the list of wrongs (j). The word *obligation* occurring in the definition is to be understood not in the narrower sense in which a parol promise to pay a promissory note and a mortgage given for the same debt may be described as three different obligations—arising from the parol promise, promissory note and the mortgage—but in the wider sense of a liability to pay the one sum of money stipulated (k). The denial of a right does not mean a mere verbal denial (l). A failure to perform a contract is a wrong within the meaning of the definition of the expression *cause of action* (m). The term "cause of action" ought not to be construed as if it were identical with the transaction out of which the right to relief arises (n). A partition action at its institution is not an action founded upon a cause of action as defined in section 5 (o).

Court

An action is an application to a *Court* for relief or remedy (p). A Court means a Judge or body of Judges empowered by law to act judicially when such Judge or

(e) Jalaldeen vs. The Colombo Municipal Council 4 A. C. R. 131
(f) Maria vs. Fernando 17 N. L. R. 65.
(g) Raman Chetty vs. Abdul Razak 7 N. L. R. 345.
(h) Soysa vs. Sanmugam 10 N. L. R. 355; Fernando vs. Silva 1 S. C. C. 27 F. B.
(i) Section 5.
(j) Ludovici vs. Nicholas Appu 4 N. L. R. 12
(x) Subramaniam Chetty vs. Soysa 25 N. L. R. 344.
(k) Croos vs. Gunawardene Hamine 5 N. L. R. 259.
(l) Lowe vs. Fernando 16 N. L. R. 398.
(m) Pless Pol vs. Lady de Soysa 9 N. R. L. 316.
(n) Abeydeera vs. Hami 4 Bal Notes 89.
(o) Abeyesundere vs. Babuna 6 C. L. Rec. 92.
(p) Section 6.

body of Judges is acting judicially. Thus a District Judge who has ceased to hold office cannot sign the formal decree consequent on a judgment given by him while in office (q). A judgment written by a Commissioner of Requests after he became *functus officio* and delivered by his successor in office with the consent of the parties is bad notwithstanding such consent (r). A District Judge cannot act officially except in Court (s).

The Plaint and its Requisites.

How and when an action is instituted.

An action is instituted by the filing in Court of a duly stamped plaint (t) written in English on good and suitable paper and containing the particulars required in section 40. The day on which the action is instituted is the day on which the plaint is filed. If the plaint is rejected and a fresh plaint has to be filed, the date of institution is the day on which the new plaint is presented (u). Where a plaint returned to the plaintiff for want of jurisdiction is presented subsequently to the right Court, the plaint is not to be deemed to have been presented from the date of the earlier presentation to the wrong Court (v). When an amended plaint is filed, it is considered for all purposes as relating back to the date of the original plaint (w). For the purposes of prescription a suit must be considered to have commenced from the date on which the plaint was originally presented (x). If certain conditions are not fulfilled, the Court may refuse to entertain the plaint but may return it for amendment. In such a case the Judge must make an order specifying the fault or defect constituting the ground of the return. Such endorsement must be signed by the Judge and filed of record (y). Once a Court accepts a plaint it has no power either to reject it or return it for amendment (z).

The Plaint

Strict pleadings are not now insisted on (a) but the plaintiff must clearly set out his title (b). If the plaintiff alleges that the estate once in another has now

(q) Davidson vs. Silva 2 S. C. R. 10.
(r) Tikiri Menika vs. Deonis 7 N. L. R. 337.
(s) Suppramaniam Chetty vs. Curera 3 N. L. R. 193.
(t) Section 39.
(u) Endoris vs. Hamine 3 N. L. R. 97.
(v) Mudiyanse vs. Siriya 23 N. L. R. 285.
(w) Lucyhamy vs. Hamidu 26 N. L. R. 41.
(x) Cave & Co., vs. Erskine 6 N. L. R. 338.
(y) Endoris vs. Hamine 3 N. L. R. 97.
(z) Mohideen vs. Mohamedu 7 C. L. Rec. 29.
(a) Emalis Hamy vs. Kannangara 1 Bal. 11.
(b) Kanapadian vs. Pietersz 9 S. C. C. 185 F. B.

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

vested in him, he must give the name of his vendor and the date of the conveyance (*c*). If the claim is, on the face of it, prescribed, plaintiff must clearly show circumstances which would defeat a plea of prescription (*d*). Every plaint must set out facts indicating that the Court has jurisdiction to try the case. When the plaint does not allege anything on the face of it disclosing the jurisdiction of the Court, and the Court by an oversight has omitted to notice the defect and accepted the plaint, it ought, when its attention is directed to the point by the defendant, either to reject the plaint or return it for amendment (*e*). When a plaint requires amendment the Judge ought not to take the case off the file but to state his opinion that it requires amendment and give leave to amend (*f*). The plaintiff, if he sues in a representative capacity, *e.g.* as executor, must show that such character has accrued to him, *e.g.*, that probate has been granted (*g*). The plaint must also clearly set out the defendant's interest and liability to be sued (*h*). The plaint must be signed by a proctor or by the plaintiff himself if he is unrepresented (*i*) The Court, may in certain circumstances, reject the plaint but the plaintiff is not thereby precluded from bringing a fresh action on the same cause of action. A plaint, once accepted, cannot be taken off the file without notice to the plaintiff (*j*). Nor can it be returned for amendment but the Court has power *ex mero motu* to amend the plaint (*k*). The reception of a plaint is a tacit waiver of the terms of section 35—misjoinder of causes of action without leave of Court—(*l*). Where a plaint has been filed in a Court not having jurisdiction it may be returned for presentation at the proper Court (*m*). The practice in our Courts, however, is usually to make an order dismissing the action (*n*). But where two Courts have concurrent jurisdiction with regard to the subject matter of the action, one of them

(*c*) Abubaker vs. Perera 2 C. L. R. 170 F. B.
(*d*) Section 44.
(*e*) Avva Umma vs. Casinader 24 N. L. R. 199.
(*f*) Sosia vs. Sepohamy 3 A. C. R. 93.
(*g*) Section 42.
(*h*) Section 43.
(*i*) Section 46.
(*j*) Fernando vs. Waas 9 S. C. C. 189 ; Mohideen vs. Gnanapragasam 14 N. R. L. 33.
(*k*) Fernando vs. Soysa 2 N. L. R. 40.
(*l*) Appuhamy vs. Dionis 12 N. L. R. 382.
(*m*) Werthelis vs. Daniel Appuhamy 12 N. L. R. 196.
(*n*) Chinnadurai vs Rajasuriya 32 N. L. R. 86.

cannot, on grounds of convenience, refuse to entertain the plaint, and refer it to the other (*o*). No objection can be taken by a defendant in his answer on the ground of the insufficiency of the stamp on the plaint. That is a matter for the Crown (*p*).

Plaintiff's documents must be filed.

If the plaintiff sues on a document in his possession he must file the document with his plaint (*q*). Where a document which has been filed with the plaint is referred to in the course of the evidence and considered by the Judge, it must be deemed to have been admitted in evidence and no objection can afterwards be raised against its reception on the ground that it has not been properly stamped (*r*). If the plaintiff relies on other documents as evidence he must file a list of such documents (*s*). Such a list should state the names of the parties, dates and nature of the instruments and other particulars sufficient to enable the defendant to understand what is going to be proved. Otherwise the documents referred to in the list will not be admissible as evidence (*t*). Where, however, the defendant is not prejudiced by the omission to list a document, the Court is given a discretion to brush aside technicalities and allow the document to be tendered in evidence (*u*). Documents not listed may, however, be produced for cross-examination of defendant's witnesses or in answer to any case set up by the defendant or be handed to a witness merely to refresh his memory (*v*).

Joinder of Parties.

Joinder of plaintiffs.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly, severally or in the alternative *in respect of the same cause of action* (*w*). It is noteworthy that the Indian Code has been amended to read "out of the same act or transaction" instead of "the same cause of action." The words *cause of action* which appeared in the old section were omitted because these words gave

(*o*) Sidapper vs. Appuhamy 3 Weer 91.
(*p*) Jayawickreme vs. Amarasuriya 17 N. R. L. 171.
(*q*) Section 50.
(*r*) Adaicappa Chetty vs. Thomas Cook & Son 31 N. L. R. 385.
(*s*) Section 51.
(*t*) Abubaker vs. Perera 2. C. L. R. 170. F.B.
(*u*) Allis vs. Babunhamy 2 N. L. R. 198.
(*v*) Section 54.
(*w*) Section 11.

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

rise to a diversity of judicial opinions owing to the different interpretations placed on them by the several High Courts (x). Where two persons, who were arrested and charged together with the same offence and were acquitted, sued in one action for damages for malicious arrest and malicious prosecution, the Supreme Court held that the cause of action according to each was *separate and distinct*; that the two causes of action should not have been combined and that the suit was bad for misjoinder of causes of action (y).

When co-owners must be joined.

One or more joint tenants or tenants in common may maintain an action in respect of his or their undivided shares in the property in any case where such an action might be maintained by all (z). Thus two or more co-owners may join as plaintiffs in the same action against another co-owner who has taken the whole rents and profits of the jointly owned land though each of the plaintiffs had a different title to a share of the land (a). It is not an inflexible rule that in every action between co-sharers all the other co-sharers must be joined as parties to the action. On the contrary, wherever possible, that ought to be avoided (b). There is no rule of law that a co-owner cannot maintain an action against another co-owner without joining all the other co-owners of the land. No doubt, in many cases, they are proper parties and would be joined on an application being made for the purpose. In some cases they may even be parties whose presence before the Court would be necessary in order to enable the Court to adjudicate effectually and completely upon all the questions involved in the action in which case the Court may add them of its own motion under section 18, but, if they are not added, the Court should, in accordance with the provisions of section 17, deal with the matter in controversy so far as regards the rights of the parties actually before it (c). But in an action between two or more co-owners, as a general rule, all the co-owners having an interest in the land should be made parties to the action unless the matter in dispute can be fitly decided without endangering or interfering

(x) Sarkar's Civil Procedure Code (Indian) 863.
(y) Sinno Appuhamy vs. Marthelis Rosa 9 N. L. R. 68.
(z) Section 12.
(a) Didi vs. Didi 13 N. L. R. 181.
(b) Silva vs. Silva 1 Br. 340.
(c) Heenhamy vs. Mohotihamy 19 N. L. R. 235.F.B.

with the rights of others (d). Where a judgment must involve a pronouncement as to the character of the common property all the co-owners must be joined (e). One of a number of co-owners cannot sue one or more of his co-owners either for possession or for declaration of title or in ejectment without making all the co-owners parties to the action (f). Where, however, a joint owner sues a trespasser he need not join the other joint owners as parties (g).

Where an action has been instituted in the name of the wrong person as plaintiff, the Court can, at any stage of the action, substitute, with such person's consent the proper person as plaintiff (h). The Court, however, must first be satisfied that the mistake was a *bona fide* one (i). Where the incumbent of a Buddhist temple instituted an action on behalf of the temple, the Court allowed the trustee to be substituted in place of the incumbent (j).

Joinder of defendants.

All persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative *in respect of the same cause of action* (k). Here too it may be noted that the Indian Code differs from ours in that, there, the right to relief arises from the same act or transaction. The same cause of action is not necessarily the same act or transaction. Where several dogs belonging to various people had killed some sheep and the owner of the sheep brought one action joining as defendants the several owners of the dogs, the Supreme Court held that the defendants should not have been sued in one action (l). Where the plaintiff claimed the entirety of a block of land on one title and complained that the defendants were severally in possession of separate and defined portions of it, it would be a misjoinder of defendants and causes of action to institute one action against all the defendants for the recovery of the whole block unless it could be shown that the defendants were acting in concert in depriving the plaintiff of the possession

(d) Ranasinghe vs. Cooray 2 Br. 20; Sura vs. Fernando 1 A. C. R. 95.
(e) Perera vs. Fernando 2 Lead 18 F. B.
(f) Pavisohamy vs. Leana Appu 7 S.C.C. 190 F. B.
(g) Geeta vs. Fernando 4 Bal 100.
(h) Section 13.
(i) Kandasamy vs. Sinnatamby 26 N. L. R. 63.
(j) Somitare vs. Jasin 1 A. C. R. 167.
(k) Section 14
(l) Aiyampillai vs. Kurrukel 16 N. L. R. 231.

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

of the entire block. "The lots," said Wood-Renton A.C.J., "are divided. Each group of defendants disputes the plaintiff's title only with regard to the lot of which it is itself in possession. His cause of action against each is its denial of his title to that lot and to that lot alone. He has therefore a different cause of action against each group. If we uphold the view taken by the learned District Judge I see no reason why a plaintiff who has inherited from his father a number of distinct lands within the same province should not sue in one and the same action any number of persons in possession of them merely by reason of the fact that they descend to him from one ancestor" (*m*). In deciding any question of misjoinder, however, the plaintiff's case must be taken as put by him (*n*). In an earlier case two plaintiffs who claimed to be entitled to two distinct lots A and B jointly brought an action for declaration of title and ejectment and damages against several defendants of whom the ninth and tenth were alleged to be in possession of lot B and the others each to distinct lots of A. The defendants objected (1) that there was a misjoinder of plaintiffs as they were not owners in common of these lots; (2) that there was a misjoinder of defendants in that the defendants were not jointly in possession of all the lots; (3) that there was a misjoinder of causes of action as possession was taken of the lots at various times. The Supreme Court held that the first objection was sound but the second and third were not. Plaintiff's cause of action against all the defendants was one, viz. to recover his land. The defendants may set up what defences they please but the plaintiff is entitled to recover possession of his land as a whole and not in fragments (*o*).

Joinder of Causes of Action.

Joinder of causes of action.

In the London and Lancashire Fire Insurance Co. vs. The P. and O. Co. and the Ceylon Wharfage Co. (*p*), the plaintiff, an Insurance Co. sued the two defendant Companies to recover the value of sugar lost in the Colombo harbour consequent on a collision between the

(*m*) Lowe vs. Fernando 16 N. L. R. 398 F. B.

(*n*) Gunawardene vs. Juwanis Hamy 1 C. W. R. 139. Lowe vs. Fernando distinguished.

(*o*) Jayamaha vs. Singappu 13 N. L. R. 348

(*p*) 18 N. L. R. 15. F. B.

barge belonging to the second defendant Company and the steamer belonging to the first defendant Company from which the sugar was transferred to be conveyed ashore. The plaint averred:—

Para 9. The loss of the said bags of sugar was due to the negligence of the servants of the defendants jointly, or to the negligence of the servants of one or other of the defendants and, if the said loss was not caused by the joint negligence of the defendants' servants, the plaintiff, being unable to discover which of the defendants was liable for the said loss, sues in the alternative.

Para 10. As a separate and alternative cause of action against the second defendant Company, the plaintiff says that the second defendant Company as a common carrier received the said bags of sugar to be carried from the s.s. Delta to the shore and that the said bags were lost in the course of transit while in the second defendant's custody and the second defendant failed to deliver the same.

Pereira and de Sampayo J.J. held that the two defendants were rightly joined in respect of the first cause of action. Pereira and Ennis J.J. held, de Sampayo J. dissenting, that the joinder in this action of the claim against the second defendant on a different cause of action was not a misjoinder of causes of action. "Section 36, said Pereira J., provides that the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly. It has been said that the word *same* here refers to a person who has been already made a defendant in an action. I do not think so. The word has to be understood with reference to the expression "several causes of action." It is merely intended to imply the *sameness*, so to say, of the defendants on the different causes of action referred to in the section. In the present case the plaintiffs have two causes of action against the second defendant Company. They have, therefore, two causes of action against the same defendant and if, in the place of the second defendant Company, there had been a group of individuals named in the plaint, it could have been said that the plaintiff had two causes of action against the same defendants jointly, so that section 36 has no reference to any particular number of defendants already named in a particular action. It stands by itself and may be applied to any one or more defendants in an action who are sought to be made liable alternatively to

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

any other defendant in the same action. In other words section 14 and section 36 may be combined and allowed simultaneous operation in any case." And Ennis J. said, "The Ceylon Code must be read in the light of the illustration to section 35. The Indian Code has not that illustration." De Sampayo J., however, dissented. "I think," he said, "it is correct to say that the general rule of law is that a plaintiff must bring one action for one cause of action except so far as it is otherwise provided. Now when section 36 permitted the joinder of several causes of action against the same defendant or the same defendants jointly, did it also permit a plaintiff to unite distinct causes of action against separate defendants? To my mind it is impossible to say so. It is clear that the section only recognizes the joinder of several causes of action against the defendant, if there be one defendant, or against the defendants jointly if there be several defendants. This seems to be the construction put by the Courts of India on the corresponding section 45 of the old Indian Procedure Code. The result of all the authorities is that *joint interest* is a condition precedent to the joinder of several causes of action against several defendants, the test being whether there is a community of interest in the causes to be determined. By reason of the examples given in section 35 of our Civil Procedure Code, there is one instance with us in which two causes of action against two separate defendants may be joined but that is confined to the case of a suit relating to immovable property and not to the causes therein specified. But this does not justify the reading of section 36 in any other sense than the above indicated." Later decisions seem to have been based on the lines indicated by de Sampayo J. In Kanagasabapathy vs Kanagasabai (q) it was held that the effect of section 36 is to enable the plaintiff to join several causes of action against the defendant, if there be one defendant, or against the defendants, if there are several, provided that, in the latter case, the several defendants are jointly liable.

Defendants acting in Concert

In De Croos vs Saiya (r) the plaintiff sued the defendants claiming a certain allotment of land. It appeared that the plaintiff and his predecessors in title were in possession for a considerable time when the defendants who owned land adjoining it cut the fence

(q) 25 N. L. R. 173. See also Sadler vs Great Western Railway 1896 A.C. 450.
(r) C. W. R. 88.

which formed the boundary and erected a fence taking it into their own land. On objection being taken that plaintiff's action was wrongly constituted inasmuch as the defendants did not own the adjoining land in common but possessed it in separate blocks, and that there was a misjoinder of causes of action, the Supreme Court held that the question was not whether the defendants owned the adjoining land in common or in severalty but whether the act complained of was done by them in concert. In Fernando vs Palaniappa Chetty (s) where, in an action on a promissory note, the defendant by false representations made to plaintiff's proctor had got the claim against him waived and the plaintiff sued him to recover damages caused to him by the defendant's fraudulent conduct in the previous case, the Supreme Court allowed plaintiff to add his proctor as a defendant on the ground that the relief claimed against both defendants arose from the same cause of action.

Parties liable on any one contract may be joined.

The plaintiff may, at his option, join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract including parties to Bills of Exchange and promissory notes (t). The holder of a joint promissory note cannot in one action sue both the surviving maker and the legal representative of the estate of the deceased maker (u). But he may, instead of suing the survivor only on the note, sue the survivor and the legal representative of the deceased on the contract of loan (v). In Odris vs Baby Nona (w) the defendants were the heirs of a deceased person whose estate was being administered by the secretary of the District Court. For the purpose of defraying the expenses of the testamentary case certain property of the estate was ordered to be sold by the administrator and, in order to save the property from being sold, the first defendant, on behalf of herself and her then minor daughter, the second defendant, requested the plaintiff to pay the amount required, namely 400 rupees, promising that the amount would be settled by the payment of 200 rupees by the first defendant and 200 rupees by the second defendant. The plaintiff stayed the sale of the property by the payment of 400 rupees and sued the defendants in one action for the

(s) 28 N. L. R. 273.
(t) Section 15.
(u) Annamalai Chetty vs. Menika 20 N. L. R. 407 F. B.
(v) Vytialingam vs Karunakarar 22 N. L. R. 343.
(w) 3. C. A. C. 98.

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

amount. The Supreme Court held that the transaction must be construed as one contract upon which the two defendants were severally liable and that they were rightly joined in one action.

Numerous parties with common interest.

Where numerous parties have a common interest in bringing or defending an action, one or more of them may act on behalf of all (*x*). But such party must first obtain the permission of Court and notice must be given to all the parties concerned. The decree will bind the persons not actually parties to the action only in so far as their common interest with the actual parties to the action is concerned (*y*). A voluntary association cannot by agreement between its members give any individual the right to sue on their behalf. The permission of the Court must be obtained (*z*). The application for the appointment of certain persons to sue or to be sued in a representative capacity under section 16 need not proceed from those persons themselves. It may be made by persons seeking to sue them and even in the face of the opposition of a person sought to be made representative. It is not necessary in an application for this purpose to specify by name all the persons to be represented. It is sufficient to describe them generally and to leave them, if necessary, to be subsequently ascertained (*a*).

Misjoinder and non-joinder of parties.

No action can be defeated by reason of the misjoinder or non-joinder of parties (*b*). An objection to non-joinder or misjoinder should be taken at the earliest possible opportunity. Otherwise such objection will be considered to have been waived (*c*). The joinder by two persons in one action of claims in respect of separate lands to which each is separately entitled is obnoxious to section 17 but such irregularity may be waived by the defendant (*d*). This decision, however, is open to doubt and, as a matter of fact, the Judges who made the order did so with hesitation. "It is a question," said Pereira J., "whether contravention of the provision cited above of section 17 is not absolutely fatal to an action. Having given the matter my best consideration I agree, not without much hesitation, with my brother Ennis that in

(*x*) Section 16.
(*y*) Jayawardene vs. The Baptist Missionary Society 25 N. L. R. 97.
(*z*) Read vs. Samsudin 1 N. L. R. 292.
(*a*) Ramen Chetty vs. Mackwood Ltd. 24 N. L. R. 73.
(*b*) Section 17.
(*c*) Section 22. John Sinno vs. Julis Appu 10 N. L. R. 351
(*d*) Madar Saibo vs. Sirajudeen, 17 N. L. R. 97

the circumstances of the present case, the irregularity was one that might be waived by the defendant and that it has practically been waived. No objection based on section 17 to the constitution of the action was ever taken." An objection to misjoinder of causes of action not having been taken at the trial cannot be taken in appeal (*e*) nor even after the case is closed (*f*). A defendant pleading non-joinder must state the name of the party to be joined (*g*). The provisions of section 17 to the effect that no action shall be defeated by reason of the non-joinder of parties means that, when the non-joinder is apparent, in the face of which the Court cannot proceed, the Court, instead of dismissing the action, should allow the plaintiff to add parties if application is made in that behalf (*h*). Where two out of three owners of a *panguwa* sued their tenant for their share of the commuted payment due in respect thereof, it was held that there was a non-joinder of plaintiffs and, in the absence of an application to add the remaining co-owner, the action was rightly dismissed(*i*). Where one judgment debtor who was jointly and severally liable with others paid the whole claim and subsequently sued his co-debtors for contribution in one action, it was held that his cause of action against each defendant was separate and that there was a mis-joinder of parties and causes of action (*j*). If the consent of any one who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint (*k*). Thus a mortgagee may make his co-mortgagee a defendant if he refuses to join as plaintiff (*l*). But in the case of a debt due to several creditors jointly, the debtor cannot be sued piecemeal but all the creditors must join in one action in spite of the provisions of section 17 (*m*).

Joint Creditors.

Parties may be Added by Court.

Court may strike out or add parties.

The Court may, on or before the hearing, order the name of a person improperly joined whether as plaintiff or defendant to be struck out. This can be done, how-

(*e*) Sado vs. Nonababa 11 N. L. R. 162.
(*f*) Fernando vs. Perera 21 N. L. R. 94.
(*g*) Ponnamma vs. Kasipathi Pulle 4 N. L. R. 261
(*h*) Ukku Banda vs. Lapaya 2 C. L. R. 38.
(*i*) Ukku Banda vs. Lapaya 2 C. L. R. 38.
(*j*) Silva vs. Punchirala 3 C. L. Rec 67.
(*k*) Section 17.
(*l*) Ran Menika vs. Vanderput 2 C. L. R. 138.
(*m*) Ukku Banda vs. Lapaya 2 C. L. R. 38.

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

ever, only on the application of either party. And the Court can, where necessary, either with or without such application order that any plaintiff should be made a defendant or that any defendant should be made plaintiff or that any party should be joined whose presence is necessary in order to enable the Court to adjudicate fully upon the matter at issue. Every order for such amendment must state the facts and the reason for the order (*n*). In applications to add parties the party applying should first obtain *ex parte* an order giving leave to serve a notice on the person he seeks to bring in, after which the question whether such person ought to be joined may be considered in the presence of the parties to the action and of such person (*o*). Where an order is properly made to add new parties as defendants, the form of such order should be one directing the plaint and the summons to be amended by the addition of their names as defendants and directing the plaintiff to cause those parties to be duly served with copies of the summons and of the plaint further amended as plaintiff may be advised within a certain time from the date of the order. It is irregular to order the case to be taken off the trial roll for that purpose (*p*). Before a third person can be added as a party he must show (1) that he has an interest in the litigation and that he would be prejudiced by a judgment being entered either for plaintiff or defendant, (2) that his admission would prevent the same question being tried twice over (3) that the subject matter of the action is the same as the subject claimed by him. A party claiming adversely to both plaintiff and defendant ought not, as a general rule, to be admitted (*q*). Since the Civil Procedure Code came into operation, intervention in a pending action can be permitted only in pursuance of, and in conformity with, the provisions of section 18 (*r*). Section 18 of the Civil Procedure Code corresponds with the language of Rule 2, Order 16 of the Supreme Court of England and, in the interpretation of that section, effect must be given to the principle that, wherever the Court can see in the transaction brought before it that the rights of some of the parties may or will be probably affected so that under the former system of law there might have been

(*n*) Section 18.
(*o*) Banda vs. Dharmaratne 24 N. L. R. 210
(*p*) Wiraratne vs. Ensohamy 2 C. L. R. 157.
(*q*) Appuhamy vs. Lokuhamy 2 C. L. R. 57.
(*r*) Punchirala vs. Punchirala 2 C. L. R. 84. See also Templar vs. Seneviratne 2 C. L. R. 70. F. B.

several actions brought in respect of the same transaction, the Court shall have power to bring in all the parties before it and determine all the rights by one trial in order that the costs of litigation may be diminished as much as possible (*s*). The policy of the Civil Procedure Code is to avoid a multiplicity of actions and, therefore, where the facts brought to the notice of the Court before it has finally disposed of the action are such that the addition of a person would tend effectually to deal with all the questions involved, the Court should not put difficulties in the way of parties to the action who seek to add such persons but should stay its hand and afford the party an opportunity to add such persons as may be necessary to determine finally all questions arising in the action (*t*). But where an action has been commenced against the wrong defendant, the matter connot be put right by dropping out the defendant and suing an entirely new person but the proper course is for plaintiff to drop the action which has been wrongly instituted, and commence a new action against the proper person (*u*).

In a partition action the Court can use the power given to it by section 18 to bring in all the owners of the land sought to be partitioned (*v*). Under the Roman Dutch Law it was not necessary that all the parties to a contract should join in an action for damages arising out of a breach of it. The defendant may apply to Court under this section to add the other party to the contract as defendant and thus save himself the expense of a second action (*w*). Where a person is joined as a party to an action by the Court, it has no power to strike him out afterwards (*x*).

Intervention in pending action.

No person can intervene in a pending action except in conformity with the provisions of section 18. No person can be added as plaintiff or the *next friend* of a plaintiff without his consent. An exception is made in cases where, under section 16, a person on whose behalf an action is instituted or defended may apply to be made a party. All added parties must then be served with summons; and a copy of the plaint with the necessary amendments must be served on all the

(*s*) Meedin vs. Banda 1 N. L. R. 51 F. B.
(*t*) Banda vs. Dharmaratne 24 N. L. R. 210.
(*u*) Kira vs. Kira 3 C. L. Rec 73
(*v*) Peris vs. Perera 1 N. L. R. 362 F. B.
(*w*) Fernando vs. Mohamedu 4 Lead 2.
(*x*) Bandiya vs. Kiriya 2 C. W. R. 115.

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

defendants, added as well as original (*y*). Where there are more than one plaintiffs or defendants, any one or more of them may be authorized to appear and act on behalf of the others. Such authority must be in writing signed by the party giving it and must be filed in Court (*z*).

Who Can Appear for a Party.

Agents of parties.

A party need not in every case appear in person. He can act by his recognized agent or proctor (*a*). A recognized agent is a person holding a general power of attorney or the manager of a business where the principal is outside the jurisdiction of the Court (*b*). A minor holding a power of attorney for his principal abroad can act as his agent for some purposes (*c*). The proctor must be the proctor on the record. There cannot be two proctors on the record and one proctor cannot act for another (*d*). Where a proctor under the general authority given to him by a proxy enters into a compromise with regard to an action, such a compromise is binding on his client. The fact that there is a limitation of that apparent authority does not affect the authority to compromise unless that limitation is communicated to the other side (*e*). But where a proctor moves to draw money deposited to the credit of his client, the latter's consent to the motion must be proved apart from the general authority given in the proxy (*f*). The appointment of a proctor must be in writing filed in Court and must contain an address for service of process (*g*). It cannot be revoked except with leave of Court and with notice to the proctor (*h*). The Court has a real discretion in this matter (*i*). A proxy in favour of several proctors trading in partnership is good (*j*). The ommission of a proctor's name in the proxy can be rectified by the Court (*k*). Where a proxy

(*y*) Section 21.
(*z*) Section 23.
(*a*) Section 24.
(*b*) Section 25.
(*c*) Somasunderam vs. Ibrahim Saibo 1 N. L. R. 297.
(*d*) Letchemanan vs. Christian 4 N. L. R. 323.
(*e*) Fernando vs. Sirigoris Appu 26 N. L. R. 469.
(*f*) Gunawardene vs. Perera 1 S. C. R. 78.
(*g*) Treaby vs. Bawa 7 N. L. R. 22; Times of Ceylon vs. Low 16 N. L. R. 434.
(*h*) Section 27.
(*i*) Fernando vs. Matthew 15 N. L. R. 88.
(*j*) Times of Ceylon vs. Low 16 N. L. R. 434.
(*k*) Treaby vs. Bawa 7 N. L. R. 22.

has not been signed by the party the omission can be rectified at a later stage in the action (*l*). The proxy continues in force till the death of the client or proctor or till the latter is removed, suspended or otherwise becomes incapable of acting or till the termination of the action (*m*). Where the proctor dies or becomes incapable of acting, the case will be laid by for thirty days after notice has been given to appoint another (*n*).

Warrant of Attorney to Confess Judgment.

To whom it may be given

A warrant or power of attorney to confess judgment may be given by any person to a proctor. There must be present at its execution a proctor expressly named by him and attending at his request to inform him of the nature and effect of such warrant before it is executed. The proctor must sign it as a witness thereby declaring himself to be the proctor for the person executing it and signing as such. He must further declare that he read and explained the contents of the warrant to the person executing it and that such person appeared to understand its nature and effect. No warrant which is not so executed shall be rendered valid by proof that the person executing it did in fact understand its nature and effect or was fully informed of the same (*o*). Every such warrant or a copy of it must be filed in Court within twenty one days of its execution. Otherwise it will be deemed fraudulent and void. If it is subject to any defeasance or condition, such condition must be written on the warrant before it is filed. Otherwise the warrant itself will be void (*p*).

Object of the Warrant.

A warrant of attorney to confess judgment must be executed by the party himself. It cannot be done by his agent even when the agent has express authority for its execution (*q*). The object of a warrant is to enable the plaintiff to obtain judgment and to put the document in the hands of any proctor for the purpose (*r*). It is generally addressed to Proctor X or any other proctor of the Supreme Court. But where the latter words are omitted, only the proctor named can act under

(*l*) Tillekeratne vs. Wijesinghe 11. N. L. R. 270.
(*m*) Section 27.
(*n*) Section 28.
(*o*) Section 31.
(*p*) Section 32.
(*q*) National Bank of India vs. Gill 32. N. L. R. 15.
(*r*) Ramanathan vs. Don Carolis 19 N. L. R. 378.

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

it (*s*). A warrant addressed to two proctors practising in partnership is given to them jointly, and the death of one terminates the authority of the other (*t*). A warrant of attorney to confess judgment on a mortgage bond includes authority to consent to a money decree being entered on the bond (*u*). Consenting to a judgment on a warrant of attorney for a larger sum than is mentioned in the warrant does not render the judgment a nullity. It is only an irregularity that is capable of amendment (*v*). Where judgment has been entered in pursuance of a warrant of attorney to confess judgment, proceedings by way of *restitutio in integrum* will not be entertained to set it aside except in case of fraud or a fundamental departure from the terms of section 31 (*w*). A Court has no jurisdiction to set aside its own decree entered of consent in pursuance of a warrant of attorney to confess judgment (*x*).

The Jurisdiction of the Court.

The Court of institution of an action.

Subject to the pecuniary or other limitations prescribed by law, the jurisdiction of the Court in which an action may be instituted is determined by any one of the following:—

(a) The place of residence of the defendant.

(b) The situation, in whole or in part, of the land which is the subject matter of the action.

(c) The place where the cause of action arises. Or

(d) Where the contract sought to be enforced was made (*y*).

Residence of defendant.

A person may be said to reside where he has his family establishment and home (*z*). Thus an action on a promissory note made in Kurunagalla was held to have been rightly brought in the Panadure Court against a person who worked in Kurunagalla but whose wife and children whom he occasionally visited resided in Mora-

(*s*) Garvin vs. Abeywardene 24 N. L. R. 382.
(*t*) Garvin vs. Abeywardene 24 N. L. R. 382.
(*u*) De Silva vs. Vaduganathan Chetty 28 N. L. R. 337.
(*v*) De Silva vs. Vaduganathan Chetty 28 N. L. R. 337.
(*w*) Suppramaniam Chetty vs. Naidu 26 N. L. R. 467.
(*x*) Van Twest vs. Goonewardene 32 N. L. R. 220.
(*y*) Section 9.
(*z*) A man's residence is not dependent altogether on his physical occupation of any house. In re Goonewardene 24 N. L. R. 431.

tuwa (*a*). The place where a party defendant carries on business is not a place where he resides so as to give jurisdiction to the Court within whose local limits such place is situated (*b*). Where the question of jurisdiction depends only on the question of residence of the defendants, a District Court has no jurisdiction with regard to some of the defendants who reside outside the limits of the district although they are partners of the other defendants residing within such limits. Under the above circumstances the action should be proceeded with and judgment pronounced as between the plaintiff and the defendants within the jurisdiction (*c*). In divorce cases the action may be brought in the Court within whose jurisdiction either the plaintiff or the defendant resides (*d*). The Courts of Ceylon, however, have no jurisdiction to decree a divorce *a vinculo matrimonii* between parties domiciled and married outside Ceylon (*e*).

Situation of land.

The mere fact that a land is situated within the jurisdiction of the Court does not necessarily give the Court jurisdiction to try a case unless the action is one brought in respect of the land. An action by a lessee, for example, to compel his lessor to accept rent due is not an action brought in respect of land (*f*).

Cause of action.

The term *cause of action* has been defined as meaning any wrong for the prevention or redress of which an action may be brought (*g*). As used in this section, it means the whole of the material facts which it is necessary for a plaintiff to allege and prove in order to entitle him to succeed. It has no relation whatever to the *defence* which may be set up by the defendant nor does it depend on the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour (*h*). The cause of action, in short, is the act on the part of the defendant which gives the plaintiff his cause of complaint (*i*). In an action by a trustee of a Buddhist

(*a*) Mendis vs. Perera 13 N. L. R. 41.
(*b*) Kanappa Chetty vs. Saibo 2 C. L. R. 37 F. B.
(*c*) Mohamedo Meera vs. Ossen Saibo (1905) Lem. 51.
(*d*) Section 608; Wright vs. Wright 9 N. L. R. 31.
(*e*) Le Mesurier vs. Le Mesurier 3 S. C. R. 12; 1 N. L. R. 160 (P. C.)
(*f*) Appuhamy vs. Gunasekera 2 Lead. 155.
(*g*) Section 5.
(*h*) Dingiri Menika vs. Punchi Mahatmaya 13 N. L. R. 59.
(*i*) Ranhami vs. Kiribami 7 N. L. R. 357.

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

Vihare against the lessee of certain lands to set aside a lease which had been executed within the jurisdiction of the District Court of Kandy on the ground that such lease was an improvident alienation, the Supreme Court held that the wrongful act of the defendant complained of was done in Kandy in accepting a lease from the incumbent which the latter had improperly executed for his own benefit and to the injury of the Vihare. The District Court of Kandy had, therefore, jurisdiction to try the case notwithstanding that the residence of the defendant and the site of the land were beyond its limits (*j*). Where the cause of action is divided and is in several districts, the action cannot be instituted in any one of the districts and the plaintiff should go to the district where the defendant resides or the contract is made. A Court has no jurisdiction to hear and determine an action by reason only of a part of the cause of action having arisen within its jurisdiction (*k*).

Breach of contract. Where it arises.

A failure to perform a contract is a *wrong* within the meaning of the definition of the expression *cause of action* (*l*). In a suit for damages for breach of contract, the cause of action consists of the making of the contract and of its breach at the place where it ought to be performed. In order to give a Court jurisdiction it is not necessary under the Code that the whole cause of action, namely both the agreement and the breach, should have taken place within its jurisdiction. In Pless Pol vs. Lady de Soysa (*m*) plaintiff and defendant entered into a contract at Colombo which was to be performed at Kandy. The plaintiff alleging a breach of the contract by the defendants sued them for damages in the District Court of Kandy. On objection being taken to the jurisdiction of the Court to entertain the action, the Supreme Court held that the District Court of Kandy had jurisdiction. In Lallyet vs. Negris (*n*) the defendants advertized hams for sale and the plaintiff by letter posted at Newera Eliya placed an order with them for three hams which were despatched by value payable post to Newera Eliya and duly received and paid for. The plaintiff alleging that the hams were unfit for human consumption sued defendants in the Court of Requests of

(*j*) Ranhami vs. Kirihami 7 N. L. R. 357.
(*k*) Ranatte vs. Sirimal 1 S. C. R. 57.
(*l*) Pless Pol vs. Lady de Soysa 9 N. L. R. 316
(*m*) 9 N. L. R. 316 affirmed by the Privy Council in 15 N. L. R. 57
(*n*) 14 N. L. R. 247

Newera Eliya to recover damages for breach of contract. It was held that the Court of Requests of Newera Eliya had no jurisdiction to try the case as the contract was made in Colombo. The indorsement in Negombo of a promissory note made in Chilaw does not give jurisdiction to the Courts at Negombo. The breach of contract is the omission to pay at Chilaw (*o*).

Creditor and debtor. Place of payment.

Roman Dutch Law requires that a creditor should seek out his debtor for payment (*p*). The rule of English law, however, is that it is the duty of a debtor to seek out and pay his creditor, if the latter is within the jurisdiction, at the creditor's residence or place of business. The debtor being under this obligation, the Court assumes that the parties, if they do not mention the place of payment, contracted on that basis (*q*). The English law with regard to the sale of goods is in force in Ceylon and part of that law is the obligation of the debtor to seek out and pay his creditor (*r*). The rule would also apply where the action arises on the obligation of a contract (*s*). Where in the case of a promissory note, however, no place of payment is mentioned, the jurisdiction of the Court will not depend on the place of residence of the creditor (*t*).

Transfer of an action

Any party to an action may, before trial and with due notice to the other party of his intention to do so, move for the transfer of a case from one Court to another (*u*). The reasons for which such transfer may be granted are laid down in section 46 of the Courts Ordinance 1 of 1889. They are:—

(1) That some question of law of unusual difficulty is likely to arise.

(2) That a fair and impartial trial cannot be had in any particular Court or place.

(3) That a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory trial of, or inquiry into the same.

(*o*) Narayan Chetty vs Fernando 2 C. L. R. 30
(*p*) Van Leeuwen Comm: 4, 40, 6
(*q*) Duval & Co. Ltd. vs Gans. (1904) 2 K. B. 685; Rein vs Stein (1892) 1 Q. B. 753
(*r*) Dias vs Constantine 20 N. L. R. 338
(*s*) Fernando vs Arunasalem Pillai 21 N. L. R. 126
(*t*) Saibo vs Senanayake 17 N. L. R. 479
(*u*) Section 10

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

(4) That it is expedient on any other ground. The application for such transfer must be made to the Supreme Court. Where the action might have been instituted in any one of several Courts, the balance of convenience only shall be deemed sufficient cause for the withdrawal and transfer to one of the alternative Courts.

Res judicata

Its object and effect

Every regular action must be framed so as to afford ground for a final decision upon the subjects in dispute and so to prevent further litigation upon them (v). It must include the whole of the claim which the plaintiff is entitled to make in respect of his cause of action. The plaintiff, however, may waive a portion of his claim in order to bring his action within the jurisdiction of a particular Court. Where a person omits to sue for, or deliberately waives, a portion of his claim he cannot afterwards sue in respect of it. And also where a person has more than one remedy in respect of his cause of action and omits to sue for any of such remedies, except with the leave of Court, he cannot afterwards sue for the remedy so omitted (w). For the purposes of this section an obligation and a collateral security for its performance are deemed to constitute but one cause of action. The obligation, however, must be incurred and the collateral security given by the same person or persons. The section will not apply where the obligation is incurred by one person and the security given by another (x).

Is it substantive law or procedure?

Sections 34, 207 and 406 constitute what is known as the law of *res judicata*. Whether the whole of our law of res judicata is contained in these three sections is a question on which there is a difference of opinion. In Samichi vs. Peris (y) Lascelles C. J. said "I see no reason for accepting the contention that the whole of our law of res judicata is to be found in sections 34, 207 and 406 of our Civil Procedure Code. The law of res judicata has its foundations in the civil law and was part of the common law of Ceylon before Civil Procedure Codes were dreamt of." Pereira J, however, preferred to follow the decision in Palaniappa vs. Gomis where Wendt J. said "Our law as to res judicata is to be found in section 207 of the Civil Procedure Code." "I am

(v) Section 33
(w) Section 34
(x) Palaniappa Chetty vs. Mortimer 25 N. L. R. 209.
(y) 16 N. L. R. 257 F. B.

prepared to concede," said Pereira J, "that possibly our whole law as to res judicata is not to be found in section 207 of the Civil Procedure Code. It may be that, under the authority of section 100 of the Evidence Ordinance, this provision may be supplemented by the English law but there is the authority of that very section of the Evidence Ordinance for saying that the English law cannot be brought in to qualify the provisions of section 207 of the Civil Procedure Code or to supersede any portion of it or to restrict or expand its scope or operation. What section 207 of the Civil Procedure Code enacts is that primarily all decrees shall be final between the parties. This is the *substantive* enactment in the section meaning that whatever is laid down as held or ordered within the four corners of a decree cannot be debated again in a subsequent action between the same parties. Then comes the explanation which says that every right of property or to relief of any kind which can be claimed or put in issue between the parties to an action upon the cause of action for which the action is brought cannot afterwards be made the subject of action between the same parties for the same cause. These concluding words are important and they must be given a meaning and their only meaning appears to be that, as regards the incidental and collateral matters mentioned in the explanation, the decree would be res judicata only when another action is attempted on the same cause of action."

Test of identity of causes of action

The test of the identity of causes of action does not depend on the relief for which the plaintiff prays. It depends rather upon the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour, upon every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. "A great criterion of the identity of causes of action," said Lascelles C. J., "is that the same evidence will maintain both actions" (z). "Section 34, said Lord Moulton (a), is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transactions. The first part of the clause makes it incumbent on a plaintiff to include the

(z) Allagasamy vs. The Kalutara Co., Ltd. 14 N. L. R. 262 quoting De Grey J. in Kitchen vs. Campbell 2 W. Bl. 827.
(a) Palaniappa Chetty vs. Saminathan 17 N. L. R. 56 (P.C.)

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

whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph, in their Lordships' opinion, is not intended to be an illustration of the foregoing provisions but a substantial enactment making an obligation and a collateral security for its performance—which would be otherwise two independent causes of action—one cause of action for the purposes of this section. Viewed thus it is evident that a claim on the bills and a claim for the amount found due under the award and for which payment was provided by the agreement are not the same cause of action but are, in truth, inconsistent and mutually exclusive causes of action. So long as the bills were outstanding there was no right of action except upon the bills." In this case the parties had settled their existing disputes by entering into a new agreement in terms of an award of arbitrators and, as a conditional discharge of that agreement, the defendants had granted two promissory notes of Rs. 14,000 each. Plaintiff sued on the Notes but his action was dismissed on the ground that the Notes were materially altered. Plaintiff thereupon brought this action to recover two sums of Rs. 11,566 and Rs. 771 which were included in the award and settled by the new agreement. In Bastian Silva vs. Mariano Silva, (*b*) plaintiff claiming title to a land of 9 acres sued the defendant in the Court of Requests to vindicate title to a house standing on the land. The defendant claimed to be entitled to an extent of three acres of the said land and alleged that he had built the house and resided there and acquired title by prescription. No issue was framed as to title to the land but the Commissioner found that the defendant had built the house and acquired prescriptive title thereto and dismissed the action. The plaintiff then brought this action to vindicate his title to the three acres claimed by the defendant. The defendant pleaded the judgment in the former suit as barring the present suit. It was held that the judgment in the previous suit could not be relied on as *res judicata* as the cause of action was not the same.

Plaintiff may split cause of action.

A plaintiff may, however, split his cause of action with the permission of Court. If a plaintiff has omitted a part of his claim he may, before that claim is heard, ask the leave of the Court to sue for the omitted remedy. So in a case where a plaintiff had instituted two actions

(*b*) 12 N. L. R. 181.

against the same defendant on the same promissory note one for interest and the other for the principal sum due on the Note, and when the action for interest came on for hearing he abandoned it with leave of Court and elected to proceed with the action for the principal sum only, this second action could be maintained under the exception contained in the words of the section (*c*).

Final judgment necessary to support res udicata.

Section 34 must be read together with section 207 which enacts that every decree, subject to appeal, is final as between the parties to the action. Every right of property, says the explanation to section 207, or to money or to damages or to relief of any kind which can be claimed, set up or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it is actually so claimed, set up or put in issue or not in the action, becomes on the passing of final decree in the action, a *res adjudicata* which cannot afterwards be made the subject of action for the same cause between the same parties. A right, however, which a litigant possesses without knowing or ever having known that he possessed it, can hardly be regarded as a portion of his claim (*d*). A judgment which is not a final decision between the parties cannot support a plea of res judicata (*e*). Neither a suspensory order nor an order striking a case off the roll is a decree within the meaning of section 207 (*f*). An action dismissed for want of title on the part of the plaintiff to sue does not operate as res judicata (*g*). Where there is no formal decree, a subsequent action on the same subject matter is not barred even though the plaintiff has applied for leave and been refused (*h*). This decision is, however, doubtful for it has been laid down in later cases that when a judge records and signs a plain and distinct order that he dismisses the plaintiff's action, the order is a sufficient formal expression of his adjudication upon the right claimed and is a decree within the meaning of sections 206 and 207 (*i*). Where the plaintiff who is ordered to give security under section 417 fails to do so and the action is dismissed, the dismissal will operate

(*c*) Raman Chetty vs. Carpan Kangany 1 S. C. R, 242.
(*d*) Allagasamy vs. The Kalutara Co., Ltd., 14 N. L. R. 262.
(*e*) Fernando vs. Menica 3 Bal 115.
(*f*) Tillekeratne vs. Marsel Appuhamy 4 Weer 38.
(*g*) Karunawardene vs. Wijesuriya 11 N. L. R. 220.
(*h*) Amarasuriya vs. Silva 5 Tam. 55.
(*i*) Perera vs. Fernando 17 N. L. R. 300.

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

as res judicata. The judgment is a decree inasmuch as it finally disposes of the suit, that is, of the plaintiff's right to maintain the action so long as it remains on the record (*j*).

Jurisdiction of the Court

To constitute a valid estoppel by res judicata it is not necessary that the Court giving the former decision should have had concurrent jurisdiction with the Court called upon to deliver the latter (*k*). But the decision relied on must be by a Court of competent jurisdiction (*l*). The Court must also be a recognized tribunal. The Maha Sanga Sabha, for instance, or the Great Council of Buddhists is not a recognized tribunal and its decisions have not the effect of res judicata (*m*).

Erroneous decision of law

A decision which is erroneous cannot have the force of res judicata in a subsequent proceeding for a different relief. When the cause of action is different but the matter has already been in controversy, then the estoppel ought to be limited to matters distinctly put in issue and determined previously and should further be restricted to questions of fact or of mixed fact and law. But as regards the law, an erroneous decision does not prevent the Court from deciding the same questions between the same parties in a subsequent suit according to law (*n*).

Matter in issue is the test

It is the matter in issue, not the subject matter of the action, that forms the essential test of res judicata. A party who has failed in one action cannot afterwards set up the same claim in another action between the same parties and support it on grounds which might have been put forward in the first action. Section 207 of the Civil Procedure Code makes a judgment conclusive not only as to matters actually pleaded, put in issue and tried and decided, but also as to matters which might and, according to the rules of the Code, ought to have been pleaded, tried and decided (*o*), and as to all the consequential remedies even though some of them were not prayed for. Even a judgment by consent has the full effect of res judicata between the parties. Its effect for this purpose is not weakened by any allegation that

(*j*) Palaniappa vs. Gomes 11 N. L. R. 285.
(*k*) Dingiri Menika vs. Punchi Mahatmaya 13 N. L. R. 59.
(*l*) Ibrahim Baay vs. Abdul Rahim 12 N. L. R. 177.
(*m*) Sumangala vs. Dhammarakkita 11 N. L. R. 360.
(*n*) Caspersz on Estoppel, sections 536-539 cited with approval in Katiritamby vs. Parupathi Pillai 23 N. L. R. 209.
(*o*) Baban Appu vs. Goonewardene 10 N. L. R. 167

it has been entered into under a mistake of fact. If mistake is alleged, proceedings may be taken to set the judgment aside. In the absence of such proceedings, it stands. All that the law of Ceylon requires for the purpose of constituting res judicata or estoppel by judgment is that the issue in question should have been distinctly raised between the same parties appearing respectively in the same capacity and should have been distinctly and necessarily determined by the former proceedings. It is of no consequence that the matter is dealt with in the decree itself or that the form or the subject matter of the latter proceedings is different from the form or subject matter of the earlier (*q*).

Partition actions.

In the case of a partition action, however, where there is no adjudication on the rights of the parties *inter se*, the dismissal of the action will not be a bar to an ordinary action for declaration of title (*x*). Nor will a subsequent action for partition of the same land be barred where, before a contest has arisen, the action is dismissed for non-prosecution. A partition action at its institution is not an action founded upon a cause of action as defined in section 5. Section 207 would not apply to partition actions but there is no doubt that in actions a contest frequently arises between the parties with regard to the rights of parties and title generally and with regard to which the parties seek redress. Such a contest would be based on a cause of action as defined in section 5 and the adjudication on it might well be res judicata under section 207. If one regards a partition action as an action founded upon some cause, even if it be not such a cause as even falls within the definition of section 5, then the cause of action would seem to be a recurring one, that is, it is due to a continuance of common ownership which exists from day to day as the inconvenience of common ownership recurs day by day (*r*).

Same parties

One of the necessary elements in a valid estoppel by res judicata is that the previous proceedings should have been the same parties (*s*). An action under section 247 of the Code between an unsucessful claimant and the

(*p*) Ram Menika vs. Dingiri Amma 1 Cur. L. R. 66.
(*q*) Samichi vs. Peris 16 N. L. R. 257 F. B. Per Wood Renton J.
(*x*) Saram vs. Martina Hamy 2 Lead 156.
(*r*) Abeysundere vs. Babuna 26 N. L. R. 459.
(*s*) Marcair vs. Velupillai 1 Cur L. R. 71.

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

writholder is not concluded by a judgment adverse to the judgment debtor in a litigation between the debtor and the claimant (*t*). Nor would it be barred where the claimant had already failed to establish his right to the land as against another judgment creditor (*u*).

Where causes of action are joined

With certain exceptions, the plaintiff or plaintiffs can unite in the same action several causes of action against the same defendant or defendants jointly. Where such joinder is inconvenient, the Court can, of its own motion or on the application of the defendant, order the causes of action to be tried separately. Where causes of action are united, the jurisdiction of the Court will depend on the value of the aggregate subject matters at the date of the institution of the action (*v*). One case, for example, may be maintained by the same plaintiff against the same defendant in respect of two or more separate and distinct parcels of land. If, in such a case, the Court finds it inconvenient to dispose of all the causes of action together, it should not dismiss the plaintiffs' claim but make order for separate trials in terms of section 36 (*w*). "This section, said Pereira J. provides that the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly. It has been said that the word *same* here refers to a person who has already been made a defendant in an action. I do not think so. The word has to be understood with respect to the expression *several causes of action.* It is merely intended to imply the *sameness*, so to say, of the defendants on the different causes of action referred to in the section. In other words, sections 14 and 36 may be combined and allowed simultaneous operation in any case" (*x*).

Exceptions to joinder of causes of action

There are exceptions to the rule of joinder of causes f action (*y*). In an action for the recovery of immovable property or to obtain a declaration of title to immovable property, no other claim or cause of action shall be made unless with leave of Court except (i) claims in respect of *mesne profits* or arrears of rent in respect of the property claimed or (ii) damages for breach

(*t*) Kuda Banda vs. Dingiri Amma 14 N. L. R. 145.
(*u*) Ponnampalam vs. Muruagsar 4 N. L. R. 296.
(*v*) Section 36.
(*w*) Kaluhamy vs. Appuhamy 18 N. L. R. 87.
(*x*) London & Lancashire Fire Insurance Co. vs. P. & O. Co. 18 N. L. R. 15. F. B. See however Kanagasabapathy vs. Kanagasabai 25 N. L. R. 173.
(*y*) Section 35.

of any contract under which the property or any part thereof is held, or consequential on the trespass which constitutes the cause of action. The *mesne profits* that can be claimed are not restricted to *mesne profits* prior to the institution of the action (*z*). But rent which may subsequently accrue after the institution of the action does not come under the description of arrears of rent (*a*). A lessee can, in the same action, join a claim against his lessor for damages in the event of his failure to warrant and defend title (*b*). A mortgagee can join claims to enforce any of his remedies under the mortgage (*c*). And no claim by or against an executor, administrator or heir, as such, shall in any action be joined with claims by or against him personally unless the latter claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents (*d*). A Judge can after the presentment of the plaint exercise his discretion and make an order requisite under section 35 at a later period in the action (*e*).

The Service of Summons.

Must be personal

Plaint having been filed, it is the duty of the Court to issue summons on the defendant (*f*). The summons must require the defendant to appear and answer to the plaint on a day specified. Summons must be served on the defendant in person except where the action is one by way of summary procedure on liquid claims (*g*). Where personal service is impossible by reason that the defendant cannot be found, substituted service of summons may be allowed (*h*). Such permission, however, will not be given unless it is shown that the Fiscal cannot effect personal service and that the defendant is in the Island and is intentionally evading service of summons (*i*), and the Court must direct the method by which such service is to

Substituted service

(*z*) Kiri Banda vs. Sleema Lebbe 11 N. L. R. 348.
(*a*) Holloway vs. Perera 13 N. L. R. 198.
(*b*) Appuhamy vs. Dionis 12 N. L. R. 382.
(*c*) Section 35.
(*d*) Section 35, sub-section 2.
(*e*) Appuhamy vs. Dionis 12 N. L. R. 382.
(*f*) Goonewardene vs. Rajapakse 1 N. L. R. 217.
(*g*) Mather vs. Peri Tamby Chetty 28 N. L. R. 443.
(*h*) Section 60.
(*i*) Chelliah vs. Ponnasamy 3 Times 85.

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

be effected (j). Where the co-proprietors of an estate were numerous and the defendant Company did not know who most of them were, the Supreme Court gave permission to the plaintiff to make an application for the joinder of such of the proprietors as he might nominate and leave to sue them as representing themselves and the other co-proprietors. Notice was also directed to be given to all the proprietors by advertisement in the papers (k). In cases where personal service is not effected and a decree is sought against a person in his absence, it is necessary that the greatest care should be used in every step of the procedure and the orders of the Court should be strictly adhered to (l). Summons may be served on the recognized agent or proctor of the defendant (m) or on his manager (n) or partner, while the partnership continues (o), or, when the action concerns immovable property, on the agent in charge of his immovable property (p). If the defendant is in jail, summons will be served on him through the officer in charge of the jail (q). Where the defendant is out of the Colony, summons will be issued on an application by the plaintiff supported by an affidavit showing in what place the defendant is to be found and the grounds on which the application is made (r). If the defendant does not understand English a translation of the plaint or of a concise statement of its contents should be served (s). The summons served upon the defendant, however, should be in the English language and not merely a translation (t). Where summons has not been duly served in accordance with the provisions of section 55, the defendant is not bound to appear and no judgment by default can be entered against him. But if he appears to the summons he cures the irregularity (u).

(j) Palaniappa Chetty vs. Arnolishamy 22 N. L. R. 368.
(k) Raman Chetty vs. Mackwood Ltd. 24 N. L. R. 73.
(l) The National Bank of India Ltd. vs. Fernando 3 Br.120.
(m) Section 64. See The British Ceylon Corporation vs. Lionel Edwards Ltd. 32 N. L. R. 143.
(n) Section 65.
(o) Mohamedu Cassim vs. Perianan Chetty 14 N. L. R. 385.
(p) Section 66.
(q) Section 68.
(r) Section 69.
(s) Lenohamy vs. Nonno 17 N. L. R. 378.
(t) Victoria vs. The Attorney General 22 N. L. R. 33. F. B.
(u) Senanayake vs. Appu 2 S. C. R. 135.

The Answer and its Requisites.

Answer of the Defendant.

The proceedings in an action may be regular or summary (v). In actions of which the procedure is summary, either a conditional order is immediately passed against the defendant or he is given notice that the application will be heard on a specified day. He can, if he thinks fit, appear in Court on that day and show cause against the application. Where the procedure is regular, the defendant appears on the day fixed in the summons either in person or by his proctor or recognized agent (w) and, if he does not admit the plaintiff's claim, must file in Court a duly stamped written answer or, if he is unprepared on that day, apply for and obtain an extension of time to file answer (x). Where a defendant appears and applies for time to file answer, he waives all objections to the acceptance of the plaint (y). The wording of the section contemplates more than one extension of time (z). An answer out of time will not be accepted and the illness of the defendant is no excuse unless it could be proved that he was so ill that he could not attend to business or see his proctor (a). Where a defendant took fourteen days time to file his answer and, on the last day on which he was entitled to file answer, he moved that the plaint be taken off the file, and the Court having taken time to consider his motion refused it some days after, the Full Court held that he should have been allowed to file his answer on the day on which his motion to take the plaint off the file was refused (b). Where a defendant files answer out of time and his explanation of the delay is unsatisfactory, the Court can hear and dispose of the case *ex parte* (c).

Requisites of the Answer.

The requisites of an answer are contained in section 75 of the Code. The defendant cannot plead in defence matter arising subsequent to the institution of the action. The judgment must determine the rights of parties as at the date of the institution of the action (d.) If the defendant has any claim in reconvention against the plaintiff he must state it in his answer and the claim in

(v) Section 7.
(w) Section 72.
(x) Section 74.
(y) Senanayaka vs. Appu 2 S. C. R. 135.
(z) Silva vs. Babahamy 1 N. L. R. 145.
(a) Nutter & Co vs. Lebbe 4 N. L. R. 279.
(b) Ceylon Gemming and Mining Co. vs. Symons 2 N. L R. 226. F. B.
(c) Nutter & Co. vs. Lebbe 4 N. L. R. 279.
(d) Raman Chetty vs. Soysa 2 Times 192.

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

reconvention will be treated as a plaint in a cross action between the defendant and the plaintiff so that the Court can pronounce a final judgment in the same action on both the original and the cross claim (*e*). But where in an action for debt the defendant prefers a claim in reconvention for a smaller amount leaving an admitted balance in the plaintiff's favour, plaintiff is entitled to an immediate judgment for the balance so admitted and is not bound to wait until the trial of the claim in reconvention (*f*). The Court possesses a discretion to reject a claim in reconvention whenever such claim is calculated to embarrass the original claim in convention (*g*). Where a defendant makes a claim in excess of a Court's jurisdiction, and moves for a transfer, the Supreme Court has a discretion under section 81 of the Courts Ordinance. Where there is urgency in the trial of plaintiff's action a transfer will not be granted (*h*). A defendant cannot claim in reconvention what amounts in fact to a claim for *restitutio in integrum* (*i*).

Claim in Reconvention.

Nature of the Claim.

A claim in reconvention must be of the same right kind and quality as the matter claimed in convention (*j*). A defendant is not bound to make a claim in reconvention on a distinct and separate cause of action (*k*). A claim in reconvention need not arise out of, or be closely connected with, the original claim (*l*). Where a plaintiff sues on a deed in which there is a mistake of which the plaintiff is aware, the defendant is entitled to claim in reconvention a rectification of such deed (*m*). Where, in an action for house rent, the defendant claimed title to the premises and compensation for improvements, it was held that it was competent for the defendant to make such a claim in reconvention (*n*). It may be made on any cause of action accruing before the filing of the answer. It is not necessary that the cause of action should have arisen before the institution of the

(*e*) Section 75.
(*f*) Joseph vs. De Run 9 S. C. C. 79.
(*g*) Amarasekera vs. Punchi Banda 6 S. C. C. 39.
(*h*) Veeravaku vs. Supparamaniam 6 N. L. R. 52.
(*i*) Sinnatamby vs. Nallatamby 7 N. L. R. 139. F. B.
(*j*) Silva vs. Perera 17 N. L. R. 206.
(*k*) Perera vs. Pesonhamy 15 N. L. R. 438.
(*l*) Soysa vs. Soysa 5 Bal. 47.
(*m*) Fernando vs. Fernando 23 N. L. R. 266.
(*n*) Soysa vs. Soysa 5 Bal.47.

plaintiff's action (*o*). But a defence of payment and counter claim for damages which have accrued after the issue of summons cannot be pleaded in the same answer (*p*).

Replication.

Where the defendant makes a claim in reconvention, the plaintiff is allowed the right of replication or answer to such claim in reconvention (*q*). Where a decree has been obtained by the fraud of one of the parties, the plea of *res judicata* may be met with a replication alleging fraud in its obtainment (*r*). Allegations of fact in a claim in reconvention which are not specially denied in replication are not taken as admitted (*s*). No further pleadings are allowed unless the Court is satisfied that the real issues between the parties connot conveniently be raised without such further pleadings. There is no necessity for replication to any new matter in the answer but such new matter will be taken as denied or, if the plaintiff desires to question its sufficiency as an answer to the declaration, he may at the trial have an issue settled by the Court on that point (*t*).

Objection to Jurisdiction.

If the defendant intends to dispute the jurisdiction of the Court he must expressly traverse the averment of jurisdiction by a separate and distinct plea (*u*). It is too late to take objection to jurisdiction when writ is issued (*v*).

Amendment of Answer.

Where an answer is defective in any of the necessary particulars, it may be returned for amendment. If the Court thinks that an answer ought to be more full and specific and that, for the purpose of framing the issues, a fuller statement of the case ought to be before it, it is entitled to act under section 77 at any time (*w*).

(*o*) Arunachalam vs. Mohamedu 17 N. L. R. 255.
(*p*) Cornelis vs. Silva 2 S. C. R. 83.
(*q*) Section 79.
(*r*) Buyzer vs. Eckhart 13 N. L. R. 371 followed by Abeyesekera vs. Haramanis Appu 14 N. L. R. 353.
(*s*) Fernando vs. The Tea Plantation Co. 3. C. L. R. 51.
(*t*) Lokuhamy vs. Sirimala 1 S. C. R. 326. F. B.
(*u*) Section 76.
(*v*) Gunasekara vs. Pompeus 21 N. L. R. 110. See Banda vs. Siyatu 32 N. L. R. 270.
(*w*) Peris vs. Punchiappuhamy 8 C. W. R. 93.

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

CHAPTER II.

THE TRIAL.

Fixing of trial date

On the expiration of the time allowed for the filing of the defendant's answer or of replication, where replication is allowed, the Court must fix a date for trial and give notice of such date to the parties (*a*). The Court may, under certain circumstances, when the case is called on for hearing, postpone the case (*b*). The hearing, however, must be postponed for a fixed day and not generally (*c*).

Where plaintiff is absent.

If plaintiff is absent decree nisi

If, on the day fixed for trial, the plaintiff is absent and the defendant, being present, denies the plaintiff's claim and refuses to consent to a postponement, the Court must pass a decree *nisi* dismissing the plaintiff's action which decree shall become absolute after fourteen days unless the plaintiff appears in the meanwhile and shows good cause for his absence. If the Court is satisfied with his excuse, the decree *nisi* will be set aside and a day fixed for trial with notice to the defendant (*d*). Where a judgment is entered against a party by default, it is not a sufficient excuse for his absence that his proctor had failed to inform him of the date of trial. "It has never been held," said Lyall Grant J., "that a proctor for a plaintiff who had received a proxy and instructions for the preparation of a plaint is entitled to avoid a final judgment against his client merely by stating on the date fixed for trial that he had received no instructions" (*e*). The proper order that should be entered in the event of plaintiff's absence on the day of trial is not one for the dismissal of his action but a decree *nisi* only (*f*). The plaintiff need not necessarily appear in person. It is sufficient if he is represented by a proctor. Where, upon the day of trial, the plaintiff's proctor moved for a postponement and tendered a headman's report of the

Plaintiff may appear by proctor

(*a*) Section 80
(*b*) Section 81
(*c*) Fernando vs Curera 2 N. L. R. 29
(*d*) Section 84
(*e*) Scharenguivel vs Orr 28 N. L. R. 302
(*f*) Silva vs Arnolis 3 N. L. R. 108

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

plaintiff's illness and the District Judge, not being satisfied as to the plaintiff's illness, dismissed his action, the Supreme Court held that the plaintiff had *appeared* inasmuch as his proctor had appeared for him and that the dismissal of the action was technically right. Under the circumstances, however, the Court had power to grant a postponement on terms (*g*). There may be circumstances in which the presence of a proctor does not constitute an appearance for his client (*h*). A decree *nisi* entered in terms of section 84 in the case of default of appearance of a plaintiff automatically becomes absolute unless good cause is shown within a period of fourteen days. Once the decree *nisi* becomes absolute, the plaintiff has no remedy under the section (*i*). Nor, where a plaintiff's action has been dismissed for want of appearance, can he, even with leave of Court, withdraw his action with leave to institute a fresh action. The proper procedure would be for the Judge to re-open his judgment. The plaintiff cannot withdraw from an action which has already been dismissed (*j*).

Where defendant is absent.

If defendant is absent ex-parte trial

If the defendant being duly served with summons fails to appear on any date on which he has had notice to appear, or fails to file his answer on the day fixed, and the plaintiff is present in Court on that day, the Court must proceed to trial *ex-parte* and pass a decree *nisi* against the defendant and issue notice of such decree on him. If, on the day appointed in the decree *nisi*, the defendant fails to appear and excuse his absence or if the Court is not satisfied with his excuse, the decree will be made absolute. If the defendant satisfies the Court that he had reasonable grounds for his absence, the Court will set aside the decree *nisi* and order the case to be proceeded with (*k*). In Letcheman Chetty vs Hadjiar (*l*) defendant being in default, decree *nisi* was entered against him. On the returnable date he was again in default and the decree was made absolute. Writ was allowed. He then came in and explained satisfactorily his default on the date decree *nisi* was returnable but gave no explanation of his previous

(*g*) Raturala Korale vs Nobothhami 3 Br 129
(*h*) Senanayake vs Cooray 15 N. L. R. 36
(*i*) Annamalay Chetty vs Carron 3 C. L. Rec 48
(*j*) Fernando vs Ali Uduman 5 N. L. R. 81
(*k*) Section 85
(*l*) 2 Matara 144

default and the defence set up by him seemed obviously untenable. The District Judge refused to allow him to come in and defend. In appeal the Supreme Court held that the Court was not concerned with the merits of the case and that the defendant, having satisfactorily explained his default on the date decree *nisi* was returnable, should have been allowed to defend the action. Under our Code any decree entered against an absent defendant must be a decree *nisi*. Where there are several defendants and some of them are absent, the Court cannot proceed to trial and enter final decree against all (*m*).

What is an appearance

Defendant may appear by proctor.

The defendant may appear in person or by his proctor (*n*). There has been some controversy as to the circumstances under which a proctor who is present in Court when his case is called may be said to appear. "It appears to me," said Wood Renton J., (*o*), "that cases of this kind turn very largely on questions of fact and it is not desirable, nor do I propose to attempt, to lay down any general rule in disposing of the appeal" And Middleton J said (*p*), "It is somewhat difficult to say what is the principle on which a Court should act in deciding whether there is an appearance or not but I think each case must be determined upon its own circumstances." Where on the day fixed for trial of a case the defendant was absent and his proctor on the record who was present in Court stated that he had no instructions, it was held that the physical presence of the proctor in Court, coupled with what he said on the trial day, did not constitute an appearance for the defendant which would give the proceedings the character of an *inter partes* trial such as would enable the Judge to enter final judgment (*q*). But where on the trial date the defendant's proctor appeared and said that he had no instructions, the Supreme Court held that judgment for plaintiff in these circumstances was a judgment *inter partes* (*r*). When the defendant's proctor appeared on the date of trial and moved for a postponement on the ground that, owing to the absence of his client from

(*m*) Suppramaniam Chetty vs Maria 30 N. L. R. 75
(*n*) Peris vs Fernando 1 S. C. R. 67
(*o*) Kandappa vs Marimuttu 14 N. L. R. 395. The question has been finally settled by a Full Bench in Andiappa Chetty vs Sanmugam Chetty 11 C. L. Rec 193
(*p*) Senanayake vs Cooray 15 N. L. R. 36
(*q*) Senanyake vs Cooray 15 N. L. R. 36
(*r*) Silva vs Silva 1 Times 20

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

Ceylon, he was unable to get ready for the trial and, on the District Judge refusing to grant the application, retired from the case and declined to take part in the proceedings, and the Judge after hearing some evidence from the plaintiff entered judgment in his favour, it was held that the proctor for the defendant must be taken to have appeared for his client at the trial, and that the judgment must be considered as pronounced *inter partes* and not *ex parte* (*s*). Where on the day fixed for trial of a case the defendant was absent and his proctor, though physically present in Court, took no part in the proceedings, it was held that the District Judge ought only to enter decree *nisi* and not final judgment after hearing plaintiff's evidence (*t*).

Decree nisi to be served on defendant

In the case of a decree *nisi* it is not sufficient under section 85 to give to the defendant a notice embodying the purport of the decree. The defendant is entitled to receive an authenticated copy of the decree itself. Such copy, before it can be issued, must bear the proper stamp duty as specified in the Stamp Ordinance, No. 3 of 1890 (*u*). And where a decree *nisi* is entered after a trial *ex parte*, the defendant being in default, the notice of such decree *nisi* should under section 85 be served personally on the defendant. Service on the defendants proctor is effectual only if the Court, after assigning sufficient cause for it, specially directs such service (*v*).

Appeal against decree by default

No appeal against decree by default

No appeal lies against a decree for default but the Court may set aside the decree on good cause being shown. An order setting aside or refusing to set aside the decree is an appealable order (*w*). The illness of the defendant is no excuse for his proctor not preparing or filing an answer in time. To justify the acceptance of an answer after its due date, it should be proved that the defendant was so ill that he could not attend to business or see his proctor. Where the explanation of the delay is unsatisfactory it is competent to the Court to place the defendant on terms and, in failure thereof, to hear and determine the case *ex parte* (*x*). Where a defendant,

(*s*) Gargial vs Somasunderam Chetty 9 N. L. R. 26
(*t*) Mahamado Lebbe vs Kiri Banda 3 Bal 200
(*u*) Mohotihamy vs Lekam Mahatmaya 1 C. L. R. 62
(*v*) Ramen Chetty vs Marikar 1 Times 120
(*w*) Section 87
(*x*) Nutter & Co. vs Mohamedu Lebbe 4 N. L. R. 279

after the decree was made in his absence, applies for an order to set it aside on the ground that no translation in his language of the summons was served on him, the decree ought to be set aside (*y*). In Jayasuriya vs Kotalawala (*z*), the defendant was in prison when he was sued on a bond. Being deceived by the plaintiff he made no effort to appear in the action and judgment was entered for the plaintiff. He moved to re-open judgment. It was held that his proper remedy was to apply for *restitutio in integrum* or seek damages for the fraud. The reason why the defendant did not appear in the action was not that he was prevented by misfortune but that he was deceived and defrauded. The fact that a man is deceived by fraudulent representations cannot be construed as a misfortune preventing him from appearing to show cause.

Decree nisi made absolute in defendant's presence

When a decree *nisi* is made absolute in the presence of a defendant who appears and attempts to show cause against it, is it a decree absolute for default? In Nachchiappa Chetty vs Muttu Kangany (*a*), the law was laid down as follows. "No appeal lies from a decree *nisi* for default of appearance or answering nor from any order making such decree absolute on the ground either of defendant's failure to show cause against it, or of his not showing sufficient cause. If such a decree be made absolute on the former ground the defendant may, within a reasonable time, move the Court to set it aside on proof that he was prevented from appearing to the decree *nisi* by reason of accident or misfortune, or by not having received due information of the proceedings and, on refusal of his application, may appeal. But if the defendant appear in due time and show cause against the decree *nisi* and the same be made absolute, the defendant has no further remedy by appeal or otherwise". This decision was considered and followed in Silva vs Grero (*b*), by a Bench of three Judges. Lawrie A. C. J. said, "The mere bodily presence of a defendant in Court is not an *appearance*. It must be an appearance on the proper day and if, being absent on that day, he comes into Court either personally or by proctor on a later day, his non-appearance on the proper day must be

(*y*) Perera vs James 4 A. C. R. 122. See however Victor vs The Attoney General 22 N. L. R. 33. F. B.
(*z*) 23 N. L. R. 511
(*a*) 2 C. L. R. 110; 1 S. C. R. 270
(*b*) 1 N. L. R. 67. F. B.

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

accounted for before the late coming can be counted an appearance in the legal sense." But Browne J, dissenting, held that the term *appear* in sections 85 to 87 means the first formal presentation of himself by the defendant to the Court in person or by proxy and that decree absolute for default in section 87 means for "entire default of appearance prior to entry thereof." In Mohamed Aliar vs Mohamedu Marikar (*c*), Dalton and Jayawardene J. J. following the decision in Silva vs Grero held that a decree *nisi* made absolute for default in the presence of defendant who appeared and attempted to show cause aganist it, is nevertheless a decree absolute for default and is not appealable. "The decision in Silva vs Grero," said Dalton J, "has not been questioned since 1896 but has generally been accepted as correctly interpreting the law on this point." And Jayawardene J, said "On principle a Court of Appeal must not be called upon to decide on the merits where a case has only been heard *ex parte*. Where the defendant is absent, the plaintiff places before the Court the minimum of evidence and the defendant must not be permitted to assail the plaintiff's case for the first time in appeal." In The Ceylon Gemming and Mining Co. vs Symons (*d*), however, Bonser C. J. in an *obiter dictum* expressed his disagreement with the decision in Silva vs Grero and his view was subsequently endorsed by Fisher C. J. and Garvin J in Conderlag vs Muttiah Pulle (*e*). In the latter case, too, no authoritative pronouncement was made. The Judges assumed that an appeal lay and dismissed the case on its merits merely expressing the opinion, *obiter*, that under such circumstances an appeal would lie. The position at present would therefore seem to be that a decree *nisi* made absolute in the presence of a defendant who appeared and attempted to show cause against it is a decree absolute for default and not appealable. An appeal would lie against the order refusing to set aside the decree *nisi*.

Both parties absent

If both plaintiff and defendant are absent, the case will be struck off the roll. But if either party within a reasonable time appears and shows sufficient cause, the Court may order the case to be restored to the file (*f*). An order directing the case to be struck off the file will

(*c*) 30 N. L. R. 1
(*d*) 2 N. L. R. 226
(*e*) 30 N. L. R. 73
(*f*) Section 88

not operate as a bar to the institution of a fresh action upon the same cause of action.

Amendment of pleadings

A party may, at or before the trial, with notice to the other side and with permission of Court, alter or amend his pleadings. The discretion of the Court in this matter cannot be questioned. After a plaint has been once accepted it should not, as a general rule, be amended until after the issues have been settled. The office of an amendment will generally at that stage be to square the plaint with the issues framed (*g*).

Interrogatories

Any party also may, at any time before the hearing, by leave of Court to be obtained on motion *ex parte*, deliver through the Court interrogatories in writing for the examination of the opposite party. Not more than one set of interrogatories can be delivered to the same person and the defendant cannot deliver interrogatories for the examination of the plaintiff until his answer has been filed (*h*). Interrogatories must be answered by affidavit (*i*). A party may refuse to answer them on the ground that they are scandalous or irrelevant or not put *bona fide* or that the answer may tend to incriminate him, or on any like ground (*j*).

Documents

Discovery of documents

Either party may also, in like manner, require the other side to admit the genuineness of any document material to the action. The admission must be made in writing signed by the party or his proctor and filed in Court. If the notice to admit is not complied with, the party refusing may have to bear the expenses of proving the document (*k*). The Court may also, at any time during the pendency of an action, order any party to the action to declare by affidavit all documents which are, or have been, in his possession relating to any matter in question in the action (*l*). An order for discovery may issue to the plaintiffs in an action although they may not be able to make the required affidavit personally. The order for discovery in such a case should go to the plaintiffs leaving it to them in the

(*g*) Ratwatte vs Owen 2 N. L. R 141
(*h*) Section 94
(*i*) Section 99
(*j*) Section 98
(*k*) Section 101
(*l*) Section 102

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

first instance to choose the channel through which the discovery should come (*m*). The Court may also order a party to produce material documents in his possession (*n*). The Court has no discretionary power to refuse the production of material documents (*o*).

Inspection of documents

A party may also with leave of Court notice the other side to produce his documents for inspection (*p*), including such documents as are disclosed in the plaint (*q*). The penalty of a party's failure to comply with a notice to produce a document is that he is unable to produce it at the trial on his own behalf unless he can satisfy the Court that the document relates to his own title, or that he had some other and sufficient cause for refusing to comply with the notice. Any party who fails to answer interrogatories or comply with the notice for discovery, production or inspection of documents shall, if plaintiff, be liable to have his action dismissed for want of prosecution and, if defendant, be placed in the same position as if he had not appeared and answered. He is also liable to be punished for contempt of Court (*r*). An order dismissing an action on the ground that a plaintiff refused to answer interrogatories can only be justified where there has been obstinacy or contumacy on the part of the person in default (*s*). An order dismissing an action under section 109 for failure to answer interrogatories amounts to a decree and is appealable but cannot be set aside by the Court which made it (*t*).

Proof of documents at trial

The parties or their proctors must at the trial be ready with all the documents on which they intend to rely and which have not been already filed in Court. A document called for and not produced cannot afterwards be received (*u*). No document will be placed on the record unless it has been proved or admitted in accordance with the law of evidence. Every document that is proved must be endorsed with a number or letter

(*m*) Commissioner of the Admiral of the U. K. vs Vanderspaar 1 S. C. R. 105
(*n*) Section 103
(*o*) Victoria vs Fernando 4 Bal Notes 22
(*p*) Section 104
(*q*) Amerasekera vs Palaniappa 17 N. L. R. 104
(*r*) Section 109
(*s*) Appu Sinno vs Appuhamy 4 Lead 81
(*t*) Appuhamy vs Appuhamy 1 Cur L. R. 249
(*u*) Section 112

to identify it and then filed as part of the record (*v*). In putting documents in evidence in a case the provisions of sections 111 to 114 ought to be observed. It is irregular simply to say "Documents put in" (*w*).

Issues

Framing of issues

On the day fixed for the hearing of the action, issues must be framed on the material propositions of fact or law upon which the parties are at variance. If the parties cannot agree upon the issues, the Court will examine the pleadings and record the issues on which the right decision of the case appears to the Court to depend (*x*). When a defendant makes an averment in his answer and no replication is filed to meet it, it is open to the plaintiff, if he denies the averment, to have an issue framed on it and thus put the defendant to the proof of the facts averred. If no issue in that way is settled, the parties must be held not to have been at issue on those facts and no burden lies on the defendant to prove them (*y*). When both sides suggest different sets of issues, the Judge ought to rule on the rival sets and decide definitely as to what are the issues on which he directs the parties to go to trial. An order refusing to frame an issue suggested by one side and objected to by the other is a formal expression of a decision by a Judge, and can be made the subject of an appeal (*z*).

Issues of law before issues of fact

Issues of law must be tried before issues of fact (*a*), but only such issues that may dispose of the action (*b*). A Court can dispose of a case on issues of law alone and for that purpose postpone the settlement of issues of fact until after the issues of law have been determined (*c*). If, however, there are issues of fact to be determined before the issue of law can be dealt with, all the issues in the case should be tried together (*d*). In Cathiravelu vs Dadabhoy (*e*), the plaintiff raised the issue "Does the answer disclose a defence to the plaintiff's claim?" No

(*v*) Section 114
(*w*) Perera vs Avishamy 12 N. L. R. 26
(*x*) Section 146
(*y*) Appuhamy vs Kiriheneya 2 N. L. R. 155
(*z*) Peris vs Perera 10 N. L. R. 41 F. B.
(*a*) Section 147
(*b*) Macdonald & Co. vs The Colombo Hotels Co. 19 N. L. R. 109
(*c*) Cathiravelu vs Dadabhoy 15 N. L. R. 339
(*d*) Pitche Tamby vs Cassim 2 Bal Notes 15
(*e*) 15 N. L. R. 339

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

evidence was taken and no admissions recorded. The District Judge answered the issue in the negative. On appeal it was contended that the District Judge had no right to dispose of the case on an issue in regard to which no evidence had been taken but the Supreme Court held that the Court had power to do so. The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit *(f)*.

The Evidence

Party beginning must call his evidence

After the issues have been settled, the party having the right to begin must state his case and call his evidence *(g)*. The plaintiff generally has the right to begin, but where the defendant admits the facts in the plaint but contends that the plaintiff ought to fail on a point of law or on additional facts stated in the answer, then the burden of proof is on the defendant. Where the burden of proof is on the plaintiff he is not entitled without calling any evidence to discharge that burden, to call the defendant and cross-examine him as to his veracity *(h)*. After stating his case in person or by Counsel, the party must call his witnesses and by questions in examination-in-chief elicit from them whatever material points they can speak to from their observation *(i)*. A party accepting a Judge's ruling or opinion as regards the relevancy of evidence which he proposes to offer without making any effort to produce it takes the risk upon himself of losing the case for want of evidence. If a Court refuses to take any evidence tendered, Counsel should not submit to such refusal but should either call the witness, propose the questions to be put to him and have the reasons for the Judge's refusal recorded, or should ask him to record that he would not entertain any evidence on the point in question *(j)*. When he takes a substantial objection in the course of a trial he must ask the Court to note the objection and give a ruling thereon instead of making use of the petition of appeal for reference to the matter *(k)*. When the examination-in-chief is concluded, the opposing Counsel can cross-examine the witness and is

(f) Section 149
(g) Section 150
(h) Silva vs Silva 2 Lead 45
(i) Section 151
(j) Muttusamy vs Ponnen 1 N. L. R. 31
(k) Ran Etana vs Nekappu 14 N. L. R. 289

allowed to put him leading questions *(l)*. His own Counsel can then re-examine him to enable him to explain such answers as he gave in cross-examination *(m)*. The Court can then put any questions it considers necessary. A Judge has no right to reject a witness on the ground that he remained in Court in contravention to an order to withdraw *(n)*.

And formally tender his documents

A document which a party intends to use as evidence against his opponent must be formally tendered as soon as its contents are spoken to by a witness. Where a document has already been filed in some other action, a certified copy will be admitted. A document when admitted, must be marked and filed in the record. Records of other actions will not be admitted in bulk, but each of the constituent documents, pleadings or processes of the former action must be separately proved *(o)*. Where a document which has been filed with the plaint is referred to in the course of the evidence and considered by the Judge, it must be deemed to have been admitted in evidence and no objection can be taken afterwards to its reception on the ground that it has not been properly stamped *(p)*. A document not objected to by the other party is legally admissible evidence against him *(q)*. Where the document is objected to, two questions arise for the Court; firstly whether the document is genuine, and secondly, whether it is legally admissible. If these two questions are answered in the affirmative, the document must be admitted and marked. Where a document is objected to at a trial, it is the duty of the Judge to rule at once admitting or rejecting the document. He should not admit the document provisionally *(r)*. The time to take objection to an instrument on the ground of its being insufficiently stamped is when it is tendered in evidence *(s)*. Where no such objection is then taken it will be held to have been waived and the objection cannot be taken in appeal *(t)*. Before a witness is allowed to speak to a document

(l) Section 152
(m) Section 153
(n) Fernando vs Welenisappu 1 N. L. R. 90
(o) Section 154
(p) Adaicappa Chetty vs Thomas Cook & Son 31 N. L. R. 385
(q) Silva vs Kindersley 18 N. L. R. 85
(r) Hartley vs Cassim 4 C. L. Rec 40
(s) Kenakal vs Velapillai 2 N. L. R. 80
(t) Silva vs Kindersley 18 N. L. R. 85

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

he should be thoroughly tested as to the grounds of his knowledge with regard to it (*u*). Where the signature on a document appears from the evidence to have been made by a person other than the person whose signature it is, the authority of the person whose mark is made must be proved before the document is admitted (*v*). In the case of an illiterate person, it must also be proved that, at the time when his name was written or his mark put to the document, he understood the nature of its contents except where he has only signed as a witness (*w*). This section, however, is merely directory and the requirement may be waived by the parties to the action. Where a person denies that he put his mark to a document and that fact is proved by the opposite party, it is not necessary to prove further that he understood the contents of the document (*x*).

The burden of proof

When the party beginning has stated his case and called his evidence, it is the turn of the opposing party. Where, however, there are several issues the burden of proving some of which lies on the other party, then the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply. The party beginning will thereupon be entitled to reply on the whole case (*y*). A departure from this general rule may be allowed by the Judge in his discretion (*z*). In an action to recover the balance of the price paid for a house sold to the defendant, defendant in support of his plea of payment read in evidence the conveyance wherein plaintiff had acknowledged receipt of the full consideration and closed his case. Plaintiff thereupon proved by witnesses and documents that the balance claimed was not really paid. After plaintiff's case was closed, defendant proposed to call evidence in rebuttal. The District Judge refused to allow the defendant to do so and, on appeal, the Supreme Court held that, as the onus was on the defendant to prove payment, it was his duty to adduce all the evidence he had and there

(*u*) Sections 155 and 156
(*v*) Ran Menika vs Lewisbamy 6 N. L. R. 283
(*w*) Section 160
(*x*) Tillekeratne vs Samsideen 4 N. L. R. 65
(*y*) Section 163
(*z*) Section 166

appeared no reason to interfere with the exercise of the discretion vested in the District Judge (*a*).

Evidence. How taken

Evidence must be taken orally and on oath or affirmation. A District Judge cannot, even with the consent of the parties, depart from the provisions of the law as to how evidence should be given and recorded (*b*). Evidence must be recorded in English in narrative form (*c*). The Court may, however, for any special reason take down any particular question and answer and objection to a question where such objection is made, whether the objection is overruled or upheld. Witnesses must be kept out of Court till they are required (*d*). The Court has, however, a discretionary power to allow experts whose presence is practically necessary in order that the case on one side or the other might be adequately put forward, to remain in Court (*e*). No witness may be called unless his name is on the list of witnesses filed (*f*). Where a witness is about to leave the jurisdiction of the Court or there appears to be reason why his evidence should be immediately recorded, the Court may, on application of either party or of the witness, record his evidence before the trial (*g*). Evidence so taken may be read at the hearing if the witness cannot then be produced. The Court may also, in certain circumstances, take evidence on affidavit or commission, unless the witness can be produced at the trial and either party *bona fide* desires the production of the witness for cross-examination (*h*).

Judgment and decree

Judgment in open Court

After both parties have closed their case, the Judge must pronounce judgment in open Court either at once or on a day of which notice must be given to the parties or their proctors at the termination of the trial (*i*). The Judge may, after the parties have closed their case but before delivering judgment, call a witness not cited by the parties and inform himself on any relevant point that

(*a*) Jaganaden Pillai vs Perera 5 N. L. R. 95
(*b*) Punchirala vs Punchi Banda 3 N. L. R. 38
(*c*) Section 169
(*d*) Section 174
(*e*) Colombo Electric Tramways Co. vs Colombo Gas and Water Co., Ltd., 18 N. L. R. 385
(*f*) Section 175
(*g*) Section 178
(*h*) Section 179
(*i*) Section 184

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

requires elucidation (*j*), but he cannot allow further documentary evidence without proof of it (*k*). Nor can he call on the parties for further evidence but he must give judgment on the material on the record (*l*). A Judge should not, without giving evidence, import into his judgment his knowledge of any particular fact (*m*). The judgment must be dated and signed by the Judge in open Court at the time of pronouncing it (*n*), and must contain a concise statement of the case, the points for determination, the decision and the reasons therefor (*o*).

Where a trial Judge wrote out his judgment after he had ceased to hold office but was re-gazetted as Judge on a subsequent date on which the judgment signed and dated by him as of that date was pronounced by his successor, the judgment was not invalid (*p*). A judgment which does not deal with the point in issue and does not pronounce a finding definitely on it is not a judicial pronouncement (*q*). A Judge may pronounce a judgment written by his predecessor but not pronounced (*r*), but a judgment written by a Judge *functus officio* is invalid and may not therefore be pronounced by his successor(*s*).

Decree in terms of judgment

After judgment has been pronounced, a decree in terms of the judgment and bearing the same date must be drawn up and signed by the Judge (*t*). A Judge has no power to delay the entering of the decree once judgment has been pronounced (*u*). The decree in a case is merely the formal expression of the results arrived at by the judgment, and it is not necessary that it should be drawn up and signed by the Judge who made the pronouncement (*v*). There is nothing to prevent a Judge from drawing up and signing a decree according to a judgment pronounced by his predecessor in office (*w*).

Amendment of decree.

A decree once drawn up cannot be amended unless it is at variance with the judgment or some clerical or

(*j*) Hendrik Kure vs Marikar 4 N. L R. 148
(*k*) Fernando vs Perera 2 A. C. R. Sup. 7
(*l*) Fernando vs Johannes Appu 1 S. C. R. 262
(*m*) Senanayake vs Cooray 15 N. L. R. 36
(*n*) Section 187
(*o*) Section 187
(*p*) Wijesekera vs Daberera 3 C. L. Rec 111
(*q*) Menika vs Dionis 7 N. L. R. 337
(*r*) Section 185
(*s*) Thamotherampulle vs Ponniah 1 C. W. R. 68
(*t*) Section 188
(*u*) Banda vs Dharmaratne 24 N. L. R. 210
(*v*) Fernando vs The Syndicate Boat Co., Ltd., 2 N. L. R. 206
(*w*) Silva vs Palaniappa Chetty 5 N. L. R. 289

arithmetical error is found in it (*x*). There is no limit to the time within which a decre can be rectified (*y*). If the Court is satisfied that there is a clerical error in its decree it is bound to correct it, and the fact that there is the same clerical error in the judgment upon which the decree is founded cannot make any difference, even though the result is that the decree when amended is at variance with the judgment. If the judgment contains a mistake in addition, which mistake is repeated in the decree, or if it contains a clerical error which is repeated in the decree, the decree ought to be amended (*z*). A Court has no jurisdiction except as provided by section 189 to vacate or alter an order after it has been passed (*a*). Where the Crown sued the defendants under Ordinance 1 of 1844 to recover a sum of sixty rupees being double the costs incurred by the Government Agent, Western Province, for clearing and defining the boundaries of certain lands adjoining Crown property, the Commissioner entered judgment for the the Crown for thirty rupees. Subsequently when it was brought to his notice that he should have entered judgment for sixty rupees he varied judgment accordingly, stating that when he entered judgment in the case he had by mistake overlooked the fact that the defendants were liable in twice the amount expended by the Government Agent. The Supreme Court held that the Commissioner had no power to alter his judgment in the way he did. The mistake he sought to rectify was not a clerical one but a mistake of fact arising from his not having consulted the Ordinance upon which the action was based (*b*). Where however the judgment of of a Court declared that the title of the plaintiff was superior to that of the defendant, and directed a declaration of title to be entered in plaintiff's favour and the decree following thereon merely declared the plaintiff's title but did not direct the placing of the plaintiff in possession, it was open to the Court to amend the decree by inserting an order for the ejectment of the defendant and for the placing of the plaintiff in possession (*c*). But where a decree of a lower Court is

(*x*) Section 189. The powers of a Judge in this respect have since been largely extended by Ordinance 26 of 1930
(*y*) Natchia vs Natchia 15 N. L. R. 319
(*z*) Singho Appu vs Andris 13 N. L. R. 297
(*a*) Dionis Appu vs Arlis 23 N. L. R. 346
(*b*) The Attorney General vs Nonohamy 8 C. W. R. 84
(*c*) Carpen Chetty vs Majidu 7 N. L. R. 145

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

affirmed in appeal, the lower Court has no jurisdiction to amend it. The decree is then a decree of the Supreme Court which alone has the power to amend it (*d*).

Setting aside of a judgment

A judgment obtained by fraud or passed under a mistake may be set aside either by a regular action or possibly by application by way of summary procedure as regulated by the Code. It cannot be done by mere motion supported by affidavits with notice to the decree holder (*e*). An action, however, cannot be prosecuted in an inferior Court to set aside a decree of a superior Court on the ground of fraud. It must be brought in a proper Court (*f*). Or the Supreme Court can rescind such judgment in review (*g*). When a decree already entered up is found to contain matter not actually decided by the Court, the Court cannot thereafter re-open its own decree so as to inquire into such matter. This is not a mere irregularity such as is contemplated in section 39 of the Courts Ordinance (*h*). Even the Supreme Court, after a decree has passed the seal, has no power to supply an omission which has occurred through inadvertence (*i*).

Re-opening judgment

Although a District Judge may amend his decree so as to bring it in conformity with his judgment he has no authority to vary or re-open his judgment and to correct what he may consider to be a mistake which he has made on the facts (*j*). A preliminary decree made in a partition suit in accordance with the judgment is binding on the parties to it subject to an appeal, and the power given by section 189 to correct or modify any clerical or mathematical error. The Judge who made the decree or his successor in office has no power to modify the preliminary decree even if he be of opinion that the former decision was mistaken in fact or law (*k*).

Decree for delivery of movables

Where the decree is for the delivery of movable property it shall also state the amount of money to be

(*d*) Singho Appu vs Andris 13 N. L. R. 297
(*e*) Perera vs Ekanayake 3 N. L. R. 21
(*f*) Buyzer vs Eckhart 13 N. L. R. 371
(*g*) Gunaratne vs Dingiri Banda 4 N. L. R. 249
(*h*) Cornelishamy vs Thoronis 2 Times 192
(*i*) Deonis vs Samarasinghe 15 N. L. R. 39
(*x*) The power of a Judge to amend his decree has been considerably extended by Ordinance 26 of 1930
(*j*) Dabera vs Marikar 1 S. C. R. 210
(*k*) Silva vs Silva 13 N. L. R. 87 F. B.

paid as an alternative if delivery cannot be had (*l*). In the earlier cases the Judges were unable to reconcile this section with sections 320 and 321 which describe the steps to be taken by a judgment creditor who holds a decree for the delivery of specific movable property. They got over the difficulty by disregarding section 191 altogether. A judgment in the form contemplated by section 191 may be executed according to the procedure laid down in sections 320 to 322. A writ could issue for delivery of possession in terms of number 62 of the second schedule. In default of delivery, the procedure laid down in section 321 would be adopted and, the Court having already estimated the judgment creditor's loss by not receiving the goods in the decree, it will not be necessary to do so again unless any further loss has accrued by non-delivery. The original application for execution might also be made in the alternative. In the case of an alternative decree the judgment creditor could himself demand delivery from the judgment debtor and, if it is refused, he could on his application for execution as a money decree, embody in the affidavit proof of the demand and refusal, when the Court might issue writ for the recovery of the money at once. In any case if a judgment debtor is ordered by a decree to deliver up movable property, demand ought to be made by the Fiscal under the writ issued to him for delivery of the goods before seizure of other property to be sold to supply the value of them (*m*).

Payment of interest

Where the action is for a sum of money the Court can order the payment of interest as agreed on by the parties or, in the absence of such agreement, of nine per cent per annum. Where the decree is silent as to interest the presumption is that interest has not been awarded. The proper method of awarding interest in the decree is that the interest should be calculated down to the date of the commencement of the action and thence to the date of the decree at the rate agreed and a decree given for the aggregate amount made up of the principal and these two sums for interest, and from the date of the decree the interest should be given on the aggregate amount at the rate of nine per cent per annum (*n*).

(*l*) Section 191
(*m*) Appuhamy vs Appuhamy 14 N. L. R. 8. (Sithambarapillai vs Vinasitamby 1 N. L. R. 114, and Sheik Ali vs Jafferjee 1 N. L. R. 117 questioned)
(*n*) Muttiah Chetty vs de Silva 1 N. L R. 358

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

Specific performance

Where the action is for damages for breach of contract and the Court finds that the defendant is able to perform the contract, it may, with the consent of the plaintiff, order specific performance of the contract by the defendant. The Court must in such cases also fix an alternative amount of damages to be paid in the event of non-performance (*o*). Where a contract cannot be completely performed, the party in default may be ordered specifically to perform his part of the contract as far as possible (*p*). An action for specific performance will lie if there is reasonable cause to support the contract. The rule that specific performance will be refused for want of mutuality must be considered from the point of view of Roman Dutch law and not English law (*q*). Mere registration of an agreement to sell will not be sufficient to support the enforcement of specific performance against a subsequent purchaser. Mere constructive knowledge on his part is not enough. There must be fraud (*r*). Specific performance of an oral agreement to reconvey land cannot be enforced even where money has been paid in pursuance of the agreement (*s*). Where plaintiff is unable to obtain specific delivery he can bring an action for damages (*t*).

Payment by instalments

In all decrees for the payment of money except money due on mortgages, the Court may order the payment of the sum by instalments. A refusal to order payment by instalments is not appealable. Where such an order has been made, if the defendant fails to pay any instalment, the whole amount or any balance then due becomes immediately payable. Where also in such a case the defendant appeals and the appeal goes against him, he loses his right to payment by instalments (*u*). The Court has a discretionary power to allow judgment debtors to liquidate their debts by instalments in appropriate cases, and the provisions of this section are not limited in their application to cases in which the judgment debtor has no realizable property and in which the judgment creditor can only look to recover his debt by means of instalments paid out of

(*o*) Holmes vs Alia Marikar 1 N. L. R. 282
(*p*) Sapramadu vs Anthony Pulle 30 N. L. R. 278
(*q*) Abeyesekera vs Gunasekera 20 N. L. R 404
(*r*) Fernando vs Peris 19 N. L. R. 281
(*s*) Fernando vs Peris 32 N. L. R. 25
(*t*) Suppiah Pillai vs Ramanathan 22 N. L. R. 225
(*u*) Section 194

wages or salary (*v*). Where the decree has been once entered for the payment of a sum of money, it is not competent for the Court to vary the decree by a subsequent order allowing the amount of the decree to be paid by instalments (*w*).

Decree for recovery of immovables

Where the action is for the recovery of immovable property yielding rent or other profit, the Court may provide in the decree for the payment of a sum of money in lieu of such rent or *mesne* profits from the date of the action till delivery of possession (*x*). Where however, in an action *rei vindicatio* prospective *mesne* profits are claimed by the plaintiff and the claim is disallowed, the order in spite of the provisions of section 196 operates as *res judicata* between the parties and no fresh action can be brought for the recovery of the same *mesne* profits. Section 196 does not vest in the Court a discretion as to allowing or disallowing future *mesne* profits, but the discretion vested is merely a discretion as to assessing beforehand the anticipated loss and giving judgment accordingly (*y*). Where *mesne* profits have accrued prior to the institution of the action, the Court may embody in the decree an order for payment of such profits, or pass a decree for the property and reserve the inquiry as to the amount of *mesne* profits until after the execution of the decree for the property (*z*).

Property of a deceased insufficient for payment of debts

In the administration by Court of the property of a deceased, if such property proves to be insufficient for the payment in full of all his debts, the same rules must be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities as may be in force for the time being with respect to the estates of persons adjudged insolvent. And all such persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration and make such claims against the same as they may be entitled to under the Code (*a*). The administration referred to in this section is not the ordinary testamen-

(*v*) Suppramaniam Chetty vs Rustomjee 8 C. W. R. 60
(*w*) Peris vs Ranasinghe 2 C. L. R. 111
(*x*) Section 196
(*y*) Cathrina vs Allis 17 N. L. R. 7
(*z*) Section 197
(*a*) Section 199

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

tary procedure provided for in the Civil Procedure Code. The section refers to actions such as those brought by a legatee against an executor or by a *cestui que trust* against a trustee claiming on account of the trust estate and administration of the trust property (*b*).

Right of pre-emption

Where an action is to enforce a right of pre-emption in respect of a particular sale of property, the decree must specify a day on which the money must be brought into Court by the plaintiff. The Court may, for good cause shown, extend the date. If the plaintiff does so, he will be given possession of the property. Otherwise his action will be dismissed with costs (*c*). A District Judge cannot, however, extend the time to allow the plaintiff to bring the money into Court by amending his own decree (*d*).

Costs

What are costs

Costs include the whole of the expenses necessarily incurred by either party on account of the action and in enforcing the decree passed therein (*e*). Apart from the consent of parties, the Court has no power, when granting an adjournment, to order that if costs are not paid before the adjourned hearing judgment will be entered against the party in default (*f*). Where the pre-payment of costs before the date of trial is agreed on, the tender of the sum on the date of trial is too late. The other party is entitled to judgment in terms of the agreement (*g*).

What may be recovered

When the defendant is put to unnecessary expense, he is entitled, whatever the result of the action, to be recouped these unnecessary costs (*h*). This may happen either by the plaintiff exaggerating his claim (*i*) or overvaluing it so as to bring it within the jurisdiction of the District Court (*j*). A successful party is entitled to recover from the opposite party not only the expenses of the witnesses who have been actually called at the hearing but also the expenses of all

(*b*) Hay vs The Administrator of Nunn's estate 9 N.L.R. 161
(*c*) Section 200
(*d*) Sidambaram Pillai vs Anthonipillai 2 Times 162
(*e*) Section 208
(*f*) Mamnoor vs Mahamooth 23 N. L. R. 493 F. B.
(*g*) Ramanaden Chetty vs Fernando 24 N. L. R. 411
(*h*) Meera Saibo vs Omer Lebbe 4 N. L. R. 319
(*i*) Goonesekera vs Senaratne 5 N. L. R. 242
(*j*) Hendrick Kure vs Saibu Marikar 4 N. L. R. 148

material witnesses whom it was necessary to bring. Whether such witnesses were material or not must be decided by the taxing officer (*k*). Batta paid to necessary witnesses who were present on dates when the matter was expected to be taken up may be recovered, but not so when it appears that they were uselessly summoned for the purposes of vexation (*l*). Even a successful party may be ordered to pay costs rendered necessary by his conduct (*m*). And he may also for the same reason be refused his own costs (*n*). As a rule, however, costs follow the event. The Court cannot speculate on motives or the ultimate issue of plaintiff's claim (*o*).

Where there are more parties than one

Where costs are decreed against two or more persons, the established practice is to consider the costs a joint and several debt which may be recovered from one or all such persons (*p*). Where costs are decreed in favour of several persons they are jointly entitled to the costs and payment to one will be payment to all (*q*). Where an order as to costs is made against the plaintiff in favour of one of two defendants, the criterion of the liability of the plaintiff to the defendant in whose favour the order for costs is made is the liability of the defendant himself to his proctor. If two defendants supporting a similar defence employ one proctor and have no agreement as to how the costs are to be borne, each of the defendants is liable to their proctor for half the costs of the defence and that would be the amount which the plaintiff would have to pay the successful defendant. If, however, the two defendants are supporting their defences entirely independent of each other though each has employed the same proctor, the liability of each to the proctor may be distinct and separate (*r*). Where two sets of defendants appear by the same proctor but give him separate proxies, each is entitled to the full amount of costs (*s*). Where the pleading is simple the settling fee for one advocate only should be allowed (*t*).

A junior advocate is not limited to a brief fee only, but where the trial lasts only one day a fee for a second consultation cannot be allowed (*u*).

(*k*) Le Mesurier vs The Attorney General 10 N. L. R. 67
(*l*) Ephraims vs Subasinghe 3 Br 69
(*m*) Government Agent Uva vs Banda 13 N. L. R. 341 F. B.
(*n*) Velan vs Ratnasingham 31 N. L. R. 375
(*o*) The National Bank of India vs Ponnusamy 9 S. C. C. 126
(*p*) Periacarpen Chetty vs Mohamedu 13 N. L. R. 97
(*q*) Adappa Chetty vs Kurera 23 N. L. R. 331
(*r*) Wijesuriya vs Mepi Nona 15 N. L. R. 158
(*s*) Croos vs Puncha 20 N. L. R. 25
(*t*) Fernando vs Totalihamy 3 C. L. Rec 68
(*u*) Jayawardene vs Karunaratne 31 N. L. R. 116

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

Bills of costs to be taxed

All bills of costs, whether between party and party or between a party and his proctor, must be taxed by the secretary of the Court according to the rates given in the schedule. Any dispute with regard to taxation must be referred to Court and its decision is subject to an appeal (*v*). The right of a party to claim a review of taxation by Court does not depend on his having appeared before the secretary and objected to items before taxation (*w*). Before the bill is taxed, however, the opposing proctor should be given reasonable notice (*x*).

Proctor's Lien

Proctor's lien

A proctor has a lien for his costs on the amount decreed. This lien is not affected by any claim in reconvention or set-off (*y*) and is not destroyed by the proctor's death (*z*). A proctor's lien attaches to a sum deposited in favour of his clients by the other side (*a*) or brought into Court through his professional exertions (*b*). A proctor's lien can be exercised against his client only and it attaches to the property only to the extent of the client's interest therein. Security deposited by an appellant for the respondent's costs remains as security until the costs are taxed and ascertained. Payment direct to the respondent on the dismissal of the appeal determines his interest in the sum so deposited (*c*). The lien may be exercised in respect of disbursements for stamps and Counsel's fees (*d*). "In several places," said Bertram C. J., "our Code makes allusion to the proctor's lien for costs. Wherever these allusions occur the word *costs* must be interpreted by the definition contained in section 208 which is entirely in accordance with the English rule governing the matter." A proctor cannot sue his client for his costs until the expiration of a month after notice to the client of his bill which must thereafter be taxed (*e*). If the taxing officer disallows more than sixth of the bill, the proctor will have to bear the expense of taxation (*f*).

(*v*) Section 214
(*w*) Meenatchi vs Rengappapulle 15 N. L. R. 449
(*x*) Abeydeera vs Soysa 14 N. L. R. 334
(*y*) Perera vs Perera 11 N. L. R. 1 ; 2 A. C. R. 150
(*z*) Perera vs Don Manuel 21 N. L. R. 81
(*a*) Appu Sinno vs de Silva 15 N. L. R. 51
(*b*) Wijesuriya vs Kaluappu 8 C. W. R 41
(*c*) Ambalavanar vs Wanduragala 11 C. L. Rec 89
(*d*) Wijesuriya vs Kaluappu 22 N. L. R. 257
(*e*) Section 215
(*f*) Section 216

CHAPTER III.

EXECUTION OF DECREES.

Judgment and decree

At the end of a trial the Judge must give his decision or judgment in the case which will be followed by a formal order or decree. A decree-holder must thereupon proceed to execution under Chapter 22 of the Code. He cannot maintain a separate action on the decree (*a*). The decree may command the person against whom it operates

(A) To pay money.

(B) To deliver movable property.

(C) To yield up possession of immovable property.

(D) To grant, convey or otherwise pass from himself any right to, or interest in, any property. A decree in a partition action enables the Court to put the party in possession and to issue a writ of possession for the purpose (*b*). But a person who has obtained merely a declaration of title to land without an order for ejectment is not entitled to a writ of delivery of possession (*c*).

(E) To do any act not falling under any of these heads.

Or it may be an injunction and enjoin him

(F) Not to do a specified act or abstain from specified conduct or behaviour,

Or it may

(G) Merely declare a right or status (*d*).

Decree to pay money

Rights of judgment creditor to seize and sell

Where the decree is a decree to pay money and is unsatisfied, the judgment creditor can seize and sell through the Fiscal all saleable property, movable and immovable, belonging to the judgment debtor or any

(*a*) Ramen Chetty vs. Appuhamy 9 N. L. R. 133
(*b*) Hadjiar vs. Mohamedu 4 C. W. R. 371
(*c*) Vengadasalem vs. Chettiyar 29 N. L. R. 446
(*d*) Section 217

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

interest he may have in any property. A judgment creditor may not issue execution for part of the debt unless he waives his right to recover the rest. Nor can each of several joint judgment creditors issue separate writs to recover fractional shares due to them (*e*).

Exemptions from liability to seizure and sale

The following however are exempted from the liability to seizure and sale.

(A) Clothes, beds and bedding of the judgment debtor or his wife and family.

(B) Tools, utensils and implements of trade or husbandry necessary to enable him to earn his livelihood as such. A fishing boat is not an implement of trade. By the word *implement* is intended something which is actually handled for the purpose of carrying on the trade or business (*f*).

(C) Professional instruments and library.

(D) Books of accounts.

(E) Mere rights to sue for damages.

(F) Any right of personal service.

(G) Naval, military and civil stipends and political pensions. Pensions granted by foreign governments however are not exempt from seizure (*g*).

(H) The salary of a public servant. A mechanic however, is neither a public servant under (h), nor a labourer under (j) (*h*).

(I) The pay and allowances of those to whom the articles of war apply.

(J) The wages of labourers and domestic servants. In Riley vs. Warden (*i*) Parke B. discussing the word *workman* or *labourer* said "It seems to me that this Act was intended to be applied to those who do a work by their own personal labour and that the object of it is to protect such men as earn their bread by the sweat of their brow and who are for the most part an unprovided class." In Jechand

(*e*) Ibrahim vs. Tillekeratne 2 S. C. R. 67
(*f*) de Silva vs. Konnamalai 30 N. L. R. 128
(*g*) Ambalavanar vs. Kandappar 31 N. L. R. 485
(*h*) Girigoris vs. The Locomotive Superintendent 15 N. L. R. 117
(*i*) 2 Exch. Rep. 59

Kusal vs. Aba Barka (*j*), it was held that labourers were those who earn their daily bread by personal manual labour or in occupations which require little skill and previous education. And our Courts have held that the wages of a lorry driver are not exempt from seizure under (j) (*k*) and that a mechanic employed in the railway is not a labourer (*l*).

(K) An expectation of succession by survivorship or other contingent right of interest. The interests of a fideicommissary are not generally saleable during the lifetime of the fiduciary (*m*). But where the fideicommissum vests on the death of the fiduciary the interest of a fideicommissary is an assured and certain interest and not of the nature of a *spes* (*n*).

(L) A right to future maintenance.

Examination under section 219

Before the judgment creditor proceeds to execution he may apply to the Court for an order on the judgment debtor to appear and state on oath what property he possesses or what debts are owing to him or whether he has means of satisfying the decree (*o*). The failure of the judgment debtor to attend does not amount to a contempt of Court (*p*). But the Court has an inherent power of enforcing its orders and may issue a warrant against him (*q*). An examination under section 219 is not obligatory on the judgment creditor but the failure so to examine the judgment debtor may operate as a bar to a subsequent issue of writ under section 337 on the ground of want of due diligence (*r*). The failure of a judgment creditor to avail himself of section 219 since the previous issue of writ is, however, not conclusive proof of want of diligence. Such failure only creates a presumption against the judgment creditor (*s*).

(*j*) 5 Bombay L. R. 132
(*k*) Reddiar vs. Abdul Latif 30 N. L. R. 95
(*l*) Girigoris vs The Locomotive Superintendent 15 N. L. R. 117
(*m*) Mohamed Bhai vs. Marikar 15 N. L. R. 466
(*n*) Silva vs. Silva 29 N. L. R. 373
(*o*) Section 219
(*p*) Annamalay Chetty vs. Gunaratne 1 N. L. R. 49 F. B.
(*q*) Narayan Chetty vs. Jasey Silva 8 N. L. R. 162
(*r*) Ephraims vs. Silva 6 N. L. R. 301
(*s*) Wijesekera vs. Perera 4 A. C. R. 23

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

Application for seizure

Application for writ of execution

The judgment creditor must apply to Court that the Fiscal be ordered to seize and sell in execution the property of the judgment debtor. An application for writ of execution is not by petition bearing a stamp on it but in the form 42 as given in the schedule to the Code (*t*). The application must state

(A) The number of the action, the names of the parties and date of the decree.

(B) Whether any appeal has been preferred from the decree.

(C) Whether any adjustment of the matter in dispute has been made between the parties subsequent to the decree. When a judgment creditor allows a judgment to remain unexecuted for a number of years a *prima facie* presumption arises that the debt has been satisfied or some settlement or adjustment has been come to about it. The creditor must prove that the amount is due on the decree before he is entitled to the prayer of his petition for execution (*u*).

(D) Previous applications for execution and their results including dates and amounts of previous levies. A seizure may terminate by abandonment (*v*). The recall of a writ will not necessarily terminate a seizure effected under it nor, in the event of a re-issue of writ, will a fresh seizure be necessary (*w*). A fresh seizure even if executed will not operate against the validity of the first seizure (*x*). The case would be different however where the writ is recalled on the full satisfaction of plaintiff's claim. This is, in effect, a removal of the seizure and an alienation after such recall would be valid against a purchaser in execution on a subsequent seizure even where the first seizure is registered (*y*). The remedy against the indefinite subsistence of a writ, the ordinary period for the execution of which has expired, is in the hands of the aggrieved party himself. It is open to him to apply to the Court for a removal of the seizure (*z*).

(E) Amount of the debt with interest due on the decree. A judgment creditor cannot issue writ for part of a debt unless he waives the rest. Nor can each of several joint judgment creditors issue separate writs to recover fractions of the debt due to all jointly (*a*).

(F) Amount of costs awarded.

(G) Name of the person against whom enforcement of the decree is sought.

(H) Mode of execution required, whether delivery of specific property, arrest of judgment debtor or seizure of property. A mortgagee in execution cannot be restricted to discuss any particular part of the mortgaged property before any other property (*b*).

Procedure in execution

If the application for writ is in conformity with the decree, the Court will issue the order of writ. The Court can, if necessary, with the consent of the applicant, amend the application to make it conform with the decree. The Fiscal upon receiving the writ must within forty-eight hours, if the debtor resides within five miles of his office or, if not, with an additional forty-eight hours for every five miles or part thereof, go to the residence of the judgment debtor and demand payment of the amount of the writ. If the demand for any reason is not complied with, the Fiscal must forthwith proceed to seize and sell any unclaimed property of the judgment debtor which may be pointed out by the judgment debtor or judgment creditor or any property specified in the writ. If the debtor is out of the Island, the property can be seized without a preliminary demand for payment. The Fiscal cannot seize property pointed out by the judgment debtor till it has been surrendered to him (*c*). A judgment creditor who seizes the property of a person other than the judgment debtor

(*t*) Soysa vs. Manuel 2 A. C. R. 130
(*u*) Chellappa Chetty vs. Kandiah 2 Bal. 61
(*v*) Gurusamy Pillai vs. Meera Lebbe 17 N. L. R. 467
(*w*) Andris Appu vs. Kolande Asari 19 N. L. R. 225 F. B.
(*x*) Periar Carpen Chetty vs. Sekappa Chetty 2 Cur. L.R. 162
(*y*) Wijewardene vs. Schubert 10 N. L. R. 90 F. B.

(*z*) Andris Appu vs. Kolande Asari 19 N. L. R. 225 F. B.
(*a*) Ibrahim vs. Tillekeratne 2 S. C. R. 67
(*b*) Gooneskera vs. de Silva 1 S. C. R. 195 F. B.
(*c*) Ranasinghe vs. Henry 1 N. L. R. 303

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

is liable to damages. It is no defence that the mistake was *bona fide* (*d*). The Fiscal cannot stay the sale except on order of Court. He may however adjourn it (*e*).

Mode of seizure

Seizure of movables

The seizure of movables must be manual (*f*), sufficient and effective to show that the thing is in *custodia legis* (*g*). Crops not severed from the ground are not movables (*h*). The property may, till the time of the sale, remain with the judgment debtor if he gives sufficient security or with the Fiscal if his expenses are paid. If the property is perishable, it may be sold at once. Where the property is a negotiable instrument not deposited in a Court nor in the custody of a public officer it must be seized and brought into Court (*i*). A debt not secured by a negotiable instrument is seized by a written notice from the Fiscal prohibiting the creditor from recovering the debt and the debtor from paying it (*j*). This is called a *garnishee* order. Sections 229 and 230 provide for the inclusion of debts due to the judgment debtor as to the existence of which there is no dispute. They are confined to cases in which the debtor would have had no defence if he had been sued by his own creditor the judgment debtor, and where the debtor of the judgment debtor could set up a claim or set off against his own immediate creditor he is not subject to the summary provisions of these sections (*k*). A decree for costs is a debt which may be seized in execution under section 229 (*l*). So are the wages due to a mechanic in the hands of the Locomotive Superintendent (*m*). But the wages of a kangany which, by the custom of the estate, are being applied in payment of a debt due by the kangany to the estate cannot be attached in execution at the instance of a third party. A garnishee order does not operate as a transfer of the debt which will make the garnishor creditor of the garnishee. It merely creates a lien in his favour which

Seizure of debt

A garnishee order

(*d*) de Alwis vs. Murugappa Chetty 12 N. L. R. 353
(*e*) Uparis vs. Subasinghe 19 N. L. R. 468
(*f*) Section 227
(*g*) Ramanathan Chetty vs. Tambyah 14 N. L. R. 134
(*h*) Perera vs. Ponnachchi 3 N. L. R. 56 ; Lee Hedges vs. Seville 8 S. C. C. 21
(*i*) Section 228
(*j*) Section 229
(*k*) Gurusamipillai vs. Palaniappa Kangany 10 N. L. R. 382
(*l*) Pullenayagam vs Pullenayagam 9 S. C. C. 122
(*m*) Girigoris vs. The Locomotive Superintendent 15 N. L. R. 117

is subject to all prior equitable rights (*n*). The garnishee may, on an *ex parte* application of the judgment creditor, be summoned to show cause why he should not pay to the judgment creditor the sum due to the judgment debtor or so much as may be sufficient to satisfy his debt. If he fails to obey the summons or, not disputing the debt, fails to pay it, the Court can issue writ against him for its recovery (*o*). Where the debtor disputes the debt, the Court cannot order him to pay it (*p*). Where he denies it, the Court has power to examine him regarding the truth of the statement that the debt was not due (*q*). And he cannot be ordered to bring into Court money belonging to the judgment debtor if he has parted with it rightly or wrongly (*r*). Payment made by, or execution levied against, him discharges his debt as against the judgment debtor to the amount paid although the judgment in respect of which payment was made, may be reversed (*s*).

Seizure of shares in a company

A share in a Company is seized by a similar notice prohibiting the person in whose name the share may be standing from transferring it or receiving any dividend thereon, and any other movable property by a notice prohibiting the person in possession from handing it over to the judgment debtor. One copy of such order must be fixed to some conspicuous part of the Court and another must be sent to the person to whom notice of the prohibition must be given (*t*).

Seizure of property in hands of public officer

If the property is deposited in the custody of the Court or of any public officer, the seizure must be by notice to such Court or officer to hold the property subject to further orders from the Court. Any claim to such property by a person other than the judgment debtor must be determined by the Court (*u*). Money deposited as security by an employee in the hands of a public officer may be seized under this section (*v*). In cases where money in the hands of a public officer is seized to satisfy a writ, there is nothing in the Civil Procedure Code which requires such officer to deposit the money in Court as a preliminary to the

(*n*) Gurusamipillai vs. Palaniappa Kangany 10 N. L. R. 382
(*o*) Section 230
(*p*) Usoof vs Sinna Umma 3 Weer 46
(*q*) Suppramaniam Chetty vs. Cave & Co. 32 N. L. R. 25
(*r*) Appuhamy vs. Abeywardene Lem & Aser 16.
(*s*) Section 231
(*t*) Section 229
(*u*) Section 232
(*v*) Albrecht vs. Grebe 3 C. L. R. 59

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

deciding of the respective rights of the parties. The prohibitory notice under section 232 orders the officer to hold the property subject to the further orders of the Court, and possession by such officer is a lawful possession which the Court will not disturb unless and until it has decided that somebody else has a better right or that the property is in jeopardy (*w*). An inquiry into a claim to money seized in the hands of a public officer under section 232 is an inquiry under sections 241 to 245 of the Code and the order on such inquiry is therefore not appealable. The remedy of the party against whom it is made is an action under section 247 (*x*). The notice necessary to effect seizure under sections 229 and 232 may be signed and served by the Fiscal under the authority of the writ of execution alone (*y*).

Seizure of money decree of the same Court

If the property is a money decree in favour of the judgment debtor by the same Court as that which passed the decree sought to be executed, the seizure will be by order of the Court directing the proceeds of the former decree to be applied in satisfaction of the latter. If the property is a decree by any other Court, seizure will be by notice to such Court to stay execution until such notice is cancelled or the holder of the decree sought to be executed applies to such Court to execute its own decree (*z*). A mortgage decree is a decree for money and seizable under section 234. The judgment debtor's debtor need not be given notice of the seizure. Payment by the debtor of the judgment debtor after that seizure is null and void as against the creditor who seized the decree (*a*). The seizure of a decree does not deprive the creditor on that decree of his right to execute it. All that the first paragraph of the section requires is that the proceeds when executed shall be applied in satisfaction of the seizure (*b*). In the case of other decrees, i. e. decrees other than decrees to pay money, seizure will be by order of the Court which passed the decree sought to be executed to the holder of the decree sought to be seized prohibiting him from transferring or charging it in any way. Where the decree sought to be seized has been passed by some other Court, a notice must be sent to such Court to abstain from executing such decree (*c*).

Decree of another Court

(*w*) Thiakarajapillai vs. Ranganathar 3 A. C. R. 123
(*x*) Samichi vs. Peris 16 N. L. R. 257 F. B.
(*y*) Section 233
(*z*) Section 234
(*a*) Saibo vs. Saibo 23 N. L. R. 56
(*b*) Carim vs. Wahid 23 N. L. R. 270
(*c*) Section 235

Alienation of movables pending seizure

When a seizure of any negotiable instrument, debt, share, money decree or any other movable property has been so effected and made known, any private alienation of it or payment of debt to the judgment debtor during the continuance of the seizure will be void as against all claims enforceable under the seizure (*d*). The seizure of movables to bind a third party must be an effective seizure, that is to say, there must be something done or apparent to show it, or proof of or inference of knowledge on the part of the third party that the property seized was in *custodia legis* (*e*).

Seizure of immovables

If the property is immovable the seizure must be by a notice signed by the Fiscal prohibiting the judgment debtor from transferring or charging the property in any way and all persons from receiving the same from him whether by purchase, gift or otherwise. The seizure must be proclaimed by beat of tom-tom or other customary mode and a copy of the notice must be affixed to a conspicuous part of the property, the Court house and the Fiscal's office. The Fiscal cannot enter on actual possession or receive the rents and profits unless expressly authorised to do so (*f*).

Regular seizure essential

A regular and perfect seizure by the Fiscal is an essential preliminary in the case of sales which will, otherwise, be void (*g*). Where what was seized and what was described in the notice under section 237 was a garden and one house of five cubits, whereas what was sold was a garden and two houses of five cubits, it was held that this was a very material irregularity which rendered the sale *de facto* void (*h*).

Registration of seizures.

Private alienations void

The registration of seizures is determined by section 9 of Ordinance 23 of 1927 which repeals that part of section 237 which deals with such registration. Under section 9 (1) of the Registration Ordinance, 23 of 1927, a notice under section 237 of the Code of a seizure of land effected after the commencement of the Ordinance, that is, after the first of January 1928, is an instrument affecting the land seized and may be registered under the Ordinance (*i*). Where a seizure of immovable property

(*d*) Section 236
(*e*) Ramanathan Chetty vs. Thambyah 14 N. L. R. 134
(*f*) Section 237
(*g*) Bastian Pillai vs. Anapillai 5 N. L. R. 165
(*h*) 1899 Koch 65
(*i*) Eminona vs. Mohideen 32 N. L. R. 145

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

has been effected, made known and registered, any private alienation after the seizure and before sale is void as against all claims enforceable under the seizure (*j*). Given a seizure duly effected, made known and registered, any dealing with the property subsequent to the seizure is void. There are three elements in the condition precedent, viz; seizure, publication and registration. The crucial date in the avoidance of an alienation is the date of the first element, the seizure (*k*). A registration of a seizure of land under a money decree in terms of section 237 does not affect a mortgage of the same land which was executed by the judgment debtor prior to the seizure and which was registered after the registration of the seizure (*l*). On a writ of execution issued in pursuance of a judgment entered on the sixteenth of February 1909 against the first defendant, the property in question was seized on the fifth of August 1916 and the seizure was registered on the eighteenth of August 1916. A sale was held under this seizure and the Fiscal reported to Court on the nineteenth of October 1916 that the purchaser had failed to pay the balance purchase money. There were several applications for execution subsequently. On the eleventh of November 1921, ten years after date of the decree, a further application was made under section 337 and was allowed. No steps were taken under the writ issued on that occasion. Writ was again re-issued whereupon the property was seized and the sale ultimately held on the sixth of November 1922 at which the second defendant became the purchaser. Meanwhile by bond dated the eleventh of December 1916 and registered on the twenty first of December 1916 the first defendant mortgaged the property with the plaintiff. In an action brought by the plaintiff on the mortgage bond it was held by Branch C. J. and Dalton J., Jayewardene J. dissenting, that the seizure in pursuance of which the Fiscal's sale was held was the seizure of the fifth of August 1916 and that the plaintiff's bond, having been executed pending such seizure, was null and void. Jayewardene J. however was of opinion that, in the circumstances of the case, the first seizure had ceased to be operative by abandonment. It was impossible to regard the sale at which the second defendant purchased the property as one based on the original seizure (*m*). Where the seizure is not registered, a private alienation

(*j*) Section 238
(*k*) Fernando vs. Fernando 9 N. L. R. 1 *per* Wendt J.
(*l*) Mohotte vs Dissanayake 13 N. L. R. 70 F. B.
(*m*) Perera vs. Mudalali 27 N. L. R. 483 F. B.

of the property under seizure is not invalid as against a purchaser at a Fiscal's sale (*n*). In such a case also a private alienation by the judgment debtor subsequent to the sale in execution but prior to the Fiscal's conveyance gives good title as against the purchaser at the Fiscal's sale (*o*). A seizure comes to an end when the writ is recalled (*p*). It will also be withdrawn if the amount of the decree and the costs of seizure are paid or if satisfaction of the decree is otherwise made through Court or if the decree is set aside in appeal (*q*). When a writ is satisfied by the payment of the amount which the Fiscal is thereby authorized to levy, he cannot further execute the writ merely for the recovery of his own fees (*r*).

Claims to property seized

Summary inquiry by Court

If a claim to the property seized in execution is made by a party other than the judgment debtor, the Fiscal must report the claim to Court and the Court must give notice to the parties (*s*) and make a summary inquiry into the claim. If the land seized is outside the jurisdiction of the Court which passed the decree sought to be executed, then the claim inquiry must be made by the Court within whose jurisdiction the seizure was effected and the proceedings must be forwarded to the Court which passed the decree. Such Court to make an inquiry must have co-ordinate jurisdiction with the Court which passed the decree (*t*). The value of the subject matter of an action under section 247 must be determined by the amount of the decree or the value of the property seized whichever is less (*u*). When a claim is made and referred to Court the Fiscal must stay his hand till the claim is determined (*v*). He should not sell the property without an order of Court. Such a sale does not pass title to the purchaser but is a nullity (*w*). No claim under section 241 can be made where the judgment creditor seizes a decree in favour of the judgment debtor (*x*).

(*n*) Kandaiya vs. Sangarapillai 3 C. L. Rec 108
(*o*) Velupillai vs. Marimuttu 22 N. L. R. 281
(*p*) Wijewardene vs. Schubert 10 N. L. R. 90
(*q*) Section 239
(*r*) Appuhamy vs. Adirian 17 N. L. R. 392
(*s*) Karonisa vs Singho 31 N. L. R. 410
(*t*) Section 241
(*u*) Ponnambalam vs. Paramanayagam 9 N. L. R. 48 F. B.
(*v*) Avitchi Chetty vs. Ibrahim Natchia 5 N. L. R. 19
(*w*) Gordion Appuhamy vs. Maria Culas 6 N. L. R. 279
(*x*) Passo vs. Alvares 13 N. L. R. 251

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

Owner need not make claim

It is not obligatory on an owner of land to make a claim if his property is seized in execution. If the owner feels secure in his title he is entitled to sit still and disregard it and the person seizing and selling it does so at his own risk while the purchaser is always liable to be ejected therefrom on an action *rei vindicatio* within the period of prescription. Of course, if an owner knowingly allows his property to be sold in execution without dispute, he risks the chance of having his claim rejected when he brings his tardy action in vindication, on the ground that acquiescence in the right of the execution creditor to seize showed an acknowledgement of the title of his debtor in the property seized (*y*).

What the claimant must prove

The claim must be made at the earliest opportunity. The sale, if necessary, will be stayed till the claim is determined unless it is obvious to the Court that the claim was made merely to obstruct the ends of justice (*z*). The claimant must show that *at the date of the seizure* he had some interest in, or was possessed of, the property seized (*a*). A person who purchases the land after it has been seized in execution is not entitled to prefer a claim under section 241 or bring an action under section 247 when the claim is disallowed (*b*). Where the purchaser of property at a Fiscal's sale has not obtained his conveyance, the debtor has still a seizable interest in the property which may be seized by another creditor. Subsequent acquisition of a conveyance will not be of avail to set up a claim to property seized or to bring an action under section 247 (*c*).

The inquiry

If it is proved at the inquiry that the property, when seized, was not in the possession of the judgment debtor or his tenant or someone in trust for him, or that the judgment debtor was possessing it on behalf of, or in trust for, someone else, the Court must release the property from seizure (*d*). Otherwise the Court must disallow the claim (*e*). The order in a claim inquiry being an order like a judgment should contain a concise statement of the case, the points for determination, the decision and the reasons. The claim or objection should be clearly defined and the facts on

(*y*) Ahamedu Marikar vs. Velupillai 12 N. L. R. 222
(*z*) Section 242
(*a*) Section 243
(*b*) Silva vs Kirigoris 7. N. L. R. 195
(*c*) Silva vs. Nona Hamine 10 N. L. R. 44 F. B. Abubakker vs. Tikiri Banda 29 N. L. R. 132
(*d*) Section 244
(*e*) Section 245

which the decision is based clearly found (*f*). If the Court finds that the property seized is subject to a mortgage or lien in favour of a person not in possession, it may allow the seizure subject to such mortgage or lien (*g*). This section is intended to benefit those whose liens or mortgages are not registered and whose rights would be extinguished by a sale in execution unless their existence and validity were acknowledged by the Court (*h*). The party aggrieved by the order made in the inquiry can within *fourteen* days from the date of such order, bring an action under section 247, commonly called a 247 action, to have his right to the property claimed established if he is the claimant, or if he is the judgment creditor, to have the property declared liable to seizure (*i*). The judgment debtor cannot bring a 247 action. He is not a party (*j*). Nor is a minor a party to an inquiry unless represented by a duly appointed guardian (*k*). In an 247 action by a judgment creditor against a successful claimant, it is incumbent on the plaintiff to aver and prove that, at the date of action, he holds an unsatisfied money decree as well as that the property he seeks to attach is assets of his debtor liable to be levied thereunder (*l*). Subject to the result of the 247 action the order in the claim inquiry is conclusive and not appealable (*m*). Such order however is not binding on any party who takes no part in the claim. He is at liberty to resort to the regular process of an action at law in respect of any title which he may have to the property seized in execution, irrespective of the provisions of section 247 of the Civil Procedure Code (*n*). A 247 action is open only to a party against whom an order under sections 244, 245 and 246 is made (*o*). And the disallowance of a claim to property seized at the instance of one writ-holder is no bar to the same property being claimed by the same claimant when seized at the instance of another writ-holder against the same debtor (*p*). An unsuccessful claimant can bring a 247 action even

Lien or mortgage

247 action

(*f*) Abdul Cader vs. Annamalay 2 N. L. R. 166
(*g*) Section 246
(*h*) Suppramaniam vs. Mohamedu 3 N. L. R. 232
(*i*) Samaranayake vs. Mendoris 30 N. L. R. 203
(*j*) Silva vs. Goonewardene 1 S. C. R. 321 F. B.
(*k*) Jalaldeen vs. Meerapulle 2 S. C. R. 81
(*l*) Perera vs. Aberan Appu 2 S. C. R. 119
(*m*) Silva vs. Fernando 9 S. C. C. 134 F. B.
(*n*) Arunasalem vs. Ramanathan 9 S. C. C. 190
(*o*) Muttiah Chetty vs. Mohamood Hadjiar 25 N. L. R. 185
(*p*) Meenatchy vs. Granapragasam 2 C. L. R. 97 F. B.

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

though the property has already been sold (*q*). "I do not see," said Wendt J., "why in principle the fact that the creditor has pushed on the sale in spite of the claim should prejudice the rights of the claimant."

When order in claim inquiry is final

An order in a claim inquiry, if a 247 action is not brought, is conclusive against the claimant and any transferee from him both as to possession and title (*r*). But the inquiry must be regular (*s*). Thus, where the claimant was absent owing to a mistake of Court and the claim was dismissed, the order was not conclusive (*t*). Where the claim was dismissed because the necessary stamps were not supplied, it was held that this was merely a refusal to investigate and not an order under section 245 (*u*). Where the Judge dismissed a claim on certain information from the secretary of the Court, the order was held not to be conclusive on a failure to bring a 247 action (*v*). The disallowance of a claim on a preliminary objection is not conclusive (*w*). But where the claimant has had notice of the inquiry and absents himself, the order disallowing the claim is one to which the conclusive character given by section 247 attaches. It is an order under section 245 for what difference is there between a decision which proceeds upon a disbelief of the evidence and one which proceeds upon the absence of evidence in support of the claim. The intention of the Code is manifest that a claim should be dealt with expeditiously so that execution of the writ should not be delayed or defeated, and to this end the Court is expressly authorised to refuse to investigate a claim which appears to have been designedly and unnecessarily delayed with a view to obstruct parties (*x*).

Action under section 247

A person whose claim is dismissed for want of appearance must bring a 247 action. He should not move to re-open the claim inquiry by explaining the default on the ground that the order was made *ex parte* (*y*). "Where the Legislature," said Wood Renton J., "has selected a particular remedy for a

(*q*) Silva vs. Ibrahim Rawter 10 N. L. R. 56 F. B.
(*r*) Meenatchy vs. Gnanapragasm 2 C. L. R. 97 F. B.
(*s*) Kiri Etana vs. Kirihamy 4 C. W. R. 164
(*t*) Fonseka vs. Ukkurala 15 N. L. R. 219
(*u*) Chelliah vs. Sinnacutty 18 N. L. R. 65
(*v*) Marikar vs. Perera 29 N. L. R. 61
(*w*) Perera vs. Fernando 1 C. W. R. 17. But the withdrawal of a claim amounts to a disallowance and is conclusive Perera vs. Perera 32 N. L. R. 197
(*x*) Isohamine vs. Monesinghe 29 N. L. R. 277
(*y*) Muttu Menika vs. Appuhamy 14 N. L. R. 329

grievance in terms that show that it intended that remedy to be the only one open to the aggrieved party, redress cannot be sought by any other form of proceedings."

Actions under section 247

Claim inquiry is with regard to possession

The investigation under section 241 is in respect of *possession* (*z*). Thus a mortgagee of movables who is not in possession of the property mortgaged has no right to claim them when seized under an unsecured creditor's writ so as to prevent a sale thereof in execution or to bring a 247 action when his claim is disallowed (*a*). The inquiry in a 247 action is an inquiry into *title*. But by way of establishing title there is nothing to prevent one of the parties from leading evidence of possession and claiming the benefit of section 110 of the Evidence Ordinance (*b*). So where a claimant consents to his claim being dismissed on the ground that the judgment debtor is in possession of the property claimed, he is not debarred thereafter from bringing a 247 action based on *title* to have it declared that the property is not liable to be seized and sold under the judgment creditor's writ (*c*). "If the only question involved in a 247 action," said Lascelles A. C. J., "is one of *possession*, the appellant is concluded by his admission in the claim inquiry that the property was in the possession of the defendants. If, on the other hand, the scope of the action is wider and the matter in question is the *title* of the claimant whether as owner or lessee, the admission of the appellant that the defendant was in possession would be no bar to his claim."

247 action is with regard to title

What must be proved in a 247 action

Where a 247 action is brought by an execution creditor against a successful claimant he has to prove as against the claimant his debtor's right to the property, and he must do so as fully as the debtor himself if the latter was seeking to vindicate his title as against the claimant (*d*). The judgment creditor in such an action cannot prove the title by prescription of the judgment debtor unless the judgment debtor is a party to the action. The language of section 3 of the Prescription Ordinance makes it quite clear that it is only the possession of the plaintiff or the defendant, or of some party under whom the plaintiff or defendant

(*z*) Karuppen Chetty vs. Anthonyake 5 N. L. R. 300
(*a*) Wijewardene vs Maitland 3 C. L. R. 7. F. B.
(*b*) Banda vs. Mahatmaya 16 N. L. R. 485
(*c*) Tamel vs. Palaniappa Chetty 9. N. L. R. 371
(*d*) Samaranayake vs. Mendoris 30 N. L. R. 203

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

claims, that can be relied upon for the purpose of establishing title by prescription (*e*). In a 247 action between the unsuccessful judgment creditor and the successful claimant, the judgment creditor is concluded by a judgment adverse to the judgment debtor in a litigation between the judgment debtor and the claimant (*f*). Where in a 247 action by an unsuccessful claimant the plaintiff and the representatives of the deceased judgment debtor attacked the validity of the judgment sought to be executed on the ground that the judgment debtor was a minor, the Supreme Court held that the judgment entered against the minor though not represented by a guardian was at most an irregularity, and that it was not open to a collateral attack. Though the plaintiff was not a party to that action he could not attack the judgment in that case in a 247 action (*g*).

Claimant may bring vindicatory action

Under certain circumstances a person who is not entitled to bring a 247 action may bring an action *rei vindicatio* for declaration of title. Thus where a claim to a land was rejected as the conveyance in favour of the claimant was subsequent to the seizure, the Supreme Court held that in such a case the failure to bring a 247 action did not make the order in the claim inquiry conclusive as to the claimant's title, and allowed him to bring a *rei vindicatio* action (*h*).

Paulian action

247 action may be combined with Paulian action

It has been held by Hutchinson C. J. and Middleton J., Wood Renton J. dissenting, (*i*) that in a 247 action where the claimant bases his title to the property seized on a deed of transfer executed by the judgment debtor, it is competent for the judgment creditor to claim a declaration that such deed was executed by the judgment debtor with a view to defraud creditors, and is therefore null and void. That is to say, the judgment creditor can combine what is known as a *Paulian action* with a 247 action. In such a case the grantor of the deed i. e. the judgment debtor should be joined as a party to the action and, where he is not already joined, the Court may add him as a party under section 18 of the Code. A Paulian action is available to a judgment creditor only if he can show that, by reason of the alienation complained of, the

(*e*) Ramen Chetty vs. Mohideen 18 N. L. R. 478
(*f*) Pedrupulle vs. Dionisa 20 N. L. R. 143
(*g*) Rupasinghe vs. Fernando 20 N. L. R. 345
(*h*) Ibrahim vs. Bawa Sahib 26 N. L. R. 71
(*i*) Haramanis vs. Haramanis 10 N. L. R. 332 F. B.

judgment debtor has no assets on which execution can be levied or that the assets on which it already has been levied are insufficient to satisfy the debt (*j*). Where in fact no creditor has been defrauded, a deed will not be set aside as being in fraud of creditors although it was so intended (*k*). The decree in a Paulian action makes a fraudulent deed void only so far as it is necessary to make the property available for execution. The title to so much of the property as is not sold in execution remains in the transferee (*l*). The mere fact that consideration has been given by an alienee does not afford him a complete defence where he has participated in a scheme to defraud the creditors (*m*). But a judgment creditor who does not bring a 247 action within the prescribed time cannot, in a Paulian action brought after the expiration of fourteen days from the date of claim, obtain a declaration that the properties covered by the deeds set aside were liable to be sold in execution of his decree (*n*).

Where the property is mortgaged.

An hypothecary action does not lie against a mortgagor who has parted with all his interest in the mortgaged property previous to the action by the mortgagee. A personal action only lies against him for the money. Where a mortgagee obtains a mortgage decree against his mortgagor after the latter has parted with all his interest in the mortgaged property, and claim is made by the purchaser on the seizure of the property in execution of the decree in favour of the mortgagee and upheld, an action under section 247 does not lie to the mortgagee. The proper remedy for the mortgagee is a personal action against the mortgagor and an hypothecary action against the purchaser who is in possession of the mortgaged property (*o*). The Supreme Court while recognising the difference between a mortgagee's action under section 247 and his common law hypothecary action, has allowed a 247 action to be treated as a hypothecary action if the plaint discloses a cause of action of the latter kind (*p*).

Test of jurisdiction.

The value of the subject matter of a 247 action must be determined by the amount of the decree or the value of the property seized, whichever happens to be

(*j*) Fernando vs. Fernando 26 N. L. R. 292.
(*k*) Fernando vs. Fernando 20 N. L. R. 298.
(*l*) Punchi Banda vs. Perera 30 N. L. R. 355.
(*m*) Meera Saibo vs. Ayan Sinnavan 29 N. L. R. 84.
(*n*) Dias vs. Perera 4 Bal. 124.
(*o*) Sleema Lebbe vs. Banda 1 A. C. R. 72 F. B.
(*p*) Koch 35.

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

less (*q*). The 247 action need not necessarily be brought in the Court which held the inquiry into the claim. If the value of the property seized does not exceed three hundred rupees, the action should be brought in the Court of Requests although the original action in which execution issued was in the District Court (*r*). Where, although the amount of the writ under which the land was seized was under three hundred rupees, the plaintiff brings his action in the District Court an order of dismissal will not be justified. The risk of losing his costs is the only penalty incurred by a plaintiff who comes into the District Court instead of the Court of Requests (*s*).

Time within which 247 action must be brought

A 247 action must be brought within fourteen days from the date of the order in the claim inquiry. In reckoning the fourteen days Sundays and public holidays are not excluded (*t*). In Fernando vs. Jamel (*u*) on a plea of non-joinder a 247 action was, under section 406, withdrawn and a fresh action was brought against the original defendants and certain others. But the fresh action was not brought within fourteen days of the decree disallowing the claim as required by section 247. The Supreme Court held that section 407 applied, and that the plaintiff was bound by the period of limitation of fourteen days as recited in section 247 as if the first action had not been brought. Where a plaint presented within the time prescribed for the institution of a 247 action was returned for amendment, and was presented again duly amended after the period of fourteen days from the first presentation had expired, it was held on objection that the action was not instituted too late (*v*). But where a plaint is rejected and not put on the file of the Court it cannot be said to constitute the institution of an action (*w*).

Costs of claim inquiry

The institution of a 247 action by the judgment creditor does not suspend the execution for costs of a successful claimant of the property seized (*x*). And an unsuccessful claimant who brings a 247 action is not entitled to recover by way of damages the costs incurred by him in the claim inquiry, though he succeeds in

(*q*) Ponnambalam vs. Paramanayagam 9 N. L. R. 48 F. B.
(*r*) Mell vs. Fernando 2 N. L. R. 225
(*s*) Perera vs. Perera 4 N. L. R. 282
(*t*) Allapitchai vs. Sinna Markayar 9 S. C. C. 182 F. B.
(*u*) 2 S. C. R. 88 F. B.
(*v*) Endoris vs. Hamine 3 N. L. R. 97
(*w*) Silva vs. Dinekhamy 1 N. L. R. 19
(*x*) Silva vs. Abeweera 3 Tam 112

establishing his title to the property seized (*y*). "If the point," said Wood Renton J. "had not been concluded by authority I should have thought that there was much to be said in favour of a decision in a contrary sense." The Court that tries a 247 action cannot interfere with the order as to costs made in the claim proceedings (*z*). Where the plaintiff brings a 247 action on a groundless claim the Court has power to punish him (*a*).

Sale of property seized.

Sale of property seized

The property having been seized, the Fiscal must proceed to sell or otherwise dispose of it. Where the property seized is a decree in favour of the judgment debtor, then the judgment creditor becomes his assignee for the purpose of execution of the decree so seized (*b*), but only to execute the decree for the satisfaction of the decree in his own favour. Any surplus will belong to the actual decree holder (*c*). In the case of all other movable property, the Fiscal must give notice of sale by tom-tom or in any other manner both at the place of seizure and of sale. The notice must be given not less than three days or more than fourteen days before the date of sale. It must specify the property to be sold (*d*), the number of the action, the place, day and hour at which the sale is to take place and the amount due on the writ (*e*). Failure to specify the property in the advertisment is a material irregularity sufficient to set aside the sale (*f*). Similar notice must be given in the case of immovable property. Four copies of the notice of the sale in English and the vernacular must also be posted one each at the Fiscal's office, the Court house where execution issued, some conspicuous part of the town or village in which the land is situated, and some conspicuous spot on the property for sale. This must be done at least ten days before the sale takes place (*g*). Where the property seized exceeds Rs. 1000 in value the sale must also be advertised

(*y*) Abdul Rahiman vs. Abubaker Lebbe 13. N. L. R. 329
(*z*) Vanniah vs. Veemanaden 2 Br. 226
(*a*) Section 248
(*b*) Section 254
(*c*) Cader vs. Saibo 25 N. L. R. 36
(*d*) The Fiscal is not required to mention the boundareis in the notice of sale. Sinno Appu vs. de Silva 4 N. L. R. 307
(*e*) Section 255
(*f*) Natchiya vs. Abdul Cader 24 N. L. R. 446
(*g*) Section 255

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

in the Gazette at least twenty days in advance. The advertisment in the Gazette is essential. It is ordered for the protection of the judgment debtor and the judgment creditor cannot waive it *(h)*. The judgment creditor or judgment debtor may also require the sale to be advertised in any newspaper named by him on payment in advance of the cost of such publication *(i)*. The sale must be held by an officer of the Fiscal or some other person duly authorised in writing by him *(j)*. The sale may be stayed if the judgment debtor satisfies the Court that he can pay the judgment debt by a lease, mortgage or private sale of the property belonging to him. In such a case the judgment debtor can, with the permission of the Court, deal with the land in spite of the provisions of section 238 which enacts that any private alienation after the seizure is void as against the judgment creditor if the seizure has been registered. No such mortgage, sale or lease shall become absolute until it is confirmed by Court *(k)*.

Payment of price.

The purchaser at the sale in execution must, where the amount does not exceed one hundred rupees, pay the amount in full. Otherwise the property must forthwith be put up for sale again. Where the price exceeds one hundred rupees he must pay a deposit of twenty five per cent of the purchase price *(l)*. The balance must be paid within thirty days *(m)*. In default of the payment of the balance the deposit is forfeited and goes to reduce the judgment debt and the property must be up for sale again *(n)*. Every such re-sale must be after such notice as is provided for in the case of the orginal sale *(o)*. If there is a difference between the price fetched at the first sale and that fetched at the second, such deficiency must be paid by the first purchaser or his sureties. On non-payment the Fiscal has to certify to Court the amount of the difference *(p)*, and execution as in a decree for money will issue against such defaulting purchaser *(q)*.

(h) Rosenberg vs. Silva 8 N. L. R. 110.
(i) Section 256.
(j) Section 257.
(k) Section 259.
(l) Section 260.
(m) Section 261.
(n) Section 262.
(o) Section 263.
(p) Section 266.
(q) Section 270.

Decree holder may purchase with sanction of Court.

The decree holder may himself bid for the property put up for sale in execution *(r)*. He must however obtain the previous sanction of the Court. In Silva vs Uparis *(s)*, Lawrie J. held that the fact of the judgment creditor bidding and purchasing at an execution sale without the previous sanction of the Court required by section 272 was not a material irregularity in the publishing or conducting of the sale within the meaning of section 282. In Chellappa vs Selvadurai *(t)*, however, Lascelles C. J. and Wood Renton J. dissented from this finding. "Notwithstanding the judgment of Silva vs Uparis," said Lascelles C. J. "I am clearly of opinion that section 272 of the Civil Procedure Code must be construed to mean what it says, namely, that the decree holder may only bid for and purchase the property with the previous sanction of the Court, and subject to such terms as the Court may impose. The language of the section is too clear to admit of any other interpretation and the provisions of the section which empower the Court to impose terms are in themselves reasonable and useful." And Wood Renton J. said "I am quite unable to adopt the view taken by Lawrie J. in Silva vs Uparis that section 272 of the Civil Procedure Code does not expressly forbid an execution creditor from purchasing without the sanction of the Court. Lawrie J. sought to justify this interpretation of the section by reference to the Roman Dutch law and to the practice prior to the enactment of the Code of Civil Procedure. With the greatest respect I would point out that we are now concerned only with the language of section 272 itself. If seems to me to be entirely unambiguous. I would hold that the order made by the Court on the respondent's motion for its sanction was an order made under section 272; that it was binding alike on the respondent and on the Deputy Fiscal and that no practice of the District Court could justify a Deputy Fiscal in disregarding it. I desire to point out as emphatically as possible that officers of the Court who fail to comply with such orders in reliance of such a practice as was set up in the present case are assuming a very serious responsibility." There is nothing, however, to prevent a judgment creditor from buying the property through another and he will be entitled to sue to enforce the trust *(u)*. A writ which

(r) Section 272.
(s) 3 C. L. R. 75.
(t) 15 N. L. R. 141.
(u) Weeraman vs. Silva 22 N. L. R. 107 followed in Samaranayake vs. Dissanayake 23 N. L. R. 383.

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

has to be re-issued on account of the *laches* of a Fiscal does not require to be re-stamped and a sale in execution of such a writ is good (*v*). When a judgment creditor is the purchaser, the amount of the purchase money may be set off against the decree and the Court may enter up satisfaction in whole or in part accordingly (*w*).

Sale of movables

If the property to be sold is a negotiable instrument or a share in a public company or corporation, the Court may direct the Fiscal instead of selling it by public auction to sell it through a broker at the market rate of the day (*x*). In the case of other movable property, the price shall be paid at the time of the sale and, in default of payment, the property shall forthwith be put up for sale again. On payment of the purchase money the officer holding the sale shall grant a receipt for the same and the sale shall become absolute (*y*). No irregularity in conducting or publishing the sale of movable property shall vitiate the sale unless substantial damage has been caused to the person impeaching the sale thereby (*z*). Section 276 recognises the right of our Courts to set aside sales of movables by the Fiscal when there has been material irregularity in the publication and conduct of the sale, and the party impeaching the sale has suffered substantial injury (*a*). It is within the competence of the Court executing the decree to inquire into the irregularity complained of in the same action. The application in such a case should be by summary procedure. The failure to set out in the petition the grounds of irregularity is no reason for dismissing the application to have the sale set aside. The averment in the petition that no notice of the execution sale had been received by the judgment debtor affords a *prima facie* case for investigation by the Court (*b*). Section 275, however, which declares a sale of movable property absolute on the payment of the purchase money and the granting of a receipt for the same by the officer conducting the sale, is clearly inconsistent with section 276 which enables such a sale to be impeached if, by reason of any irregularity in publishing or conducting the sale, substantial damage has been caused (*c*).

(*v*) Udeappa Chetty vs. Appuhamy 2 A. C. R. 165
(*w*) Section 272
(*x*) Section 274
(*y*) Section 275
(*z*) Section 276
(*a*) Muttiah vs. Fernando 2 A. C. R. 86
(*b*) Girigoris Silva vs. Selohamy 1 Times 272
(*c*) Silva vs. Selohamy 25 N. L. R. 113

Delivery to purchaser

When the property sold has been actually seized it must be handed over to the purchaser (*d*). If a third party is in possession, a notice will be served on him prohibiting him from delivering the possession of it to any person but the purchaser (*e*). Where the property sold is an unsecured debt or a share in any public company, the assignment will be by a certificate of sale in favour of the purchaser signed by the Fiscal and a prohibitory notice on the debtor or the company in favour of the purchaser (*f*). The assignment must be signed by the Fiscal. The Deputy Fiscal has no authority to sign it (*g*). Any necessary endorsement of a negotiable instrument may be made by the Judge on behalf of the judgment debtor (*h*). In the case of any movable property not provided for previously, the Court may make an order and execute such documents as may be necessary vesting such property in the purchaser and such property shall vest accordingly (*i*).

Confirmation of sale.

Sale must be reported to Court

Every sale of immovable property must be reported to Court by the Fiscal within ten days after the sale. No sale of immovable property shall become absolute until thirty days have elapsed subsequent to the receipt of such report and until such sale has been confirmed by Court (*j*). The report contemplated by the Code is a true report by the Fiscal that he had sold the property, or caused it to be sold under seizure, to the persons named as purchasers. The Code does not contemplate the substitution of another person for the person reported to be the purchaser on the ground that the report was false, and the confirmation of the sale with so important a modification (*k*). A sale may be set aside on the ground of some material irregularity in publishing or conducting it, but only if such material irregularity has resulted in some substantial damage to the applicant and the grounds of the irregularity have been notified to Court within thirty

(*d*) Section 277
(*e*) Section 278
(*f*) Section 279
(*g*) Abdul Cader vs. Valiappa Pillai 5 Bal 95
(*h*) Section 280
(*i*) Section 281
(*j*) Section 282
(*k*) Nandias vs. Bastian Appu 5 C. L. Rec 129

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

days of the receipt of the Fiscal's report (*l*). This section does not apply to the sale in execution of a mortgage decree (*m*).

When sale may be set aside.

The sale may be set aside on the application by petition of (a) the decree holder, (b) the person whose immovable property has been sold, (c) any person establishing to the satisfaction of the Court an interest in such property (*n*). In an application by the judgment debtor to set aside a sale, the decree holder is not a necessary party (*o*). A decree holder in another action who has obtained a judgment against the same debtor and who is entitled to share rateably in the proceeds of the sale of the debtor's property under section 352 of the Code is a person having an interest in such property within the meaning of section 282, and may apply thereunder to have the sale in execution set aside (*p*). A holder of a decree in another Court who may not claim concurrence under section 352 is nevertheless also a person interested (*q*). So also an heir to an estate has an interest in the property sold in execution of a judgment against the administratrix of that estate within the meaning of section 282 (*r*). A sale can be set aside only on the ground of a material irregularity which has resulted in substantial injury. A mere allegation of inadequacy of price without proof that it was the effect of the irregularity on the ground of which the sale is impeached is not sufficient evidence of substantial damage caused by such irregularity. It was held in Silva vs. Dias (*s*), followed in Chellappa vs. Selvadurai (*t*), that a person seeking to set aside a Fiscal's sale on the ground of material irregularity must lead direct evidence to prove that the sale of the property at an undervalue was due to the irregularity. In Koelman vs. Amerasekera (*u*) the alleged material irregularity was the misdescription of the property sold. The substantial injury was that it was sold much below its real value. It was held that to set aside a Fiscal's sale on the ground of material irregularity under

(*l*) Section 282.
(*m*) Palaniappa Chetty vs. Usubu Lebbe 24 N. L. R. 351.
(*n*) Section 282.
(*o*) Muttuwa vs. Silva 32 N. L. R. 107.
(*p*) Komerappa vs. Muttiah 3 S. C. R. 41.
(*q*) Perera vs. Brito 22 N. L. R. 63.
(*r*) Caruppan Chetty vs. Habibu 11 N. L. R. 230.
(*s*) 13 N. L. R. 125.
(*t*) 15 N. L. R. 139.
(*u*) 23 N. L. R. 327.

section 282 it is not necessary that in all cases there should be direct evidence of the connection between the irregularity and the injury. Where the injury appears to be one which may be reasonably and logically inferred to be the natural consequences of the irregularity the connection need not be further established by direct evidence.

Material irregularity.

The non-publication of a Fiscal's sale in the Government Gazette is a material irregularity within the meaning of section 282 but does not render the sale null and void (*v*). In Ukku Amma vs. Punchi Ukku (*w*) there was an application to set aside a sale on the ground of a material irregularity. The irregularity alleged was that the sale was not published in the Government Gazette as required by section 256. The property which consisted of an undivided half share of three lands was sold for Rs. 748/50 to the appellant. The Judge held that the inadequate price realized at the sale was due to the failure to advertize in the Gazette and set aside the sale. On appeal the decision of the trial Judge was reversed on the ground that inadequacy of price was not of itself evidence of substantial damage caused by an irregularity, and a failure to advertize in the Gazette not necessarily the cause of the low price realized. "The substantial injury," said Dalton J., "is the alleged inadequate price. The Court has previously held on more than one occasion that inadequacy of price was not of itself evidence of substantial damage caused by the irregularity. There is, in addition, here admittedly no direct evidence of the connection between the irregularity, that is the failure to advertise in the Gazette, and the injury. But one can go further than that in the interests of the applicant (*x*). Is the injury one which may be reasonably and logically inferred to be the natural consequences of the irregularity? To me it seems the answer is "no." As De Sampayo J. with all his long experience pointed out in Muttu Tamby vs. Jayaman (*y*) the class of persons who are likely to bid for village lands are not those who ordinarily read the Government Gazette." And Akbar J. said "Although section 256 says that no sale of land

(*v*) Dias vs. Wijesekera 4 C. W. R. 338 following Silva vs. Dias 13 N.L.R. 125 and Chellappa vs. Selvadurai 15 N. L. R. 139.
(*w*) 30 N. L. R. 30.
(*x*) See Koelman vs. Amarasekera 23 N. L. R. 327.
(*y*) 2 C. W. R. 247.

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

over one thousand rupees in value is to take place unless it is advertised in the Government Gazette, yet section 256 must be read along with section 282 in order that one may find out what the effect of non-publication is going to lead to. Dias vs. Wijesekera (z) is an authority to this effect and I see no reason why it should not be followed in this case." The irregularity must be in the publication and conduct of the sale. No other objections can be considered than those mentioned in the section (*a*). "I am of opinion," said Lascelles C. J. in Kandavanam vs. Hoole (*b*), "that section 282 as far as irregularity of procedure is concerned is exhaustive, and that no irregularity of procedure which is not a material irregularity in publishing and conducting the sale is a ground for setting the sale aside. To admit of any description of irregularity for this purpose would be to deprive the section of its natural and obvious meaning." The sale must be a public sale so that the failure on the part of the Fiscal's officer to secure a proper public entrance to the place where the sale is conducted would be a material irregularity in the conduct of the sale (*c*). An order of Court to stay the sale supersedes the writ, and any sale held in defiance of of such an order will be void (*d*).

Grounds of irregularity must be notified to Court

The grounds of the alleged irregularity must be notified to Court within thirty days of the receipt of the Fiscal's report. "Sections 282 and 283 of the Civil Procedure Code," said Wood Renton J (*e*), "if they are read together require, in my opinion, and the same view was taken *obiter* by Layard C. J. (*f*), that the grounds of each irregularity on which the appellant relies should be expressly notified to the Court within the period of thirty days contemplated by the section and the Court has *no power* to set aside—whatever hardships the particular circumstances of the case disclose—any sale on the ground of an irregularity which has not been so notified. There is good reason for the requirement that irregularities should be promptly notified to the Court dealing with applications of this kind inasmuch as their determination frequently depends on *viva voce* evidence which can be lead at the inquiry. It might well be that, if the

(*z*) 4 C. W. R. 338
(*a*) Wickremesinghe vs. Jevath Hamy 2 A. C. R. 160
(*b*) 14 N. L. R. 314
(*c*) Suppramaniam Chetty vs. Soysa 25 N. L. R. 344
(*d*) Raman Chetty vs. Siriwardene 7 C. L. Rec. 63
(*e*) Chellappa vs. Selvadurai 15 N. L. R. 139
(*f*) Muttu Carruppen Chetty vs. de Mel 6 N. L. R. 239

point had been taken in the appellant's original petition, the respondent might have been in a position to meet it by *viva voce* evidence.

Where decree is reversed in appeal

Where a decree has been reversed in appeal and where, pending the appeal, the property has been sold by the Fiscal and the sale has been confirmed by Court after judgment in appeal was given, the Court has the power to vacate the order of confirmation (*g*). "A sale under a decree said Layard C. J." "is incomplete until confirmation by the Court and the Court's power to confirm a Fiscal's sale is dependent upon the sale being held in pursuance of a decree. It is the existence of a valid decree which gives the Court jurisdiction to act. Such being the case, when the decree has been swept away by a judgment in appeal, the Court has no power to confirm the sale, there being at the time no subsisting decree which would justify the Court in acting. The power of confirmation is to be executed when there is a decree and a sale thereunder and, consequently, if the decree has ceased to exist before the Court is called upon to exercise the power of confirmation, the Court's jurisdiction to confirm ceases. Again under section 283 a sale can only be confirmed if no such application is made as is mentioned in the preceding section. One of the parties who is entitled to make such application and support it under section 282 is the decree holder. No such person, however, exists as a decree holder when there is no subsisting decree." And Wendt J. said, "The true principle appears to me to be that the confirmation of the sale is a step in the execution of the decree which the Court has no jurisdiction to take if the decree no longer exists." This decision was followed by a Full Bench in Abdulla vs. Menika (*h*). Bertram C. J. with whom de Sampayo J. agreed said, "I cannot accept the argument that execution proceedings stop with the execution sale. In my opinion the confirmation of a sale is part of the execution proceedings and a sale is not complete until it is confirmed. In this connection section 289 is noticeable for it provides that the execution debtor shall not be divested of his title by virtue of the sale until confirmation of the sale and execution of the Fiscal's conveyance. Any act done by the Court for divesting him of his title, such as the confirmation of the sale, is surely part of the execution proceedings. This being so, it follows that, if at that stage there is

(*g*) De Mel vs. Dharmaratne 7 N. L. R. 274
(*h*) 23 N. L. R. 301

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

no decree to execute, the Court's powers to go on with the execution proceedings cease also (*i*). It is contended that the position of a stranger who purchases is different from that of the execution creditor who purchases under his own writ. But in every case an auction purchaser undertakes a certain risk and the purchaser must satisfy himself that there was a subsisting decree before he applies for confirmation." Garvin J. however, did not agree. "Sections 282 and 283," he said, "contemplate the presence of the decree holder in the event of an application to set aside a sale but I can find nothing in these sections which requires his presence at the confirmation of the sale. Indeed, confirmation is obtained by an *ex parte* application and may, under the Code, be so obtained at any time after the prescribed time of thirty days so long as no application has in the meantime been made to set aside the sale. I must therefore dissent from the statement that sections 282 and 283 contemplate a valid and subsisting decree at the time of confirmation. There is the clearest possible authority for the proposition that the reversal of a decree does not affect rights to property *bona fide* acquired at a sale regularly held in execution of a decree valid and subsisting at the date of the sale (*j*). It is contended that, in view of requirement of our law that a sale should be confirmed, this applies only to the case of a sale which has been confirmed. But what is important is the principle underlying the decision which applies with as much force to the case of a purchaser who has, as in this instance, parted with his money in exchange for the right to obtain title to and possession of property sold in execution and who, I think, is entitled to receive that which he has purchased and paid for unless it is quite clear that the Court is prevented from fulfilling its part. The provisions of the Code and the general principles to which I have referred lead me to the conclusion which I think is just to all the parties; that conclusion is that the confirmation of a sale in execution is not a step in execution and is a step which a Court has jurisdiction to take even after the decree has been set aside in appeal. It is the decree holder alone who can take a step in aid of execution. An application by the purchaser for confirmation of a sale in execution is not a step in execution even when the purchaser is the decree holder."

(*i*) See De Mel vs. Dharmaratne, 7 N. L. R. 274.
(*j*) Jan Ali vs. Jan Ali Chowdray, 10 W. R. Sutherland 154.

Where judgment debtor has no saleable interest.

The sale may also be set aside at the instance of the purchaser on the ground that the judgment debtor had no saleable interest in the property sold (*k*). A person, however, who has forfeited his deposit under section 262 cannot apply under this section because there has, in fact, been no sale owing to his default (*l*). The proviso to this section requires that both the judgment debtor and the decree holder should be made respondents to the application. Can, therefore, a purchaser at a Fiscal's sale who is also the decree holder apply under section 284 to have the sale set aside on the ground that the judgment debtor had no saleable interest therein ? It has been held that he can (*m*). "The terms of section 284," said Bertram C. J., "are general but there is a proviso. De Sampayo J. in Suppramaniam Chetty vs Fernando (*n*), said that the terms of the proviso which declare that both the judgment debtor and the judgment creditor must be made respondents to the petition exclude from its application the case in which the judgment creditor is the purchaser. These observations, however, are *obiter*. In the West Derby Union vs The Metropolitan Life Assurance Society (*o*), Lord Herschell said 'I decline to read into any enactment words which are not to be found there and which would alter its operative effect because of the provisions to be found in any proviso.' With regard to this particular proviso—that is, to section 284—its object is to protect the decree holder to secure that, in a case in which he would not otherwise have notice, he gets notice. It would be acting against this object if we were to construe the proviso as depriving him of the privileges of the section altogether. The proviso applies only in cases in which some person other than the decree holder is the purchaser".

Fiscal's conveyance to purchaser.

Where a sale is set aside under sections 282, 283 and 284, the purchaser is entitled to a refund of his purchase money (*p*). Where the purchase money has been paid in full and the sale confirmed, the purchaser is entitled to a conveyance from the Fiscal transferring the property to him (*q*). It is well settled law that mere lapse of time does not deprive the purchaser of the right to ask for a conveyance. But it

(*k*) Section 284.
(*l*) Arunachalam Chetty vs Hamidoon, N. L. R. 101.
(*m*) Colombo Stores vs Silva, 26 N. L. R. 185.
(*n*) 4 C. W. R. 33.
(*o*) (1897) A. C. 647.
(*p*) Section 285.
(*q*) Section 286.

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

was pointed out in the case of Jaldin vs. Nurma (r) in which the same principle was laid down that when a purchaser at a Fiscal's sale delays to obtain a conveyance and when the Fiscal declines to give him one without an order from Court, the Court on being applied to would probably refuse to interfere unless if was satisfied that the applicant had had possession by virtue of his purchase and that no rights adverse to him had been created by his delay (s). A Fiscal's transfer in the name of a purchaser after his death passes no title. In such a case the proper course is for the legal representative of the deceased purchaser to apply to the Court for an order directing the Fiscal to make out the conveyance in his favour (t). A vendee from a deceased purchaser however has no right to ask for a conveyance (u). Sections 282 to 295 indicate that it is only the purchaser at a sale by the Fiscal who is entitled to ask for a conveyance. "It does not seem to me a sound argument to contend," said Schneider J., "that because the legal representative of a deceased person has been recognised as entitled to ask for a conveyance (v), therefore a purchaser from a deceased purchaser should also be regarded as entitled to that right. The same reasoning is not applicable to both cases. A legal representative succeeds to all the rights of a deceased person. It would not be equitable to deny to him the exercise of a right which has devolved on him and which, had the deceased been alive, he would himself have been entitled to exercise. The position of a purchaser is altogether different. He has purchased a title from a person who had no title to sell or right to transfer. The deed in his favour therefore is ineffectual to convey the title to him and, if the form of deed be simply a conveyance of title in pursuance of a contract of sale, the instrument cannot be regarded as an assignment of the deceased vendor's right to claim a conveyance from the Fiscal."

Order for delivery of possession.

A purchaser who has obtained his Fiscal conveyance is entitled to an order for delivery of possession (w). Section 287 provides a summary means of putting into possession a person who has obtained a Fiscal's transfer in pursuance of an execution sale. The cases in which that section may be applied are limited by the words of

(r) 1 S. C. R. 187.
(s) Fernando vs. Nagappa Chetty, 18 N. L. R. 29.
(t) Bastian vs. Andris, 14 N. L. R. 437 F. B.
(u) Leelawathie vs. Dingiri Banda, 29 N. L. R. 193.
(v) 14 N. L. R. 437 F. B.
(w) Section 287.

that section. They are (1) when the property sold is in the occupancy of the judgment debtor. (2) where it is in the occupation of some person on his behalf (3) where it is in the occupation of some person claiming under a title created by the judgment debtor provided that that title was created subsequent to the seizure. The section does not apply where a person in possession is not a judgment debtor or some person holding on his behalf but is a person who has derived title from the judgment debtor before the property is seized in execution. As against that person the final paragraph of the section does not apply. The person who has obtained a Fiscal's transfer under those circumstances if he seeks to give effect to his title, must do so by a separate action (x). Section 287 is concerned only with Fiscal's sales (y). It has no application to purchasers under the Partition Ordinance (z), and a Court has no power to make an order for delivery of possession in favour of a person to whom property has been sold in pursuance of a decree for sale under the Partition Ordinance (a). Nor can an order for delivery of possession be made in favour of a purchaser of property sold under a mortgage decree by a Commissioner appointed under section 201 (b). Sections 287 and the connected sections are provisions in aid of execution and are part of the execution proceedings. "I think," said de Sampayo J., (c), "that only the execution purchaser as such can move under them. A private purchaser from the execution purchaser is no party to the execution proceedings and to allow him to take advantage of the above provisions is to make an unauthorised and improper extension of them."

Title is in debtor till sale is confirmed.

The right and title of the judgment debtor, or of any person holding under him or deriving title through him to immovable property sold by virtue of an execution, is not divested by the sale until the confirmation of the sale by the Court and the execution of the Fiscal's conveyance. But if the sale is confirmed by the Court and the conveyance is executed in pursuance of the sale, the grantee in the conveyance is deemed to have been vested with the legal title from the

(x) Kurukal vs. Kurukal, 27 N. L. R. 89.
(y) Abeyratne vs. Perera, 15 N. L. R. 347.
(z) Sherif vs. Pitche Umma, 26 N. L. R. 353.
(a) Fernando vs. Cadiravelu, 28 N. L. R. 492.
(b) Allis Appu vs. Anderson, 31 N. L. R. 426.
(c) Sabapathipillai vs. Alagaratnam, 24 N. L. R. 56.

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

time of the sale (*d*). The expressions *right* and *title* and *legal estate* are synonymous (*e*). This section, however, does not apply to sales by auction under a mortgage decree. The title in such a case will be from the date of transfer not the date of sale (*f*). When a purchaser at a Fiscal's sale conveys before he has himself obtained a Fiscal's transfer and then obtains the transfer, the benefit of the transfer enures to the purchaser (*g*). But until the Fiscal's purchaser obtains such transfer, a vendee from him has no title and cannot bring an action to vindicate title (*h*). There is nothing in the Civil Procedure Code which debars a debtor who has been in possession of the land sold for ten years after the Fiscal's sale, and before the execution of the Fiscal's transfer, from claiming title to the land sold by prescription (*i*). It would be a question of fact, however, whether or not his possession was adverse. "Whether we apply the provisions of Ordinance 4 of 1867," said Grenier J., (*j*), "or those of the Civil Procedure Code as to the retrospective effect of a conveyance by the Fiscal, it is clear that, until the execution of such a conveyance, the judgment debtor remains vested with the title and, by the doctrine of relation back, the execution purchaser becomes vested with the title as from the date of seizure. We are bound by the judgment of the Full Court on this point (*k*). This being so, the execution debtor cannot set up title by prescription because he would then be seeking to prescribe against himself. I was referred by respondent's Counsel to the case of Muttu Carpen vs. Rankira (*l*), where it was held that there was nothing in sections 289 or 291 of the Code which debars a judgment debtor who has been in possession of the land for ten years after the Fiscal's sale, and before the execution of a Fiscal's transfer, from claiming title to the land sold by prescription. There is no conflict between this judgment and the Full Court judgment I have referred to because a judgment debtor may prove exceptional facts and circumstances, as indicated in the judgment of Hutchinson C. J., to show that his possession was not such a possession

Doctrine of relation back.

(*d*) Section 289.
(*e*) Silva vs. Hendrik Appu, 1 N. L. R. 13 F. B.
(*f*) Mohideen vs. Issay, 24 N. L. R. 239.
(*g*) Abraham vs. Nonno, 15 N. L. R. 302.
(*h*) Ponnamma vs. Weerasooriya. 11 N. L. R. 217.
(*i*) Muttu Carpen vs. Rankira, 13 N. L. R. 326.
(*j*) Carolis vs. Perera, 14 N. L. R. 219.
(*k*) Silva vs. Nona Hamine, 10 N. L. R. 219.
(*l*) 13 N. L. R. 326.

as authorised by section 291 but that it was adverse possession as defined by Ordinance 22 of 1871." The fiction that, upon the confirmation of the sale and the execution of the Fiscal's conveyance, the title is deemed to vest from the date of sale has for its object the protection of the purchaser at a sale in execution against the consequences of alienation of the property by the judgment debtor in the interval. It does not affect the rights of persons claiming adversely to the judgment debtor nor interfere with the operation of the law of prescription (*m*).

After conveyance, title relates back to date of sale.

The title of an execution purchaser, when he obtains the Fiscal's conveyance, relates back to the date of sale. The benefit of registration, however, does not (*n*). In the case of conflicting conveyances the priority of a transfer must be determined not by the date of registration but by the date of the sale to which it seeks to give effect (*o*). The relation back of the purchaser's title under section 289 is not intended to override any competing title, but merely to see that all rights and transactions which have arisen or taken place in the interval on the footing of a title which was equitable only should be deemed to have arisen or to have taken place upon the basis of a legal title (*p*).

Debtor may possess till conveyance.

Till the confirmation of the sale and the execution of the Fiscal's conveyance, the Fiscal himself may enter and possess the property if he is provided with the necessary funds (*q*), or the person in possession may continue to possess it. His use of it is, however, limited.

(A) He may use and enjoy it in like manner and for the like purpose as it was used and enjoyed before the sale, doing no permanent injury to the property.

(B) He may make the necessary repairs to a building or other erection thereupon. But this provision does not permit an alteration in the form or structure of the building or other erection.

(*m*) Gunasekera vs. Rodrigo, 30 N. L. R. 468.
(*n*) Noordeen vs. Ukkuhamy, 5 C. W. R. 93. F. B.
(*o*) Amerappa vs. Weeratunge, 14 N. L. R. 417. F. B.
(*p*) Hendrik Singho vs. Kelanis Appu, 23 N. L. R. 80. F. B.
(*q*) Section 290.

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

(C) He may apply any wood or timber on the land to the necessary repair of a fence, building or other erection which was there at the time of the sale (*r*). If he exceeds this use he commits waste and may be restrained by an injunction (*s*).

Where debtor has no property.

Arrest and Imprisonment.

A warrant for the arrest of the judgment debtor's person may issue in execution of a decree for money if the Fiscal returns to the writ of execution that he is unable to find any property of the judgment debtor or if, before the Fiscal's return to the writ, the judgment creditor satisfies the Court that the judgment debtor

(A) Has not pointed out to the Fiscal, though requested to do so, any property for seizure and sale, or

(B) Has not been found by the Fiscal in spite of reasonable efforts, and the judgment creditor does not know of any property of his debtor which can be seized, or

(C) Is about to abscond or leave the jurisdiction of the Court with intent to obstruct or delay the execution of the decree, or with the like intent has disposed of or removed any part of his property from the Fiscal's reach, or

(D) Is about to leave the Island under circumstances affording reasonable probability that execution will be obstructed or delayed (*t*).

No warrant unless writ has issued.

A warrant in execution of a decree cannot issue unless a writ against property has issued previously. The only section under which a warrant of arrest in execution of a decree can issue is section 298. The language of that section is clear, that a warrant does issue only in two events, namely, if the Fiscal's return to the writ of execution is that he is unable to find any property of the judgment debtor or if, before the return to the writ of execution is made, the Court is satisfied of the matter and things stated in heads (a), (b), (c) or (d) of section 298. The words *if before the return to the writ of execution* predicate that a writ has issued and is in the hands of the Fiscal. They do not indicate a point of time or a stage in the proceedings. It is worthy

(*r*) Section 291.
(*s*) Section 292.
(*t*) Section 298,

of note that the circumstances mentioned under heads (a) and (b) are identically those on which the Fiscal would be justified in making a return of *nulla bona*, and they therefore favour the construction that a warrant may not be issued until after a writ against property has been issued. This construction of section 298 is consonant with the spirit of the Code which is to discourage the incarceration of honest debtors and to confine the creditor's remedy of imprisoning his debtor to those cases mainly where the debtor is contumacious and will not pay or disclose for seizure property available for levy (*u*). But where the application for the execution of a money decree has been granted and the Fiscal has made a return of *no property*, a warrant for the arrest of a judgment debtor may be issued without notice to him. It is not competent to a Court to refuse a warrant for the arrest of a judgment debtor merely on the ground that the latter has preferred an appeal against the decree (*v*).

No warrant for amount less than two hundred rupees.

A judgment debtor cannot however be arrested unless the sum payable, inclusive of interest up to the date of the decree and exclusive of costs, is rupees two hundred or more, provided that the debtor in incurring the liability has not been guilty of any fraud (*w*). A decree for costs alone is a decree for money which may be executed by ordinary execution or by warrant of arrest. It is only where a substantive decree is given for the payment of money or delivery of any property that the costs, though awarded, cannot be taken into account in calculating the amount on which a man may be arrested (*x*). If, on the other hand, he had obtained credit under false pretences or contracted the debt in spite of knowledge that he would not be able to pay it, or has removed or concealed property with intent to defraud his creditors, then a warrant for his arrest may issue even without a previous writ against his property (*y*). Costs are not a part of a decree. In the interpretation of a Code it is important to bear in mind the particular meanings which are assigned by the particular clause to the words and expresssions used in that Code. "Decree" as used in the Civil Procedure Code means

(*u*) Nadar vs Nadar, 19 N. L. R. 268 followed in Ran Menika vs. Dingiri Banda, 25 N. L. R. 465. F. B.
(*v*) Shell Transport Co. vs. Dissanayake, 26 N. L. R. 363.
(*w*) Section 299.
(x) Government Agent Western Province vs. Vythianathan Chetty, 4 C. L. Rec 137.
(*y*) Section 299.

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

"the formal expression of an adjudication upon any right claimed or defence set up in a civil Court when such adjudication, so far as regards the Court expressing it, decides the action or appeal". In its correct significance, therefore, a decree is the formal expression of the Court's adjudication on the right claimed or defence set up. It has no concern with the costs which a Court may or may not order. Neither in the classification of decrees nor in fifty odd sections which relate to their enforcement is there any warrant for the notion that costs are part of a decree or that the word *decree* is used in any sense other than that which is assigned to it in the interpretation clause. Section 299 is explicit in itself and, being one of a series of sections concerned with the enforcement of decrees to pay money, it is beyond question that its provisions have no application to decrees falling under any of the other heads of the classification made in section 217, and cannot therefore refer to a decree declaring the plaintiff entitled to land. An order for costs is undoubtedly an order for the payment of money and may be enforced under section 353 (z).

Who may not be arrested

No *woman* may be arrested for debt (a). A debtor can be arrested under a warrant at any hour on any day and at any place (b) between the hours of sunrise and sunset (c), excepting on a Sunday, Good Friday, Christmas Day (d), or public holiday (e). A *minister of religion* is protected from arrest while performing his functions in any place of public worship and any member of the congregation is also protected during the performance of public worship (f). *Judges, Magistrates*, and other judicial officers are privileged from arrest while going to, presiding in, or returning from Court (g). The *parties* to an action pending before a Court having, or in good faith believing itself to have, jurisdiction and their *proctors* and *advocates* are also exempt from arrest while going to, or attending, such Court for the purpose of such matter or while returning from such Court (h). There is no obligation on a party to an action to return at once on the completion of his

(z) Ran Menika vs. Dingiri Banda, 25 N. L. R. 465. F. B.
(a) Section 299.
(b) Section 299.
(c) Section 365.
(d) Section 365.
(e) Georgiana vs. Ensohamy, 7 N. L. R. 129.
(f) Section 365.
(g) Section 834.
(h) Section 834.

case. He is at liberty to take all needful rest and refreshment and to consult his proctor on the business which had brought him into Court, but not on other business (i). A Police Court holding a non-summary inquiry is not a Court within the meaning of section 834 and a debtor attending such Court for such inquiry cannot claim the benefit of that section (j). But a debtor who attends a Police Court in connection with a criminal charge is privileged from arrest until he has returned home (k).

When debtor may be released.

If the judgment debtor when arrested pays the amount of the decree and the costs of arrest, he must be released (l). Otherwise he must be brought before the Court, that is the place where the Judge is empowered to act judicially and is in fact so acting (m). A District Judge cannot ordinarily exercise his judicial functions elsewhere than in open Court. He has no power to order the committal or release of a judgment debtor arrested on a warrant when he has not the debtor before him (n). If the debtor satisfies the Court that, by reason of poverty or other satisfactory cause, he cannot pay the amount of the decree, he may be released (o). The Court may, however, refuse to release him or release him only on his furnishing security (p), if it finds that

(a) The decree was for a sum for which the judgment debtor was bound, as trustee or as acting in any other fiduciary capacity, to account.

(b) Since the institution of the action he has placed any part of his property out of the creditor's reach or has committed any other act of bad faith with a view to obstructing or delaying execution of the decree.

(c) He has given undue preference to other creditors.

(d) He has refused to pay when he had the means of paying.

(i) In re Insolvency of Jayasekera, 1 Br 4.
(j) Nusserwanjee vs. Sherifdeen, 1 Br 3.
(k) In re Insolvency of W. P. Peris, 1 Br 1.
(l) Section 298.
(m) Mohideen vs. Nallatamby, 1 N. L. R. 377. F.B. Lawrie J dissenting.
(n) Mohideen vs. Nallatamby, 1 N. L. R. 377 F. B.
(o) Section 300.
(p) Section 302.

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

(e) He is likely to abscond or leave the jurisdiction of the Court with intent to defeat his creditors (*q*).

A judgment debtor so released may be re-arrested (*r*). If the debtor is not so released he will be committed to jail (*s*). Before the order of committal is made the Code lays down certain preliminaries to be observed. Such an order can be made only if the debtor had been arrested and brought before the Court on a warrant duly issued under section 298, and such a warrant can only be issued where there is a return by the Fiscal of *nulla bona* to the writ against property issued to him for execution, or where the judgment creditor has satisfied the Court of the existence of any of the four conditions mentioned in the section. The Court's jurisdiction to issue a warrant is dependent upon the compliance with the requirements of section 298 (*t*).

A judgment debtor undergoing imprisonment in execution of a decree may apply for his discharge from custody on the ground that he has no property which can be sold in execution of the decree (*u*). He must do so by petition and affidavit stating particulars of his arrest, the nature of his debts, and the extent of his property if he possesses any (*v*). He must also make oath that he has not, since the institution of the action, removed any property from the reach of his creditors or committed any act of bad faith (*w*). If the Court is satisfied, the debtor may be released. A debtor so released may not be re-arrested in execution of the same decree (*x*). In the case of such an application the consideration of bad faith must be limited to the matter of the application for discharge, and it is not open to the Court to go behind the decree into which the original debt was converted to see in what way the original debt had been incurred (*y*).

When debtor must be committed to prison.

A judgment debtor cannot, in any case, be arrested until the creditor deposits in Court a sum sufficient for the subsistence of the debtor from the time of his arrest till such time as he can be brought before the Court (*z*). And where he is committed to prison the creditor, unless such creditor is the Crown (*a*), must make him a monthly allowance for his subsistence there (*b*), which must be paid before the first day of each month (*c*). There is nothing, however, to prevent a Fiscal from detaining a debtor on credit or accepting a particular month's allowance on the second day of the month (*d*). A judgment debtor cannot be imprisoned for any period exceeding six months (*e*), and must be discharged from jail

(a) On the decree being fully satisfied.

(b) At the request of the creditor.

(c) When the creditor fails to pay the allowance.

(d) Where the debtor is declared insolvent. A debtor in jail on a civil writ is not, however, entitled as of right to be discharged on his adjudication as an insolvent. The Court has a discretion in the matter (*f*).

(e) When the term of six months has expired.

He is not thereby discharged from his debt but may not be re-arrested in execution of the same decree (*g*).

(*q*) Section 301.
(*r*) Section 303.
(*s*) Section 304.
(*t*) Costa vs Perera, 17 N. L. R. 319.
(*u*) Section 306.
(*v*) Section 307.
(*w*) Section 311.
(*x*) Section 312.
(*y*) Valiappa vs. Peries, 3 N. L. R. 31.

Decrees for the delivery of movable property.

Writ or warrant.

A decree for the delivery of specific movable property is executed in the same manner as a decree for money (*h*). The Fiscal, on receiving the writ, must demand from the judgment debtor the specific movable and, if he fails to comply with the demand, seize it and hand it over to the judgment creditor or his authorised agent (*i*). If he is unable to obtain it, the Court, on the application of the creditor to which the debtor must be made a party, can direct a writ of execution against his property or a warrant for his arrest or both. The amount to be levied in the writ of execution will be the pecuniary loss suffered by the creditor by reason of the debtor's default in making delivery of the specific movable and will be awarded by way of compensation

(*z*) Section 313.
(*a*) The Attorney General vs Ponniah, 11 N. L. R. 245.
(*b*) Section 314.
(*c*) Section 315.
(*d*) Sarvai vs. Murray, 4 A. C. R. 37.
(*e*) Section 318 and Section 338.
(*f*) In re Insolvency of Abdul Gaffoor, 11 N. L. R. 353.
(*g*) Section 317.
(*h*) Section 320.
(*i*) Section 321.

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

The execution of the writ will be effected in the same way as the execution of a writ in enforcement of a decree to pay money (*j*). If, in an action for the recovery of specific movable property, the Court has decided, upon evidence and after framing an issue, what the value of the property was, it is not incumbent on the Court on a subsequent application for writ of execution against the property and person of the judgment debtor, on his failure to deliver the property to the Fiscal, to enter upon a further inquiry as to the amount of compensation to be awarded. In such a case the Court may award the value of the property as ascertained at the trial (*k*).

Decrees for the possession of immovable property.

A decree or order for the delivery of possession of immovable property will also be executed in the same manner as a decree for money (*l*). The Fiscal, on receipt of the writ, must deliver over the property mentioned in the writ to the judgment creditor or his agent by removing, if need be, any person bound by the decree who refuses to vacate the property. If the property is occupied by a tenant or other person (*m*) entitled to occupy it as against the judgment debtor and not bound by the decree to relinquish such occupancy, delivery will be effected by fixing a copy of the writ in some conspicuous part of the property and proclaiming to the occupant by beat of tom-tom, or other customary mode, the substance of the decree in regard to the property. If the occupant can be found, a notice in writing containing the substance of the decree must be served on him in which case a proclamation will be unnecessary (*n*).

Resistance to execution.

Resistance to execution.

If, in the execution of a decree for the possession of property under heads (B) and (C) of Section 217, the officer charged with the execution of the writ is resisted or obstructed by any person or if, after the officer had delivered possession, the judgment creditor is hindered by any person in taking complete and effectual possession, the judgment creditor may at any time within one

(*j*) Section 322.
(*k*) Sellamma vs. Kathamuttupillai, 2 Cur. L. R. 72.
(*l*) Section 323.
(*m*) "Other person" is *eiusdem generis* with "tenant". Gunaratne vs. Dingir Banda, 4 N. L. R. 249.
(*n*) Section 324.

month from the time of such resistance or obstruction complain thereof to the Court by a petition in which the judgment debtor and the person resisting and obstructing shall be named respondents(*o*), and an interlocutory order shall be made appointing a day for the determination of the matter of the petition and giving notice to the respondent (*p*). The hindrance or obstruction should be at the time of the giving of the possession or shortly after. An interval of five months, for example, is not a short period (*q*). If the Court, at the hearing, is satisfied that the resistance complained of was by the judgment debtor or some person at his instigation, it may (*r*) commit the person resisting to jail for a period extending to thirty days and direct the judgment creditor to be put into possession of the property (*s*). In proceedings under these sections the fact that the judgment debtor or the person obstructing was not a party respondent to the petition would be a fatal objection to a conviction (*t*).

If by person claiming bona fide.

If the resistance or obstruction is found by the Court to have been occasioned by any person other than the judgment debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the Court shall direct the petition of complaint to be numbered and registered as a plaint in an action between the decree holder as plaintiff and the claimant as defendant and try and determine it as if it were an action for the property instituted by the decree holder against the claimant (*u*). A similar procedure must be adopted where a *bona fide* possessor, who is dispossessed in effecting the execution, disputes the right of the decree holder to dispossess him of such property under the decree on the ground that the property was *bona fide* in his possession on his own account or that of some person other than the judgment debtor, and that it was not comprised in the decree, or, if it was, that he was not a party to the action in which the decree was passed (*v*). These sections will not, however, apply to any person to whom the judgment debtor has transferred the property after the institution of the action in which the decree was made. An

(*o*) Section 325.
(*p*) Section 377 (*b*).
(*q*) Mohamedu Lebbe vs Ahamedu Ali, 23 N. L. R. 406.
(*r*) Nannayakkara vs. Nannayakkara, 6 C. L. Rec 98.
(*s*) Section 326.
(*t*) Perera vs. Silva, 31 N. L. R. 94.
(*u*) Section 327.
(*v*) Section 328.

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

investigation under the provisions of section 327 is not limited to the determination of the right of *possession*. Questions of *title* arising between the parties in connection with their right of possession may be determined in such investigation (*w*). A Court of Requests has no jurisdiction to entertain a petition under section 328 where the property exceeds in value the limit of the Court's jurisdiction. In such a case the party dispossessed must proceed by way of a separate action in a Court of competent jurisdiction (*x*).

The remedy by way of petition under section 325 is open to a judgment creditor to whom the Fiscal has given only constructive possession under section 324 (*y*). Only the execution purchaser can move for an order for delivery of possession. A private purchaser from the execution purchaser is no party to the execution proceedings and cannot move for an order for delivery of possession. Resistance to such an order would be justified. The execution purchaser himself, after he has sold to a third person, cannot ask for an order because he has, by reason of the sale, divested himself of his character as execution purchaser (*z*). Nor is a purchaser of property sold under a decree for partition entitled to invoke the provisions of section 287 in order to obtain delivery of the possession of such property or to the benefit of section 325 in the event of resistance to an order directing delivery of such possession (*a*).

Is decree synonymous with order.

It will be noticed that section 325 refers to the execution of a *decree* for the possession of property while section 323 speaks of a *decree* or *order* for the recovery of possession of immovable property. Is *decree* synonymous with *order* or was the omission of the word *order* in section 325 intentional? The result of Full Bench decisions seems to be that, as far as sections 325 and 326 are concerned, the word *decree* cannot be read as if it were equivalent to *order*. With regard to 328 however the word *decree*, when it is used alone, should be held to include an *order*. "Sections 325 and 326" said the Full Court in Silva vs. Silva (*b*), "render it an offence punishable summarily by the District Judge for a person

(*w*) Vander Poorten vs. Amerasekera, 28 N. L. R. 452; Fernando vs. Fernando, 24 N. L R. 502 considered.
(*x*) Daniel vs. Rasiah, 31 N. L. R. 438.
(*y*) Abbubakker vs. Ismail Lebbe, 11 N. L. R. 309.
(*z*) Sapapathipillai vs. Alagaratnam, 24 N. L. R. 56.
(*a*) Sheriff vs. Pitche Umma, 26 N. L. R. 353.
(*b*) 3 N. L. R. 161. F. B.

to resist or obstruct the officer charged with the execution of a writ in execution of a decree for the possession of property under head (C) of section 217. Section 287 which deals with the delivery of possession of property purchased on a sale by the Court provides that the Court shall, on the application of the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint in possession of the property. It goes on to provide that such an order for delivery of possession may be enforced as an order falling under head (C) of section 217, the purchaser being considered as judgment creditor. Now section 217 provides that a decree or order may command the person against whom it operates to yield up possession of immovable property and therefore we have to ascertain what provision is made for the enforcement of an order under head (C) of section 217. It will be noticed that the word is *order* and not *decree*. If we turn to section 323 we find an answer to that question. It is there provided that "if the decree or order is for the recovery of possession of immovable property" a certain procedure is to be followed. Then section 325 provides for resistance or obstruction in the case of a *decree*. The words *or order* which occur in the previous section do not occur in this section. Therefore to hold that sections 325 and 326 apply to that case we must either insert the words *or order* in section 325 or we must read in section 287 the word *order* as though it were *decree*. I do not think that we are at liberty to do either of these things. Where the liberty of the subject is concerned a statutory enactment must be construed strictly". In Silva vs. De Mel (*c*), another Full Court said, "The decision in Silva vs. Silva (*d*) does not deal with section 328. It might fairly be considered as limited in its application to sections 325 and 326 which attach penal consequences to resistance or obstruction to the execution of writs in certain cases. The Judges held, it is true, that the word *decree* in section 325 cannot be read as if it was equivalent to *order* but both Sir John Bonser and Withers J. justify this interpretation on the ground that the enactment is one in which the liberty of the subject is concerned. On the ground that I have stated I am of opinion that, in spite of Silva vs. Silva, we are at liberty to construe section 328 for ourselves. In view of the provisions in section 287 that an order for delivery of possession may be enforced as an order falling under

(*c*) 18 N. L. R. 164. F. B.
(*d*) 3 N. L. R. 161. F. B.

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

section 217 (C), the purchaser being considered as judgment creditor, of the use of the words *or order* in section 323 and of their subsequent omission which must have been *per incuriam*, it appears to me that the Legislature intended to put orders under section 287 on the footing of decrees for the purpose of the group of sections with which we are here concerned and that we ought to interpret section 328 in this sense so as to effectuate its clear intention." This differentiation is a very fine one and gives no effect to the *ratio decidendi* in Silva vs. Silva which was that the words *decree for possession* in section 325 which appear to control the meaning of the whole group of sections does not include an *order* for possession. Indeed, in the latter case, the Judges dissent from the reasons given for the decision in the earlier case and hold that the relevant provisions of the Code relating to enforcement of a decree for possession including section 328 are made applicable to orders for possession by the second paragraph of section 287. The resulting position is this :—

(a) The punitive provisions of section 325 and 326 are not available where there has been resistance or obstruction to the officer charged with the enforcement of an order for possession.

(b) The provisions of section 328 are applicable to the case of a person who has been dispossessed by an officer purporting to act under the authority of an order for possession under section 287. Section 326 is not specially mentioned ; it is a little difficult to see how it can be made applicable to the case of orders for possession. The Court has no power to punish resistance in such a case and consequently a person who offers resistance need not submit his defence or explanation to Court (*e*).

Due diligence.

Subsequent applications for execution.

Where an application to execute a decree for the payment of money (*f*) or delivery of other property has been made and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that, on the last preceding application, due diligence was used to procure complete satisfaction

(*e*) Daniel vs. Rasiah, 31 N. L. R. 438. Per Garvin J.

(*f*) A mortgage decree is a decree for the payment of money within the meaning of section 337. Muttu Ramen Chetty vs. Mohamed, 21 N. L. R. 97.

of the decree or that execution was stayed by the decree holder at the request of the judgment debtor. No subsequent application shall be granted after the expiration of ten years from either the date of the decree or, where the decree directs the payment of money or the delivery of property on a specified date, from such date (*g*). If the application for execution is made within ten years of the date of decree, the order on the application may be made after the expiry of the ten years (*h*). The limitation of ten years, however, will not apply where the judgment debtor has prevented execution of the decree by fraud or force within the period of ten years immediately preceding the application (*i*). The Court should not construe this section unnecessarily strictly against the judgment creditor or search about for possible steps that he might have taken had he exercised great diligence in enforcing his first decree (*j*). A systematic evasion of service by the judgment debtor will amount to fraud (*k*). The prevention by fraud or force of the execution of a decree in order to deprive a judgment debtor of the benefit of section 337 (a) must be strictly traceable to an act done within the ten years immediately preceding the date of the application for execution. The mere fact that the debtor, having assets including household furniture, failed to surrender these to be taken in execution or that he, being a notary, practised his profession indoors and thus prevented arrest in execution does not amount to such fraud or force as is contemplated by the section (*l*).

Due diligence not condition precedent.

It is not the intention of section 337 that an inquiry into the exercise of due diligence should be a condition precedent to the application of the section. The words in respect of the matter and form are directory and not imperative (*m*). A second or subsequent application for execution of a decree is not barred for want of due diligence by the fact that, on the previous application, the judgment creditor had not taken steps to examine the judgment debtor under section 219. The question whether a failure to make application under section 219 or under section 298 before the return of the writ is made is *prima facie* evidence of want of due diligence

(*g*) Section 337.

(*h*) Kiribanda vs. Lebbe Amine, 32 N. L. R. 70.

(*i*) Section 337.

(*j*) P. L. K. N. M. K. Chetty vs. Perera, 19 N. L. R. 140.

(*k*) Fernando vs. Latibu, 18 N. L. R. 95.

(*l*) Sidamparam Chetty vs. Jayawardene, 18 N. L. R. 171.

(*m*) Carim vs. Wahid, 23 N. L. R. 270.

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

on the application turns on whether the creditor knew, or had reason to believe, that no property of the debtor could be found. Until then no application under section 298 to attach the person of the debtor could, by the express terms of the section, be successful and it would be equally unreasonable for the creditor to call upon the debtor and add to the costs by an application under section 219 until satisfied that no property of the debtor could be found which could be seized in execution. No presumption from the absence of an application under section 219 would necessarily arise from that fact alone. Whether such a presumption can be drawn would turn on the facts in each particular case (*n*).

Re-issue of writ.

An application for the issue or re-issue (*o*) of a writ, where more than one year has elapsed between the date of the decree and the date of the application, should be by petition to which the judgment debtor is made respondent and a copy of the petition should be served on him (*p*). These provisions apply even in the case of a decree to pay by instalments (*q*). But in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution upon merely technical grounds where the execution has been found to be substantially right (*r*). A judgment creditor in such a case is not required, as a condition precedent to such application being allowed, to prove the exercise of due diligence, or to explain the delay in making such application. He need only show that the decree has not been satisfied. Questions of due diligence arise only on application for the re-issue of writs (*s*).

No time limit for first application for writ.

There is no limit to the time within which a first application for execution of writ may be granted (*t*). Where an application for writ is allowed but no writ is taken out, and a subsequent application is made for execution of the writ, the provisions of section 337 as to the exercise of due diligence apply (*u*). "It was argued before us for the appellant," said Wendt J., "that section 337 did not apply because it was in terms directed

(*n*) Raman Chetty vs. Jayawardene, 18 N. L. R. 392.
(*o*) Perera vs. Novishamy, 29 N. L. R. 242.
(*p*) Section 347.
(*q*) Perichiappa Chetty vs. Jacolyn, 2 C. L. R. 91.
(*r*) Nanayakkara vs. Sulaiman, 28 N. L. R. 314.
(*s*) Silva vs. Singho, 10 N. L. R. 312 F. B.
(*t*) Peris vs. Cooray, 12 N. L. R. 362. But see Perera vs. Ibrahim, 23 N. L. R. 30.
(*u*) Ibrahim Saibo vs. Silva, 11 N. L. R. 57.

against subsequent applications for execution, and the plaintiff's present application was not an application to execute a decree but merely a request to take out the writ which had been allowed on the application of 1898. I am of opinion that this contention cannot be sustained. It is true that the Code does not expressly enact that the writ of execution should be taken out within any defined period after the Court has sanctioned its issue. That is because the issue of the writ is a public ministerial act which the law expects to be done forthwith according to the routine of business in the office of the Court. It was never contemplated that a decree holder, having satisfied the Court of his present right to execute a decree, could lie by for an indefinite period during which the circumstances as to which the Court had required to be satisfied might materially have altered and then take out writ."

Writ may be re-issued.

There is nothing in the Civil Procedure Code to prevent the re-issue of a writ in the sense of its being issued again for execution or further execution. A second or subsequent writ is not liable for stamp duty if it comes within the exemption indicated in schedule 2 of the Stamp Ordinance. The provisions of the Stamp Ordinance with regard to the re-issue of writs have a purely fiscal purpose and cannot be read as an enactment that a writ, if re-issued after having been returned to Court, is a nullity whether stamped or not (*v*). The refusal of an application for the re-issue of a writ does not operate *res judicata* (*w*).

Assignment of decree.

Decree in favour of several persons.

If the decree is in favour of more than one person, then any one of them or his legal representative can apply for execution of the whole decree on behalf of all. A legal representative is the executor or administrator. In the case of an estate below Rs. 1000 (*x*) in value the legal representative is the next of kin who has adiated the inheritance (*y*). The estate for this purpose is the nett estate after the deduction of secured debts (*z*). If a decree is transferred by assignment in writing or by operation of law from the decree holder to any other person, the transferee may apply for its execution by

(*v*) Andris Appu vs. Kolande Asari, 19 N.L.R. 225. F. B.
(*w*) Doloswala vs. Amarisa, 14 N. L. R. 129.
(*x*) Rupees 2500 by Ordinance 15 of 1930.
(*y*) Section 338.
(*z*) Silva vs. Lokumahatmaya, 22 N. L. R. 184.

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

petition, to which all the parties to the action or their representatives must be made respondents, to the Court which passed the decree. If, on the application, the Court thinks fit, the transferee's name may be substituted for that of the transferor in the record of the decree and the decree may be executed in the same manner, and subject to the same conditions, as if the application were made by the decree holder (*a*). Such a transferee will take the decree subject to such equities as might be available against the original decree holder (*b*). It is entirely within the discretion of a Court to allow or not to allow the substitution of an assignee of a decree on the record (*c*).

Where decree has been assigned.

Where, however, the decree has been transferred by operation of law, the transferor need not be made respondent to the petition (*d*). Where a decree against several persons has been transferred to one of them, it cannot be executed against the others (*e*). When the judgment debt is paid by one of the debtors the decree is satisfied, the action is at an end and no further proceedings can be taken under the writ and no further writ of execution can be issued because there is nothing to execute (*f*). The only remedy is an action for contribution on the assignment, an entirely new right of action (*g*). Section 339 enacts substantive law and its provisions cannot be waived. The rule embodied in this section is not a mere rule of arbitrary enactment or of convenience but one resting on solid grounds of principle and equity (*h*). The section does not apply, however, where a person becomes a party to a suit by operation of law after the transfer (*i*). Where one decree of Court is seized in execution of another decree, the judgment creditor of the second decree is in the situation of the assignee of the judgment creditor of the decree seized if the latter person is identical with the judgment debtor of the decree in execution of which the seizure was made (*j*).

(*a*) Section 339.
(*b*) Section 340.
(*c*) Somasunderam Chetty vs. Odayappa Chetty, 6 C. L. Rec. 11.
(*d*) Section 339 proviso 1.
(*e*) Section 339 proviso 2.
(*f*) Muttiah Chetty vs. Marikar, 11 N. L.R. 50, F.B. followed in Ammanulla vs. Sinnatamby, 21 N. L. R. 245.
(*g*) Idroos Lebbe vs. Tamby Marikar, 10 N. L. R. 206.
(*h*) Muttiah Chetty vs. Marikar, 11 N. L. R. 50, F. B.
(*i*) Ramanaden Chetty vs. Fernando, 3 C. L. Rec 172.
(*j*) Section 339 proviso 3.

No separate action on decree.

Section 337 is exhaustive of the remedies open to a decree holder and he cannot bring a separate action on his decree (*k*). But this prohibition does not apply to the case of an assignee to a decree. He can bring a separate action on his assignment (*l*).

Assignment of rights in a pending action.

The assignment of the rights of a party in a pending action after *litis contestatio* is not illegal in Ceylon. It is, in fact, specially provided for in section 404 (*m*). A plaintiff can assign his rights between the granting of the decree and the making of it absolute, for the decree *nisi* has taken the place of his right of action. It is true that it is a conditional order, but there is nothing to show that the rights under a decree of that nature cannot be assigned although it is true they may turn out to be worthless (*n*). The assignee, however, takes subject to all the liabilities resulting from the application of the doctrine of *lis pendens* (*o*).

Where a decree is seized there is no sale.

In the case of a seizure of a decree in execution there is no sale of the decree for, under section 339, all that the seizing creditor does is to apply for execution of the decree for his own benefit and to execute it accordingly. Consequently it is impossible to apply section 3 of the Insolvency Ordinance and to hold that, as he only seized the decree and did not sell it before the adjudication of the debtor as an insolvent, he is obliged under section 3 of the Insolvency Ordinance to suffer the money to be paid to the assignee in insolvency for the benefit of all the creditors of the judgment debtor (*p*).

Where debtor dies before execution.

If the debtor dies before the decree is fully executed the decree may be executed against his legal representative (*q*). The latter, however, will only be liable to the extent of the property of the deceased which has come to his hands and has not been disposed of (*r*). This provision, however, has no application where, at the death of the judgment debtor, the property is under seizure. A sale in pursuance of such a seizure is good without the legal representative of the judgment debtor being made a party to the proceedings (*s*).

(*k*) Raman Chetty vs. Appuhamy, 9 N. L. R. 133.
(*l*) Mohamedo Hanifa vs. Levana Marikar, 11 N. L. R. 177.
(*m*) Pless Pol vs. de Soysa, 15 N. L. R. 51 P.C.
(*n*) Fernando vs. Mendis, 27 N. L. R. 143.
(*o*) Ramasamy Chetty vs. Fernando, 7 C. L. Rec. 10.
(*p*) Carolis Appuhamy vs. Ramanathan Chetty, 5 C. L. Rec. 206.
(*q*) Section 341; Omer vs. Fernando, 16 N.L.R. 135.
(*r*) Section 341.
(*s*) Goonetilleke vs. Jayasekera, 32 N. L. R. 227.

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

When Court may stay execution.

The Court may, for sufficient cause, stay execution proceedings at any stage and make order for adjournment of a sale. To the application to stay proceedings all persons interested in the matter of the execution must be made parties and the Fiscal's dues must first be paid (t). These provisions, however, are merely directory (u). The provisions of the section are not necessarily limited to ordinary execution proceedings. They apply to execution proceedings in pursuance of a mortgage action as well (v). An application may be made by a party interested even though he is not a party to the action (w). Where a judgment debtor alleges that judgment was obtained by fraud, the Court may stay execution and give him time to apply for *restitutio in integrum* (x).

Questions between parties to an action.

Questions relating to execution must be decided in the same action.

All questions arising between the parties to an action in which the decree was passed, or their legal representatives, and relating to the execution of the decree must be determined by order of the Court executing the decree and not by a separate action (y). These questions have regard only to procedure and the conduct of the parties concerned or of the officers entrusted with the duty of carrying out the seizure and sale. Such a question as the title of the execution debtor to the property sold is outside the scope of the section (z). The section does not enact substantive law. It does not enable a judicial sale to be impeached on any ground whatsoever. It merely regulates the form under which questions as to its validity arising under other heads of the common law or the Statute law are to be determined. Under the general law a sale can be impeached on the ground of fraud. An allegation of fraud in the conducting of the sale is a question arising between the parties to the action in pursuance of the decree in which the sale takes place. It must under section 344 be determined by the Court in the execution proceedings and not by a separate action (a). If a Fiscal's sale can be shown, before it has been confirmed, to have been made under an entire mistake when, to the knowledge of the purchaser, the exigency of

(t) Section 343.
(u) Raman Chetty vs. Siriwardene, 27 N. L. R. 269.
(v) Faulkener vs. Soysa, 26 N. L R. 449.
(w) Faulkener vs. Soysa, 26 N. L. R. 449.
(x) Lucyhamy vs. Alwis, 26 N. L. R. 123.
(y) Section 344.
(z) Peries vs. Silva, 21 N. L. R. 117.
(a) Goonetilleke vs. Goonetilleke, 15 N. L. R. 272.

the writ had been fully satisfied, the sale may be set aside under section 344 (b).

The policy of the Code is, where possible, to grant relief in the same action instead of referring parties to a separate action (c). Thus it is not open to a party in an action in which a mortgage decree under section 201 has been entered up, to bring a separate action to have the sale of the land in execution set aside on the ground of irregularity. He must in terms of section 344 move the Court executing the decree (d). "It is of the utmost importance," said the Privy Council in Sanyal vs Kalidas (e) "that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 (f) and that, when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result has never been held a bar to the application of the section". Where the defendant paid plaintiff a sum of money in satisfaction of the decree and subsequently discovered that he had paid more than the amount actually due, the question was one relating to the execution of the decree and fell within the scope of section 344 (g). But an agreement made before decree is passed and not embodied in the decree cannot be given effect to on an application under section 344. By the terms of that section the existence of a decree is a preliminary to any action under the section and no agreement prior to the decree which is inconsistent with it can be given effect to (h).

Cross decrees may be set off.

Cross decrees between the same parties may be set off against each other and execution levied on the balance by the decree holder of the larger decree (i). The decrees must be capable of execution at the same time and by

(b) Appuhamy vs. Adirian, 17 N. L. R. 392.
(c) Silva vs. Selohamy, 25 N. L R. 113.
(d) Perera vs. Abeyratne, 15 N. L. R. 414, followed in Fernando vs. Fernando, 18 N. L. R. 380.
(e) I. L. R. 19 Cal 683.
(f) Of the Indian Code corresponding to Section 344 of our Code.
(g) Sinnatamby vs. Kallamuttu, 17 N. L. R. 107.
(h) Velupillai vs. Sunderapandianpillai, 21 N. L. R. 236. Kuppe Kany vs. Caliappa Pillai, 19 N. L. R. 353. distinguished by its special circumstances.
(i) Section 345.

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

the same Court (*j*). Where one of the parties is an assignee of one of the decrees, this provision applies both with regard to the judgment debts due by the assignor as well as those due by the assignee (*k*). The sums due under the decree must be definite and unconditional and the judgment creditor in each decree must be the judgment debtor in the other (*l*). A decree obtained against a husband alone cannot be set off against a decree obtained by the husband and wife against the decree holder (*m*). A decree for costs not yet taxed cannot be said to be a decree capable of execution in terms of the section (*n*).

Satisfaction of decree and certification of payment.

If any money payable under a decree (*o*) is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree holder, he shall certify such payment or adjustment to the Court whose duty it is to execute the decree. The judgment debtor may also by petition inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified. And if, after due service of such notice, the decree holder fails to appear on the day fixed or, having appeared, fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly." No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid (*p*). The duty of certifying a payment or adjustment is cast primarily on the judgment creditor. If there is more than one decree holder, it should be certified by all (*q*). The judgment debtor may also apply to the Court, but that is for his protection only and not as a matter of duty, whereas the judgment creditor has a statutory duty towards the judgment debtor (*r*). A judgment debtor who applies for certification must support his petition by affidavit before notice to show cause can be issued (*s*). He can, even after examination under section

(*j*) Section 345 Explanation 1.
(*k*) Section 345 Explanation 2.
(*l*) Ibid. Explanation 3.
(*m*) Missy Nona vs. Jayasuriya, 2 S.C.R. 79.
(*n*) Virasingam vs. Jathiravelu, 2 N. L. R. 358.
(*o*) The Indian Code says "decree of any kind".
(*p*) Section 349.
(*q*) Wijekoon vs. Perera, 2 Br. 263.
(*r*) Naina vs. Sedembram, 20 N. L. R. 7.
(*s*) Kanappa Chetty vs. Croos, 3 C. L. R. 69.

219, apply for certification of payment made before such examination (*t*). The certificate of adjustment or payment is the sole admissible evidence of satisfaction of the decree (*u*). But section 224 (e) makes it incumbent on the decree holder who is applying for execution to incorporate in his application an answer to the question "whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree". It will be observed that the section speaks of the making of the adjustment not of its certification. It results by necessary implication from the provisions of section 225 that, if such an adjustment is brought to the notice of the Court, execution for the whole amount will not be allowed. The judgment creditor who by his failure to do so secures the issue of process which would be otherwise withheld makes his conduct actionable if the debtor can prove *as a fact* that it has caused legal damage to himself. The position is in no way modified by the fact that, under section 349, the judgment debtor himself can certify the adjustment or payment of the sum in dispute. The obligation rests in the first instance on the decree holder (*v*). Where a judgment debtor sues his creditor to recover money overpaid on a decree, the costs in the Court below should be taxed as though the proceeding had not been an action but a petition under section 349 (*w*).

Concurrence.

Notice of claims.

Money which, in the course of an action or in satisfaction of a decree, has been paid into and received by the Court to the *separate account* of a specified person or which, by an order of Court, has been carried to such separate account, may be paid out to the specified person on his *ex parte* application. But in all other cases money, whether realised in execution of a decree or not, shall only be paid out on notice to all the parties to the action or such of them as are interested in the money. And if, before the proceeds in execution have been paid to the party in whose favour the execution issued, notice shall be given to the Court of any claim to such proceeds by any other person, the Court shall, before making any order for payment of such proceeds, cause notice to issue to all persons whose claims have been notified to the Court as well as to the parties to the

(*t*) Sidambaram Chetty vs. Goonetilleke, 2 Times 175.
(*u*) Pitche vs. Mohamedu, 9 S. C. C. 187, F. B.
(*v*) Naina vs. Sedembram, 20 N. L. R. 7.
(*w*) Konnehamy vs. Silva, 3 N. L. R. 65.

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

action, that the Court will on the day specified in the notice proceed to determine the respective rights of the persons claiming such proceeds or any part of them. And on such day the Court shall proceed to hear and adjudicate upon the claims made and make such order as the justice of the case may require. Or the Court may, if, in its opinion any claim cannot be heard and adjudicated on in the manner aforesaid, refer the parties to a separate action (*x*).

Property seized under decrees of several courts.

Where property not in the custody of any Court has been seized in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto, and any objection to the seizure thereof, shall be the Court of highest grade or, where there is no difference in grade between such Courts, the Court under whose decree the property was first seized (*y*). Whenever assets are realized by sale or otherwise in execution of a decree and more persons than one have, prior to realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be divided rateably among all such persons. Provided that when any property is sold which is subject to a mortgage or charge, or for any other reason remains subject to a mortgage or charge notwithstanding the sale, the mortgagee or incumbrancer shall not, as such, be entitled to share in any proceeds arising from such sale. If all or any portion of the money realized in execution of a decree is in such distribution paid to a person not entitled to receive it, any person who is entitled to it can compel him to refund the money (*z*).

Who can claim concurrence.

Concurrence, or the right of creditors to share in the proceeds of a common debtor, is now governed by sections 350 to 352 of the Civil Procedure Code which have superseded the Roman Dutch law on the subject (*a*). By the Roman Dutch law all creditors were entitled to claim concurrence regardless of the dates of their decrees or application for execution or, indeed, whether they had any decrees at all. The object of the enactment contained in section 352 was clearly that

(*x*) Section 350.
(*y*) Section 351.
(*z*) Section 352.
(*a*) Konnamalai vs. Sivakolanthu, 9 S. C. C. 203. F. B., Mendis vs. Peris, 18 N. L. R. 310. F. B.

stated in the judgment in Konnamalai vs. Sivakolanthu (*b*), namely, to give the creditors who had been to the trouble of realizing the assets of the debtor an advantage over more dilatory creditors (*c*).

The scope of the right to concurrence.

The right to concurrence is limited to the proceeds in execution against property. It is not available as against the proceeds of an execution against the person as when a debtor on arrest pays into Court the amount claimed (*d*). The scope of the sections has been thus stated by Shaw J. (*e*). "By section 218 a judgment creditor has power to seize and sell or realize in money by the hands of the Fiscal any property belonging to the judgment debtor with certain specified exceptions. This would seem to include property already seized by the Fiscal. Countenance for this is to be found in section 351 which refers to property seized in execution of decrees of more Courts than one. When the Fiscal sells he has, by section 225, to specify in the notice of sale the action in which, and the amount of money for the levy of which, the writ issued. In the case, therefore, of a seizure under more decrees than one, he would have to mention the various actions and amounts. The sale having been effected under all the writs, the amount realized has by section 351 to be received by the Court of highest grade or, where there is no difference of grade between such Courts, by the Court under whose decree the property is first seized. The property has thus been sold at the instance of, and on behalf of, the various creditors whose writs were in the hands of the Fiscal, and I do not see anything in the Code which prevents such creditors from giving notice under section 350 to the Court holding the money of their claim to the proceeds to which they appear to be entitled equally with the judgment creditor of such Court, the property having been sold under all the writs. A difficulty undoubtedly arises with regard to section 352. It is obviously impossible for anyone, in the case of an execution by the hands of the Fiscal, to apply to the Court by which such assets are held for execution of a decree for money against the same judgment debtor prior to the realization for, until such sale takes place, the assets are not held by the Court and if we read the words to mean 'by which the assets will eventually be

(*b*) 9 S. C. C. 203. F. B.
(*c*) Meyappa Chetty vs. Weerasooriya, 19 N. L. R. 79. F. B.
(*d*) Muttu Ramen Chetty vs. Suppramaniam Pillai, 12 N. L. R. 193.
(*e*) Mendis vs. Peris, 18 N. L. R. 310. F. B.

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

held' it will still be impossible for any decree holders of other Courts to participate because they can only apply to the Court in which they have got judgment for writs of execution and it is obvious from section 351 that the Code intends to provide for seizure, in execution of decrees of more Courts than one. Even if this difficulty could be got over, I fail to see how anyone could know what Court to apply to for, in the case of seizures in execution of decrees of more Courts than one, the Court to hold the money is the Court of highest grade and what Court that will be cannot be ascertained until the seizure and sale have been completed. The section seems to be urgently *in need of amendment* and the only reasonable interpretation that I think can be given to it is to confine the section only to persons who can, under the law, make application under it for execution, namely, decree holders of the same Court, leaving to decree holders of other Courts the rights that appear to have been given to them by the earlier sections to participate in the seizure and sale and then to apply for their share of the proceeds under section 350."

Where creditors are decree holders of other Courts.

Where, therefore, the persons seeking concurrence are holders of decrees of Courts other than the Court by which the assets are realized and held, they must participate in the seizure and sale, that is, they must have writs in the hands of the Fiscal at the date of sale. They must then notify their claims under section 350 to the Court which, under section 351, holds the assets, i. e. the Court of highest grade or, where the Courts are of equal grade, the Court under whose decree the property was first seized (*f*). The section prescribes its own time limit. It only requires that the claim should be notified before the proceeds of execution have been paid to the party in whose favour the execution issued (*g*).

Where they are decree holders of the same Court.

Where the persons seeking concurrence are decree holders of the same Court two conditions have to be fulfilled.—

(1) Applications must be made by judgment creditors of the same debtor who have not at the time obtained satisfaction of their decrees. The Crown is not bound by this provision (*h*).

(2) Applications must be made before the realization of assets.

(*f*) Mendis vs. Peris, 18 N. L. R. 310. F. B.
(*g*) Mendis vs. Peris, 18 N. L. R. 310. F. B.
(*h*) Palaniappa Chetty vs. Seidik, 5 N. L. R. 322.

When assets are realized.

Where the assets consist of property whether movable (*i*) or immovable they are realized at sale (*j*). Creditors entitled to concurrence are those who have applied for execution prior to the date of sale. Where the assets consist of money the mere issue of a notice under section 232 does not amount to realization (*k*). A notice under section 232 is a seizure by prohibitory notice and has the same effect as a notice under section 229 which is expressly prohibitory (*l*). There must be a further act of Court directing the money to be brought to the credit of the case before there can be realization (*m*).

Rights of a mortgagee.

The provison to section 352 does not expressly take away the rights of the mortgagee. These rights must be determined by the law as it existed at the date of the passing of the Code. The section would be given its legitimate force and effect by referring it to cases where there is a competition between holders of ordinary money decrees. "The provision," said Bonser C. J (*n*) "at the end of the section seems to me to manifest the intention of the Legislature not to interfere with the rights of mortgagees and I must say I fail to see on what principle the mortgagee can be deprived of his right to the proceeds of the movables hypothecated to him" (*o*).

(*i*) Suppramaniam Chetty vs. Mohamedu Bhai, 27 N. L. R. 425.
(*j*) Meyappa Chetty vs. Weerasooriya, 19 N. L. R. 79. F. B. de Sampayo J. dissenting.
(*k*) Shaw & Sons vs. Sulaiman, 29 N. L. R. 481.
(*l*) Suppramaniam Chetty vs. Mohamedu Bhai, 27 N.L. R. 425.
(*m*) Shaw & Sons vs. Sulaiman, 29 N. L. R. 481.
(*n*) Velaiappa Chetty vs. Pitche Maula, 4 N. L. R. 311.
(*o*) See Raheem vs. Usoof Lebbe, 6 N. L. R. 169.

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

CHAPTER IV.

ACTIONS IN PARTICULAR CASES.

Pauper actions.

Who is a pauper.

Any action, except an action to recover compensation for libel, slander or abusive language (*a*), may be brought by a person *in forma pauperis* provided such person is not entitled to property worth fifty rupees other than his necessary wearing apparel and the subject matter of the action (*b*). He must make an application in writing for permission to sue giving the particulars necessary in an ordinary plaint and, in addition, a schedule of his property of any kind whatever with its estimated value and an affidavit by himself and two headmen or respectable persons to the effect that he is a pauper; that he has not within the previous two months fraudulently disposed of his property so as to enable himself to sue as a pauper and that he has not entered into any agreement with regard to the subject matter of the proposed action (*c*). He may present his application in person (*d*). The applicant's statement of what forms the subject matter of the action is not binding on the Court. It is open to the respondent to show that the applicant is, in fact, worth more than fifty rupees or that his title to the part of the share claimed has not been contested but has been purposely misrepresented as contested (*e*).

Inquiry into his cause of action.

The Court will then direct a proctor to make inquiry and certify whether such party has a good cause of action or not. If he has a good cause of action, the Court will make an interlocutory order fixing a day for the determination of the question of pauperism and giving notice to the respondent (*f*). If it is found that the applicant is a pauper, he will be given leave to sue as such and an order to that effect will be made by

(*a*) Section 442.
(*b*) Section 441.
(*c*) Section 444.
(*d*) Section 445.
(*e*) Hinniappu vs. Hendris, 7 N. L. R. 326.
(*f*) Section 447.

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

Court (*g*). The application when granted will be numbered and filed and deemed the plaint in the action which will then take the course of any regular action except that the plaintiff will not be liable in any stamps (*h*). If the plaintiff succeeds in the action, he will have to pay the stamp duties he would have paid if he had not sued as a pauper and such amount will be a first charge on the subject matter of the action (*i*). He will also have to pay the stamp fees if he fails in the action or if he is dispaupered or if the action is dismissed for want of appearance or struck off the file (*j*). A person may also be allowed to defend an action *in forma pauperis* on the same terms (*k*). The refusal of leave to sue as a pauper will bar a subsequent application of a like nature with respect to the same cause of action but the applicant can institute an ordinary action in respect of such right if he first pays the costs of his unsuccessful application (*l*).

When he may be dispaupered.

The Court may, on motion made by the other party of which one week's notice in writing has been given to the party allowed to sue or defend as a pauper, order such person to be dispaupered

(a) If he is guilty of vexatious or improper conduct in the course of the action.

(b) If it appears that his means are such that he ought not to continue to sue or defend as a pauper.

(c) If he has entered into any agreement with respect to the subject matter of the action under which some other person has obtained an interest in it (*m*).

Actions by the Crown.

Who may represent the Crown.

The Attorney General must represent the Crown in any action brought by or against it (*n*). In the Court of Requests, however, any person can represent the Crown who is appointed in writing in that behalf by the Attorney General or any Crown Counsel or the

(*g*) Section 448.
(*h*) Section 449.
(*i*) Section 450.
(*j*) Section 451.
(*k*) Section 453.
(*l*) Section 452.
(*m*) Section 454.
(*n*) The Attorney General does not include the Solicitor General or any Crown Counsel.

Government Agent or Collector of Customs of the district (*o*). But these officers themselves cannot do so except the Attorney General (*p*). An action against the Attorney General as representing the Government of Ceylon for an alleged wrongful act on its part should be treated as an action brought against the Attorney General as representing the Crown (*q*). In an action to which the Crown is a party the original summons must be served on the Attorney General himself. Any other process may be served on a Crown Counsel (*r*). Where the defendant is a public officer the summons may be served on him through the head of his office (*s*).

Notice of action must be given in suit against public officer.

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 has been delivered to him or left at his office stating the cause of action and the name and place of abode of the person intending to sue and the relief which he claims, and the plaint in such an action must state that such notice has been given (*t*). Notice under this section is necessary only where the defendant has purported to act in his official capacity. A public officer who has done an act maliciously in the pretended exercise of his authority cannot be said to be purporting to act as a public officer and is therefore not entitled to notice (*u*). Such notice is necessary even where the action is based on a contract (*v*). A notice under this section is not vitiated by the statement of a claim for relief greater than that ultimately claimed in the action (*w*). An irrigation headman is a public officer (*x*). The section applies to Customs officers as well (*y*).

Interpleader actions.

Who can bring action.

An interpleader action is an action by a stakeholder when two or more persons claim adversely to each

(*o*) Section 456.
(*p*) Assistant Government Agent vs. Vellappuhamy, 4 C. L. Rec. 117.
(*q*) LeMesurier vs. C. P. Layard, 3 N. L. R. 227. F. B.
(*r*) Section 457.
(*s*) Section 459.
(*t*) Section 461.
(*u*) Abaran Appu vs. Banda, 16 N. L. R. 49.
(*v*) Silva vs. Jonklaas, 17 N. L. R. 377.
(*w*) Le Mesurier vs. Murray, 3 N. L. R. 113.
(*x*) Tampoe vs. Murugesu, 1 Cur L. R. 107.
(*y*) Muttupillai vs. Bowes, 17 N. L. R. 453.

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

other the sum of money or property which is in his hands and he is willing and ready to render it to the rightful owner. He may then institute an action of interpleader against all the claimants for the purpose of obtaining a decision as to the party who is entitled to the property and of obtaining indemnity for himself. He cannot, however, institute such an action if any action is pending in which the rights of all the parties can properly be decided (z). If he does institute an action, he must state in his plaint and support by affidavit

(a) That he has no interest in the thing claimed otherwise than as a mere stakeholder.

(b) The claims made by the defendants severally.

(c) That there is no collusion between him and any of the defendants (a).

If the thing claimed is capable of being paid into, or placed in the custody of, the Court he must do so before he can be entitled to any order in the action (b). An agent cannot sue his principal or a tenant his landlord to compel him to interplead with any persons other than persons claiming through such principal or landlord (c). Where money, for example, is given to a person for investment and is claimed by a third party, the person holding the money cannot bring an interpleader action. He must pay the money back to the person from whom he got it (d).

The hearing.

At the hearing the Court may declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs and dismiss him from the action, or retain all parties till the final disposal of the action. If it finds that the admissions of the parties or other evidence enables it to do so, it may adjudicate on the title of the thing claimed or direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court (e). If any of the defendants in an interpleader action is actually suing the stakeholder in respect of the action is actually suing the stakeholder in respect of the subject of such action, the Court in which the action against the stakeholder is pending must, on being

(z) Section 628.
(a) Section 629.
(b) Section 630.
(c) Section 632.
(d) Perera vs. Perera, 2 C. W. R. 58.
(e) Section 631.

informed of the decree in the interpleader action, stay proceedings against him. His costs may be provided for in the action so stayed. Otherwise they may be added to his costs in the interpleader action (f).

Actions by minors.

Must sue by next friend.

Every action by a minor must be instituted in his name by an adult person who is designated his *next friend* in the plaint and may be ordered personally to pay the costs in the action as if he were the plaintiff (g). An application for the appointment of a *next friend* must be accompanied by the plaint in the action intended to be brought, so that the Court may exercise its judgment whether the plaint shows on the face of it a good cause of action, and whether it is to the interest of the minor that the action should be brought. In the case of a minor claiming as heir of a deceased person, if it becomes necessary to institute an action, the administrator is the proper person to bring it for, although a minor may obtain a declaration of his rights as a minor to participate in the estate of his father without administration, a minor cannot sue for damages to the estate where an administrator should have been appointed (h). An action brought in the name of a curator on behalf of a minor is not valid. The curator should first obtain leave of Court to sue as *next friend* of the minor. Otherwise the defendant may apply to the Court to have the plaint taken off the file (i). The duty of deciding whether the *next friend* should pay the costs of the suit brought on behalf of the minor is in the discretion of the Judge (j). Where a plaint is filed by a minor without a *next friend*, the defendant may apply by summary procedure to have the plaint taken off the file. In such a case the costs will have to be paid by the proctor or other person by whom the plaint was presented (k). A minor, however, may sue in person in the Court of Requests for any money due to him as wages or piecework or for work as a servant, artificer or labourer, as if he were of full age (l).

Who can be next friend.

Any person of full age and sound mind may be appointed *next friend* of a minor provided he has no

(f) Section 634.
(g) Section 476.
(h) Fernando vs. Fernando, 2 C. L. R. 82.
(i) Gunasekera vs. Abubakker, 6 N. L. R. 148. F. B.
(j) Minga vs. Senderiya, 5 N. L. R. 50.
(k) Section 478.
(l) Section 492.

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

interests in the action adverse to those of the minor (*m*). A regularly appointed *next friend* can sue without a certificate of curatorship under section 582(*n*). Application for the appointment of a *next friend* must be made by petition and affidavit by way of summary procedure. The defendant must be made respondent to the petition if it is made in the course of, or as incidental to, the action but not otherwise (*o*). A *next friend* may be removed if his interests become adverse to those of the minor or if he does not do his duty or if, pending the action, he ceases to reside in the Colony (*p*). He cannot otherwise retire unless he procures a substitute and gives security for costs already incurred (*q*). On his death or removal proceedings must be stayed until someone is appointed in his place (*r*). If the proctor of the minor omits within a reasonable time to get a new *next friend* appointed, any person interested in the minor or in the matter at issue may do so on application by summary procedure to which the defendant must be made a respondent (*s*).

When minor comes of age.

When a minor plaintiff comes of age he must elect whether he will proceed with the action or abandon it (*t*). If he elects to proceed with it, he must apply for an order discharging his *next friend* and for leave to proceed with the action in his own name (*u*). The application may be made *ex parte* on affidavit (*v*). If he elects to abandon the action, he must apply for an order dismissing it on payment of the costs incurred by the defendant or paid already by his *next friend* (*w*). If the minor is a co-plaintiff and desires to abandon the action, the Court may strike his name out if he is not a necessary party. Otherwise it may direct him to be made a defendant (*x*). The *next friend* as well as the defendant must be made respondents to the application and it must be proved by affidavit that the minor has attained his full age. If the minor on attaining majority can prove

(*m*) Section 481.
(*n*) Uduma Lebbe vs. Seyadu Ali, 1 N. L. R. 1. F. B.
(*o*) Mohamedo Umma vs. Cader Mohideen, 2 C. L. R. 163.
(*p*) Section 482.
(*q*) Section 483.
(*r*) Section 484.
(*s*) Section 485.
(*t*) Section 486.
(*u*) Section 487.
(*v*) Section 489.
(*w*) Section 488.
(*x*) Section 490.

to the satisfaction of the Court that the action instituted in his name was unreasonable and improper, he may apply by summary procedure to have the action dismissed. In such a case the *next friend* will have to pay the costs of the action and of the application (*y*). A minor attains full age when he attains the age of twenty one years or on marriage or on obtaining letters of *venia aetatis* (*z*).

Order where minor is not represented.

Every order made in any action or application in which a minor is concerned may, where such minor is not represented, be discharged on application by way of summary procedure. The proctor, if he was aware of the minority of the party, may be ordered to pay the costs provided he is made a respondent to the application (*a*). A decree is binding, however, on parties who were minors at the date of the decree until it is set aside by proceedings under section 480 or by application by way of *restitutio in integrum* (*b*). Where a minor is the defendant in the action, the Court must appoint a guardian *ad litem* to represent him (*c*). If a minor is sued and he takes no steps to have a guardian *ad litem* appointed to represent him, it is for the plaintiff to procure the appointment of a guardian *ad litem* so that he may proceed with the action (*d*). A minor may have a guardian *ad litem* to represent him even after judgment has been given. The plaintiff has no right to be heard in the matter of an application of a guardian *ad litem* (*e*)

Guardian ad litem.

An order for the appointment of a guardian *ad litem* may be obtained on application by way of summary procedure by some one on behalf of the minor or by the plaintiff. The proposed guardian must not have any interest in the matter at issue adverse to that of the minor (*f*). The disregard of these provisions, however, is merely an irregularity which is not necessarily fatal either to the order for the appointment of a guardian *ad litem* or to what may be done under that order (*g*). The curator of a minor is not necessarily a good guardian *ad litem*. Where a curator is sued individually and as curator of the minor, it is a good plea that he has

(*y*) Section 491.
(*z*) Section 502.
(*a*) Section 480.
(*b*) Muttu Menika vs. Muttu Menika, 1 C. W. R. 82.
(*c*) Section 479.
(*d*) Paramanathan vs. Paramanathan, 3 N. L. R. 79.
(*e*) Carpen Chetty vs. Ossen, 3 Tamb 18.
(*f*) Section 493.
(*g*) Wickremanaike vs. Kiri Banda, 5 Bal. Notes 28.

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

interests conflicting with those of the minor and the minor ought to be separately represented by a proper guardian *ad litem* (*h*). Where there is no other person fit and willing to act, the Court may appoint any of its officers (*i*) or even a co-defendant (*j*) to be a guardian *ad litem* if there are no conflicting interests between them. But neither the plaintiff nor a married woman can be so appointed (*k*). The guardian *ad litem* may be removed by the Court if he does not do his duty (*l*). If he dies pending the action, the Court must appoint a new guardian *ad litem* (*m*).

Minor protected by Court.

Where the enforcement of a decree or order is applied for against the minor heir or representative of a deceased person, the Court must appoint a guardian of the minor for such action and the decree holder must serve notice of his application on such guardian (*n*). No sum of money or other thing can be received by the *next friend* or guardian for the action on behalf of a minor unless he has first obtained leave of Court and given security (*o*). A minor becomes a ward of Court by being made a party to a suit. The Court in which the action is instituted has the power, in appropriate circumstances, apart from any provisions of the Code, to take such steps as it may deem necessary for the purpose of seeing that any money recovered by the *next friend* on behalf of the minor is actually for the minor's benefit (*p*).

When guardian can compromise.

A *next friend* or guardian of a minor cannot, without the leave of Court, enter into any agreement of compromise on behalf of the minor with reference to the action in which he acts as *next friend* or guardian. Any such agreement entered into without leave of Court will be voidable against all parties other than the minor (*q*). The attention of the Court must be directly called to the fact that the minor is a party to the compromise and the Court must give its express approval (*r*). Where one of the parties to an action is a minor represented by his guardian *ad litem*, a general sanction applied for by

(*h*) Mohamedo vs. Sleema Lebbe, 2 Br. 107.
(*i*) Section 494.
(*j*) Section 495.
(*k*) Section 495.
(*l*) Section 496.
(*m*) Section 497.
(*n*) Section 498.
(*o*) Section 499.
(*p*) Nicholas vs. Walker Sons & Co., 10 N. L. R. 257.
(*q*) Section 500.
(*r*) Silindu vs. Akura, 10 N. L. R. 93.

all the parties will not be sufficient to bind the minor. His guardian *ad litem* must apply also for special leave from Court to enable him to compromise the rights of the minor (*s*).

Actins for the appointment of guardians.

Curatorship.

Every person who claims a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise, may apply to the District Court for a certificate of curatorship. No person is entitled to institute or defend any action connected with the estate of a minor of which he claims the charge until he has obtained such a certificate (*t*). A certificate of curatorship is necessary only for actions instituted or defended by a curator in his own name *qua* curator (*u*). A minor can sue or defend only by a properly appointed *next friend* or guardian *ad litem* and not through a curator. The curator, if he wants to sue on behalf of a minor, must obtain the authority of Court to institute the action as his *next friend* and in his name (*v*). Where he does not do so, the judgment obtained by him in the action is a bad one and the minor on attaining majority cannot claim the advantage of that judgment (*w*). A Court has no power to appoint a curator over the estate of a minor who is not resident within its jurisdiction even though the minor may be entitled to property situated within such jurisdiction (*x*). An executor under a will does not need a certificate of curatorship but any person to whom letters of administration have been granted does not thereby obtain the right to have charge of the share which descends to a minor heir. If the property is below Rs. 1000 (*y*), or for any other sufficient reason, the Court may allow any relative of the minor to sue or defend an action on his behalf without a certificate of curatorship (*z*).

Powers of a guardian.

The Civil Procedure Code does not limit the powers conferred on guardians under the Roman Dutch law. A guardian may sell immovable property with the sanction of Court. Such sale should be by public auction with a

(*s*) Bandara vs. Elapata, 23 N. L. R. 411.
(*t*) Section 582.
(*u*) Uduma Lebbe vs. Seyadu Ali, 1 N. L. R. 1.
(*v*) Gunasekera vs. Abubakker, 6 N. L. R. 148. F. B.
(*w*) Abeysinghe vs. Siriwardene Hamine, 2 Bal. 137.
(*x*) Muttiah vs. Baur, 9 N.L.R. 190. F. B.
(*y*) 2,500 Rupees by Ordinance 15 of 1930.
(*z*) Section 582.

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

reserve price put upon the property by the Court which should also give directions as to the manner of sale and the investment of the proceeds thereof (*a*). He may not, however, grant a lease of the property without the sanction of Court (*b*). A mother does not, on the father's death, become the guardian of a minor child otherwise than by appointment of Court (*c*). She may, however, have a preferential right (*d*) and, if married a second time, may be appointed curatrix over the property of her minor children of the first bed (*e*).

Guardian of a minor's person.

Whenever a certificate of curatorship to the estate of a minor is granted to any person, the Court must at the same time appoint a guardian to take charge of the person and maintenance of the minor. The curator may also be appointed guardian provided he is not the legal heir of the minor were the latter to die. If the person appointed guardian or curator (*f*) is unwilling to act without remuneration, he may be granted an allowance to be paid out of the estate of the minor. The Court may also fix an allowance for the maintenance and education of the minor. If necessary, the Court may permit the raising of such allowance by the mortgage, sale or other realization of the minor's estate (*g*). Such a sale should be by public auction with a reserve price put upon the property by Court which should also give directions as to the manner of sale and of the investment of the proceeds thereof (*h*).

Curator must file inventory.

Every curator other than one deriving title under a will or deed must, within a time fixed by Court, file an inventory of the property belonging to the minor. He must also, twice a year in January and July, file an account of the property in his charge showing the amounts received and spent on account of the estate and the balance in hand (*i*). Such accounts may be impeached by any relative of the minor or by the minor himself by a *next friend* or by the Attorney General (*j*). Such a person may also sue the curator during the continuance of his office or after his removal from such

(*a*) Perera vs. Appuhamy, 1 N. L. R. 140.
(*b*) Mahawoof vs. Marikar, 31 N. L. R. 65.
(*c*) Lebbe vs. Christie, 18 N. L. R. 353. F. B.
(*d*) Perera vs. Appuhamy, 1 N. L. R. 140.
(*e*) Pinto vs. Fernando, 5 N. L. R. 183.
(*f*) Section 593.
(*g*) Section 587.
(*h*) Perera vs. Appuhamy, 1 N. L. R. 140.
(*i*) Section 588.
(*j*) Section 589.

office or his personal representative in case of his death for an accounting of his curatorship (*k*).

Curator may be removed from office.

The Court on sufficient cause shown by petition by way of summary procedure by a guardian, relative or *next friend* of the minor or by the Attorney General, may recall the certificate of curatorship and grant it to some other person and may compel the curator to hand over the property and make an accounting to his successor (*l*). It may also allow the curator to resign his trust and give him a discharge on his accounting to his successor for moneys received and disbursed by him and on his making over the property in his hands (*m*). A compulsory judicial settlement of accounts may be obtained by the minor after he has attained majority or by his executor or administrator on his death (*n*). The curator himself may petition for a judicial settlement of his accounts (*o*).

Actions in Lunacy.

Inquiry into lunacy.

Whenever any person who is possessed of property is alleged to be a lunatic (*p*), the District Court within whose jurisdiction he is residing may institute an inquiry for the purpose of finding out whether or not such person is of unsound mind and incapable of managing his own affairs. The application for such an inquiry may be made by petition in the way of summary procedure by any relative of the alleged lunatic, by the Provincial Superintendent of Police or at the instance of the Attorney General. If the property consists wholly or in part of land or any interest in land, the application may be made by the Government Agent or Assistant Government Agent of the district in which it is situated (*q*). If the Court is not satisfied on the evidence before it that such an inquiry is necessary, the application must be dismissed (*r*). Otherwise a day must be fixed for inquiry (*s*). A copy of the petition must then be served on the alleged lunatic. If he is not in a fit state to receive the petition, then substituted service must be

(*k*) Section 590.
(*l*) Section 591.
(*m*) Section 592.
(*n*) Section 745.
(*o*) Section 746.
(*p*) A lunatic is a person of unsound mind and incapable of managing his own affairs. Section 555.
(*q*) Section 566.
(*r*) Section 557.
(*s*) Section 558.

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

directed (*t*). The alleged lunatic may also be directed to attend for the purpose of being examined by Court as to his mental capacity and condition. The Court may also authorise any person to have access to the alleged lunatic for the purpose of making a personal examination (*u*).

Issue at the inquiry.

The issue to be tried at the inquiry is whether the alleged lunatic is, or is not, of unsound mind and incapable of managing his own affairs (*v*). The Court has no power in the course of such an inquiry to inquire into the validity of a deed. The Legislature having conferred a special exemption from stamp duty on lunacy proceedings, no application can be allowed under cover of such proceedings which would otherwise be liable to stamp duty (*w*). The trial must be conducted in the same manner as an ordinary civil action and the inquiry must be public (*x*). The alleged lunatic must be present and can take part as a party defendant either in person or by his pleader unless his state of health renders it impossible for him to be present. Any relative of his may also take part in the inquiry on his behalf (*y*).

Manager of the estate.

On completion of the inquiry, the Court must decide whether or not the alleged lunatic is of unsound mind and incapable of managing his affairs (*z*). If he is not, he must be discharged (*a*). If he is, the Court must appoint a manager of his estate. Any near relative or suitable person may be appointed manager (*b*). For the purposes of the appointment of a manager of the estate it is not necessary to prove complete insanity rendering the alleged lunatic incapable of looking after himself. It is sufficient to show that he is so far unsound in mind as to be incapable of managing his affairs (*c*).

Guardian of the person.

Whenever a manager of the estate of a lunatic is appointed, the Court must also appoint a guardian of his person. The manager may also be appointed guardian. The Court is entitled, when the circumstances warrant

(*t*) Section 559.
(*u*) Section 560.
(*v*) Section 562.
(*w*) Peris vs. Fernando, 1 Cur. L. R. 6.
(*x*) Section 563.
(*y*) Section 564.
(*z*) Section 565.
(*a*) Section 566.
(*b*) Section 567.
(*c*) Uduma Lebbe vs. Uduma Lebbe, 16 N. L. R. 29.

it, to appoint some person other than the husband as the guardian of the person, or the manager of the estate, of a wife who is of unsound mind (*d*). In any case the lunatic's heir at law cannot be appointed guardian of his person (*e*). The guardian must have care of the lunatic's person and maintenance. Where the manager and guardian are separate persons, the guardian must be paid an allowance fixed by Court for the maintenance of the lunatic and his family (*f*).

Powers of manager.

The manager of the estate of a lunatic can exercise all the powers of a proprietor. He may collect and pay all just claims, debts and liabilities due to or by the estate. He cannot, however, sell or mortgage the estate or any part of it or grant a lease of immovable property for a period of more than five years without the leave of Court (*g*). He must file in Court an inventory of the movable and immovable property of the lunatic's estate and a statement of debts due to or by it. And he must furnish in Court annually, within three months of the close of the year, an account of the property in his charge exhibiting the sums received and disbursed on account of the estate and the balance remaining in his hands. If any relative of the lunatic or the Attorney General by petition to Court questions the accuracy of his inventory or annual account, the Court must make an inquiry into the matter (*h*). All sums received by the manager in excess of what may be required for the current expenses of the lunatic or the estate must be paid into the Kachcheri and dealt with in the manner prescribed by law in the case of suitors' deposits (*i*). Any relative of the lunatic may sue the manager for an accounting both during his continuance in office and after his removal from it and, in the event of his death, may sue his personal representative (*j*). A refusal to make an accounting may be punished by a fine not exceeding five hundred rupees which may be realized by the attachment and sale of the curator's property (*k*).

Manager may be removed.

The Court for any sufficient cause may, on the application of the guardian or a relative of the lunatic or

(*d*) Alwis vs. Goonetilleke, 22 N. L. R. 303.
(*e*) Section 568.
(*f*) Section 570.
(*g*) Section 571.
(*h*) Section 572.
(*i*) Section 573.
(*j*) Section 574.
(*k*) Section 576.

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

of the Attorney General, Provincial Superintendent of Police or, if the property consists of land or any interest in land, of the Government Agent or Assistant Government Agent, remove the manager and appoint another in his place and compel him to make over all property in his hands to his successor and to account for all moneys received or spent by him. The guardian of a lunatic's person may be removed in like manner (*l*).

Where lunatic recovers.

When the person adjudged to be a lunatic is alleged to have recovered, the Court must institute an inquiry for the purpose of ascertaining whether such person is still of unsound mind and incapable of managing his affairs. If it is found that he has ceased to be a lunatic, the Court must order his estate to be delivered over to him (*m*).

No stamps in lunacy proceedings

The proceedings in lunacy are free from all stamp duties (*n*). Every order made by the District Court in such proceedings is subject to an appeal to the Supreme Court. Such appeal may be prosecuted by, or at the instance of, the suspected or adjudged lunatic or of any relative or friend of his or of any medical practitioner who shall have certified or testified to his frame of mind. The Supreme Court must take cognizance of such an appeal and deal with it as an appeal from an interlocutory order of the District Court and make order thereon as it thinks fit (*o*).

Matrimonial actions.

Jurisdiction of Court.

All actions for divorce *a vinculo matrimonii* or for separation *a mensa et thoro* or for declaration of nullity of marriage must follow the procedure set out with respect to ordinary civil actions except in the case of Muslims or Kandyans (*q*). The plaint may be filed in the District Court within whose jurisdiction the plaintiff resides (*r*). The Courts of Ceylon have no jurisdiction to entertain an action for divorce between parties who are domiciled, and who were married, elsewhere than in Ceylon (*s*).

(*l*) Section 575.
(*m*) Section 578.
(*n*) Section 581.
(*o*) Section 580.
(*p*) Section 596.
(*q*) Section 627.
(*r*) Section 597.
(*s*) LeMesurier vs. LeMesurier, 1 N. L. R. 160. F. B.

Co-respondent to be named.

Where a husband seeks a divorce on the ground of his wife's adultery, he must make the alleged adulterer a co-defendant in the action unless he avers that the defendant is leading the life of a prostitute or that he has been unable to discover the name of the adulterer in spite of his efforts or that the adulterer is dead. He can also claim damages against the co-respondent (*t*). Such excuse can only be obtained by regular prayer to the Court upon an affidavit or other sufficient evidence and it must be embodied in the plaint (*u*). Merely inserting in the plaint the name of the alleged adulterer as a co-defendant—no process being served upon him and no steps being taken to bring him into the action—is not a sufficient compliance with the requirements of section 598 (*v*). But where a plaint contains a prayer to be excused from naming the alleged adulterer as co-respondent, an order by the Judge that the plaint has been accepted is wide enough to include an allowance of the special prayer in the plaint (*w*). At the trial the Court must satisfy itself not only as to the facts alleged but also whether or not the plaintiff has in any manner been accessory to, or conniving at, the act or conduct which constitutes the ground of his prayer for divorce or has condoned the same. It must also inquire into any counter charges made against the plaintiff by the defendant or co-defendant (*x*). If the Court finds that the plaintiff's case has been proved and that there has been no connivance, condonation or collusion in presenting the plaint (*y*), it must pass a decree *nisi* in the first instance not to be made absolute till after the expiration of not less than three months from its pronouncement (*z*). The Court can refuse a divorce where the plaintiff has been guilty of adultery (*a*). For the Court to exercise its discretion in favour of the adulterous husband it is not enough that the adultery of the petitioner was more or less pardonable or capable of excuse. The Court must find as a fact that the misconduct of the petitioner was caused directly by the matrimonial offences of the respondent (*b*). A divorce may also be refused where

(*t*) Section 598.
(*u*) Section 599.
(*v*) Ziegan vs. Ziegan, 1 S. C. R.3. F. B.
(*w*) Amerasekera vs. Amerasekera, 6 C. L. Rec.119.
(*x*) Section 600.
(*y*) Section 602.
(*z*) Section 604.
(*a*) Seneviratne vs. Panishamy, 29 N. L. R. 97.
(*b*) Appuhamy vs. Menikhamy, 5 N. L. R. 100.

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

there has been unreasonable delay in presenting the plaint. In Swaris vs. Alwis (*c*) the plaintiff and his wife were married in 1860. They separated immediately after the marriage ceremony and never cohabited, and the plaintiff never made the defendant any allowance for maintenance. For three years immediately before the bringing of the action the defendant was living in adultery. Plaintiff in 1871 brought an action for divorce on the ground of his wife's adultery but was refused it on account of his own *laches*.

Desertion.

A divorce may also be refused on the ground of cruelty (*d*) or of wilful desertion or separation before the adultery, or of such wilful neglect or misconduct as has conduced to the adultery, or of condonation of the misconduct by the renewal of conjugal cohabitation (*e*). An abstention on the part of the husband from conjugal intercourse must be shown affirmatively to be malicious and without reasonable cause in order to constitute constructive desertion (*f*). Though lapse of time is not the sole standard by which malicious desertion is determined, yet a long absence and an intention not to return or a man's refusal to live with his wife upon some pretext which will not bear examination will constitute malicious desertion (*g*). Desertion must be malicious, that is to say, it must be deliberate and unconscientious, a definite and final repudiation of the obligations of the marriage state. It must be *sine animo revertendi* (*h*).

No decree of consent.

A divorce cannot be granted on confession or consent. Even the affidavit of either party as to any of the matters in issue is inadmissible (*i*). No fact is held proved by the admission of a defendant who admits the adultery and desires to be freed from the marriage (*i*). Nor where a divorce *a vinculo matrimonii* is prayed for, has the Court power to grant a divorce *a mensa et thoro* without either party asking for it or being heard on the subject (*k*). Nor is it competent to the Court to enter

(*c*) Ramanathan (1872-76) 50.
(*d*) The wilful communication of venereal disease constitutes cruelty. Appuhamy vs. Julihamy, 16 N. L. R. 83.
(*e*) Section 602.
(*f*) D. C. Colombo 80966 ; 4 S. C. C. 107.
(*g*) Sinnatankam vs. Vairamuttu, 2 Br. 138.
(*h*) Silva vs. Missinona, 26 N. L. R. 113.
(*i*) King vs. King. Ramanathan, (1820-33) 60.
(*j*) Ratnavira vs. Enso Hamy, 7 S. C. C. 116.
(*k*) 1871 Vand. 180.

a conditional decree for divorce in the event of the wife not returning to her husband within a period fixed in the decree (*l*).

Decree nisi.

A decree *nisi* cannot be made absolute until three months at least have expired since its pronouncement (*m*). It is a decree from which an appeal lies to the Supreme Court (*n*). The period of three months is only a minimum period. In cases of malicious desertion it should be substantially longer in order to give effect to the principle of Roman Dutch law that the object of this interval is to allow an opportunity for reconciliation, and that the decree should not be made absolute unless it appeared that the complaining spouse had in the interval provided a reasonable opportunity for a resumption of married life and that this had been contumaciously and unreasonably refused by the other party (*o*). In the interval between order *nisi* and order absolute, any person may show that the decree had been obtained by collusion or the supression of material facts and the Court may then reverse the order *nisi* (*p*). Where no sufficient cause is shown, the decree *nisi* will, after the specified period, be made absolute (*q*)

Nullity of marriage.

An action may be brought in the District Court within whose jurisdiction the plaintiff resides to declare a marriage null and void on any ground that renders the marriage void by law (*r*). An action may also be brought in such a Court for a separation *a mensa et thoro* (*s*). To enable a wife to get a decree of judicial separation it is not necessary that there must be proof of cruelty or harshness or display of personal violence so as to give rise to reasonable apprehension that life, mind or health, would be endangered to plaintiff unless separation were decreed. Among other grounds, continuous quarrels and dissensions or other equally valid reasons which render the living together of the spouses insupportable will justify a judicial separation. Although a wife or husband may reasonably be expected to bear with occasional outbursts of ill temper, yet occasional assaults, however slight, accompanied by habitual intemperance

(*l*) Silva vs. Carlinahamy, 23 N. L. R. 344.
(*m*) Section 604.
(*n*) Ziegan vs. Ziegan. 1 S. C. R. 3. F. B.
(*o*) Silva vs. Missinona, 26 N. L. R. 113.
(*p*) Section 604.
(*q*) Section 605.
(*r*) Section 607.
(*s*) Section 608.

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

will make cohabitation insupportable (*t*). A suit for restitution of conjugal rights is not maintainable in Ceylon (*u*).

Rights of wife during separation.

In the case of a separation, and while such separation continues, the wife will be considered unmarried with respect to property of every description which she may acquire or which may devolve upon her. On her death intestate the property will devolve as if she had died unmarried. If, however, she again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use subject to any agreement in writing made between herself and her husband whilst separate (*v*). In every case of separation the wife must be considered unmarried for the purpose of any contract or tort or liability to sue or be sued in any civil proceedings. Her husband will not be liable for any act done, or contract entered into, by her whilst separate. But where the husband has been ordered to pay alimony and has not done so, he will be liable for all necessaries supplied for the use of his wife. The wife can also, at any time during separation, join in the exercise of any joint power given to herself and her husband (*w*).

Alimony pending action.

In any action for divorce or separation, whether it be instituted by the husband or the wife, the latter may present a petition for alimony pending the action. The petition must be by way of summary procedure and the husband must be made a respondent. Alimony pending an action must not be more than one-fifth the husband's average nett income for the three years next preceeding the date of the order and will continue until the decree is made absolute (*x*). The Court may also, on a decree absolute for divorce or separation, order the husband to settle on his wife either a gross sum of money or an annual income till her death, having regard to the circumstances of the parties and of the case. The Court may also for that purpose cause a proper instrument to be executed by the necessary parties. The Court may order a monthly or weekly sum for the wife's maintenance. If the husband for any reason becomes unable to make the payments, the Court can discharge the order or

(*t*) Orr vs. Orr, 22 N. L. R. 57. Wright vs. Wright 9 N. L. R. 31. distinguished.
(*u*) Wright vs. Wright, 9 N. L. R. 31.
(*v*) Section 609.
(*w*) Section 610.
(*x*) Section 614.

merely suspend it and revive it again (*y*). There is no provision for the enhancement of alimony on the application of the wife (*z*). A decree *nisi* may be made absolute while an order with respect to a settlement on the aggrieved party is under appeal (*a*).

Where wife is possessed of property.

Where the marriage is dissolved on the ground of the adultery of the wife and the wife is entitled to any property, the Court may order a reasonable settlement of such property for the benefit of the husband, or the children of the marriage, or of both,(*b*). The forfeiture of the property of an adulterous spouse contemplated by the Roman Dutch law had reference only to the benefits derived by such spouse under the marriage and did not extend to the separate property of the offending spouse. Under our Code, however, the Court has power, on entering a decree for dissolution of marriage, to make an order charging the property of the offending wife for the benefit of the husband (*c*). The Court may, after a decree absolute for dissolution of marriage or nullity of marriage, inquire into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and make such order as it thinks fit as to the application of the property settled, whether for the benefit of the husband or wife or children of the marriage. The Court cannot, however, make any order for the benefit of the parents,or either of them,at the expense of the children (*d*). The Court may make order for the custody, maintenance and education of minor children during (*e*) an action for judicial separation or dissolution of marriage or after the decree in such action (*f*).

Husband must pay wife's costs.

In an action for divorce or separation the husband, besides being generally liable to pay his own costs, is also, as a general rule, whether the wife be successful or not, liable to pay his wife's costs (*g*). Where, however, the wife is possessed of property and is in a position to find the means to defend the action, the Court should not order her husband to provide for her

(*y*) Section 615.
(*z*) Ranasinghe vs. Perera, 24 N. L. R. 201.
(*a*) de Silva vs. de Silva, 29 N. L. R. 378.
(*b*) Section 617.
(*c*) de Silva vs. de Silva, 27 N. L. R. 289.
(*d*) Section 618.
(*e*) Sections 619 and 621.
(*f*) Sections 620 and 622.
(*g*) Silva vs. Silva, 8 N. L. R. 280.

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

costs (*h*). Where the plaint has been presented by the husband and the co-respondent has been found guilty of the adultery, the Court may order him to pay the whole or any part of the costs of the proceedings in addition to any damages which may be awarded if damages have been claimed. But not, however, where the wife at the time was living apart from her husband and leading the life of a prostitute or if the co-respondent at the time of the adultery had no reason to believe that she was a married woman (*i*). The nature of the damages awarded against a co-respondent is compensatory not punitive. It is based upon two considerations, namely, the actual value of the wife to the husband and the proper compensation to him for the injury to his feelings, the blow to his honour and the hurt to his matrimonial and family life (*j*).

Testamentary actions.

Nature of testamentary action.

A testamentary action under the Civil Procedure Code must be distinguished from an administration suit. Chapter 38 of the Civil Procedure Code is concerned with the administration of an estate by the executor or administrator and any action under it is such as would, in England, be brought in a Probate Court. Administration suits, on the other hand, would pend in the Chancery Courts and include actions such as those brought by a legatee against an executor or by a *cestui que trust* against a trustee claiming on account of the trust estate and administration of the property by the Court (*k*). The law relating to executors in Ceylon is the English law. The Civil Procedure Code merely regulates the procedure—generally summary procedure—to be followed in the proof of a will, the grant of probate or letters of administration, and the conduct of the executor or administrator in the management and distribution of the estate.

Will must be produced in Court.

When any person dies leaving a will in Ceylon, the person with whom the will has been deposited, or who finds it after the testator's death, must produce the same in the District Court within whose jurisdiction he resides or that of the district in which the testator has died. He must also produce an affidavit stating the time and place of the testator's death, the nature and value

(*h*) Joseph vs. Alexander Elizabeth, 28 N. L. R. 411.
(*i*) Section 612.
(*j*) de Silva vs. de Silva, 27 N. L. R. 289.
(*k*) Hay vs. the Administrator of Nunn's Estate, 9 N. L. R. 161.

of the property he has left and the Court within whose jurisdiction the property is situate or, if such is the fact, that the testator has left no property in Ceylon. The will, so produced, must be numbered and initialled by the secretary and kept in the record room of the District Court (*l*). A failure to observe the provisions of this section is punishable by a fine not exceeding one thousand rupees (*m*). A delay in producing the will, if wilful, may be so punished (*n*).

Application for probate.

When any person dies leaving a will under which any property is affected, the executor appointed under the will may apply to the District Court within whose jurisdiction the testator died for probate of the will. If the testator died out of Ceylon, the executor must apply to the Supreme Court to appoint any District Court to have sole testamentary jurisdiction over the estate and then apply to such Court for probate. Also any person interested, either by virtue of the will or otherwise, in having the property of the testator administered may apply for grant of administration to himself with a copy of the will annexed. If any person so entitled to letters of administration is absent from the Island, his duly appointed attorney may apply for administration with or without the will annexed as the case may require (*o*). When the estate is over one thousand rupees (*p*) in value, probate or administration is compulsory. Otherwise on an application being made, the Court must issue probate of the will to the executor named therein. If there is no executor in the Island competent and willing to act, the Court must issue letters of administration, with or without the will annexed, to any person who is entitled to apply for it under section 518 or to any other person who, in the opinion of the Court, is a proper person to be appointed administrator (*q*). An undischarged bankrupt is not *ipso jure* disqualified for the office of administrator of a deceased person's estate (*r*). The Court has a discretion in the limitation of the powers of the administrator so appointed (*s*). Where there is no fit and proper person or no person willing to act, the secretary of the Court

(*l*) Section 516.
(*m*) Section 517.
(*n*) In *re* the last will of Hendriks, 4 N. L. R. 24.
(*o*) Section 518.
(*p*) 2,500 rupees by Ordinance 15 of 1930.
(*q*) Section 519.
(*r*) Lebbe Marikar vs. Manatchy, 11 N. L. R. 237.
(*s*) Section 519.

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

may be appointed (t). Where there has been delay in the application, probate will be granted only if it would not injuriously affect the title or position of any one whose rights have accrued after the death of the testator (u). An old will may be admitted to probate if a third of a century has not elapsed but a stale application for administration will not be granted unless necessity for administration is shown (v).

Conflict of claims for probate or administration.

In the case of a conflict of claims for probate or letters of adminstration, the claims of an executor or his attorney must be preferred to all others and the claims of a creditor must be postponed to those of a residuary devisee or legatee under the will. So, in the case of an intestacy, the claim of the widow or widower must prevail against all others and the claim of an heir against that of a creditor (w). The provisions of this section are imperative. They are not conditional upon no fitter person being found (x). So a widow is entitled to preference even where she has been a party to an attempt to deprive the estate of some of its assets (y), and a husband even where he has been living apart from his wife in terms of a deed of separation (z) and although he has no beneficial interest in such estate (a). The attorney of an absent widow is entitled to preference (b). A *binna* husband is so entitled (c) and so is a Muslim widow (d). Even where the widow of a deceased person is a lunatic, her preferential right to administration should be recognized by the grant of letters to the manager of her estate (e). A widow, however, is not entitled to sole administration. Her claim must have preference but the Court may appoint associate administrators with her (f). The proper question which arises when there is a conflict of claims to letters of administration is which of the persons claiming is entitled to have letters issued to him. Questions regarding

Widow entitled to preference.

(t) Section 520.
(u) de Silva vs. Mendishamy, 3 Br. 102.
(v) In *re* the last will of Hendriks, 4 N. L. R. 24. Caroline vs. Eddie, 32 N. L. R. 331.
(w) Section 523.
(x) In *re* Ukku Banda, 4 N. L. R. 257.
(y) In *re* Ahammedu Lebbe, 2 C. L. R. 179.
(z) Cornelis Appuhamy vs. Appuhamy, 28 N.L.R. 286.
(a) Davith Singho vs. Podihamy, 4 Times 31.
(b) Moosajee vs. Carimjee, 29 N. L. R. 387.
(c) Appuhamy vs. Menika, 19 N. L. R. 149.
(d) Habibu vs. Ali Marikar, 3 Bal. 59.
(e) Kanagasunderam vs. Sinniah, 32 N. L. R. 43.
(f) Banda vs. Anguahamy, 4 N. L. R. 257.

the title to the property alleged to form part of the intestate's estate have no place in, and are wholly irrelevant to, this stage of the proceedings (g).

Procedure is summary

Every application to have the will proved must be by petition by way of summary procedure. The petition must state the relevant facts of the making of the will, the death of the testator, the heirs to the best of the petitioner's knowledge, the details and situation of the property of the deceased and the grounds upon which the petitioner is entitled to have the will proved. It must also show in what character the petitioner claims, whether as creditor, executor, administrator, residuary legatee, legatee, heir, devisee, or in any other character. If the will has not already been deposited in Court it must either be appended to the petition or be brought into the Court and identified by affidavit or parol testimony when the application is made. The application must also be supported by sufficient evidence, whether by affidavit or otherwise, to show that the will was duly executed according to law and that the petitioner possesses the character in which he claims (h). If the petitioner is satisfied that no opposition will be made to his application, he may file an affidavit to that effect and omit to name any respondent to his petition (i).

Order nisi.

Upon the application being made, if the Court is satisfied on the evidence, of the due making of the will and the character of the petitioner, it shall make an order *nisi* declaring the will proved which order must be served on the respondent, if any, and on any other person to whom the Court shall direct notice. A day must be named for the final hearing (j). Where before that day the order *nisi* has not been served on the respondent, the Court has a discretion to enlarge the time instead of discharging the order (k). If the applicant claims as executor and asks for probate, the Court shall declare him executor and direct the issue of probate (l). If he claims in any other character and asks for administration, then the order *nisi* shall include a grant of power to administer the property according to the will with a copy of the will annexed (m). Where no respondent is named in the

(g) Appuhamy vs. Sarahamy, 2 Times 205.
(h) Section 524.
(i) Section 525.
(j) Section 526.
(k) Fernando vs. Fernando, 2 C. L. R. 181.
(l) Section 527.
(m) Section 528.

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

petition the Court has a discretion to make an order absolute in the first instance (*n*). Even in such a case it is competent to the Judge not to allow probate to issue, but then he should make an order *nisi* and name the person upon whom such an order should be served (*o*). After an order absolute in the first instance it is too late to enter a *caveat* under section 535. But if probate has been wrongly granted it may be recalled (*p*).

Application for administration.

Every application for grant of administration to the property of a deceased where he has left no will, or where the will cannot be found, must be made by petition by way of summary procedure. The petition must set out the relevant facts of the death of the deceased, the absence of the will, and the heirs of the deceased to the best of the petitioners knowledge; also the character in which the petitioner claims and the facts which justify his claim. The material allegations in the petition must be supported by sufficient evidence either by affidavit or otherwise and the next of kin of the deceased must be made respondents (*q*). The question whether a person not named as respondent is an heir of the intestate may be tried as an issue between the applicant and the opponent at the earliest opportunity (*r*). An inquiry into legitimacy is not relevant at this stage (*s*). If, on the application, the Court is satisfied that the material allegations are proved, it shall make an order *nisi* declaring the petitioner's status and making the grant prayed for. The order must be served on the respondent and any other person to whom the Court may direct notice and must come on for final hearing on a day named therein (*t*). In the case of all applications for the grant of letters of administration, whether with or without a will and whether or not a respondent is named in the petition, the order *nisi* must be advertized in the Gazette and twice in a local paper before the final hearing. The Court has a discretion, however, with regard to the mode of advertisment (*u*).

Issues on objections

If, at the final hearing, the respondent satisfies the Court that there are grounds of objection to the application such as ought to be tried on *viva voce* evidence, the Court must frame issues on the objections and appoint a day for trial of the issues (*v*). A claimant under a will upon producing it in Court is not bound to prove that it has not been cancelled by some subsequent will or that it is otherwise valid (*w*). It is not, however, sufficient for the Court to be satisfied that somebody objects or for somebody to get up and say that the will is a forgery (*x*). Except in cases in which a paper propounded as a will discloses on the face of it indications exciting serious suspicions as to its authenticity, an objection to the genuineness of a will should be supported by oral evidence on oath, or by an affidavit (*y*). No issue should be allowed unless the objector can satisfy the Court that he has at command evidence which, if believed, will ensure the rejection of the application for probate (*z*).

Undue influence

The burden of proof of undue influence is on those who allege it. It cannot be presumed. The burden of proving mental competency, on the other hand, lies on the propounders of the will. But they are not bound to go further than this. They are not bound to show affirmatively that the testator's mind was free from any influence which the law considers undue. But it is the duty of the propounders to remove suspicions either of undue influence or fraud. If this is not done the will must be rejected even though the suspicious circumstances do not amount to a *prima facie* case of fraud, and even though it cannot be said on a review of the evidence of both sides that fraud or undue influence has been established (*a*). To impeach a will on the ground of undue influence (*b*) or fraud (*c*) it must be proved that the influence exercised amounted to coercion, that is, that the testator was compelled to do something he did not want to do.

Order absolute.

If the material allegations in the application are not rebutted, the order *nisi* must be made absolute and probate or letters of administration, as the case may be, allowed. If they are rebutted, the order must be discharged and the petition dismissed. If the respondent

(*n*) Section 529.
(*o*) In *re* the last will of W. F. Morriss, 6 N. L. R. 371.
(*p*) In *re* Ferdinandus, 1 N. L. R. 245.
(*q*) Section 530.
(*r*) In *re* the estate of Banda, 3 N. L. R. 173.
(*s*) Fernando vs. Fernando, 18 N. L. R. 24.
(*t*) Section 531.
(*u*) Section 532.

(*v*) Section 533.
(*w*) In *re* the last will of W. F. Morriss, 6 N. L. R. 371.
(*x*) In *re* the estate of Poothepillai, 2 N. L. R. 214.
(*y*) In *re* the last will of Venasi Elupalayar, 2 N. L. R. 136.
(*z*) Perera vs. Perera, 7 Tamb. 105.
(*a*) Andrado vs. Silva, 22 N. L. R. 4.
(*b*) Croos vs. Croos. 21 N. L. R. 208.
(*c*) Peris vs. Peris, 8 N. L. R. 179.

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

at the trial of the issues proves his own right to probate or administration, the Court must make an order to that effect in his favour (*d*). The procedure in the trial of issues is the ordinary procedure in a regular action (*e*). The word *rebutted* does not refer to the trial of issues but to the final result of the proceedings (*f*). The dismissal of the petition, however, will not bar a subsequent application by the same petitioner as long as no grant of probate or administration has been made to someone else (*g*). Such a subsequent application may be allowed where there is a change of circumstances or where the application can be supported by additional evidence or on grounds different from those considered and adjudicated upon by the Court (*h*). Where an application for probate is allowed, there is no necessity for further motion that probate do issue to the applicant (*i*). Probate must be registered. Otherwise a title obtained under a subsequent sale of the land that has been duly registered takes precedence to a title derived under a prior probate that has not been registered (*j*).

Caveats.

At any time after the filing of a petition for probate or administration and before the final hearing, any person interested in the will or estate of the deceased, though not a respondent to the petition, may intervene by filing a *caveat* against the allowing of the petition and any order *nisi* made must be served on such person (*k*). Where, however, order *absolute* has been made *in the first instance* it is too late to file a *caveat* (*l*). But where an order absolute has been made in the first instance, the Court can recall probate or letters of administration and revoke the grant upon being satisfied that the will ought not to have been held proved or that the grant should not have been made or where events have occurred which render the administration of the estate impracticable or useless (*m*).

Recall of probate or administration.

All applications for the recall of probate or grants of administration must be by petition by way of summary procedure and the petitioner must show that he has such an interest in the estate of the deceased as would entitle him to make the application (*n*). These provisions for summary procedure apply only to applications authorised by section 536. Where an order *nisi* declaring a will proved has been made absolute and probate granted, an application for recall of probate cannot be made in the summary manner indicated in section 537. The person attacking the will must bring an action for the purpose in the ordinary manner and prove his case (*o*). But where an order *absolute* has been made in the first instance, an application to recall probate may be made under section 537 (*p*).

(*d*) Section 534.
(*e*) In *re* the last will of Carolis Dias, 2 N. L. R. 66.
(*f*) In *re* the last will of Carolis Dias, 2 N. L. R. 66.
(*g*) Section 534.
(*h*) In *re* the goods and effects of Appuhamy Aratchi, 2 N. L. R. 178.
(*i*) In *re* the last will of Ferdinandus, 1 N. L. R. 245.
(*j*) Fonseka vs. Cornelis, 20 N. L. R. 97. F. B.
(*k*) Section 535.
(*l*) In *re* the last will of John Ferdinandus, 1 N. L. R. 245.
(*m*) Section 536.

Limitation of grant.

In making a grant of probate or administration the Court may limit it with respect either to its duration or to the property affected by it or to the power of dealing with the property. Such a limitation may be made

(a) Where the will is lost and probate is granted on a copy or a draft.

(b) Where the original will is out of the Island and the executor produces a copy. If, however, the will is duly proved out of the Island there will be no limitation in the grant.

(c) Where the executors are out of the Island and their attorney applies for administration with the will annexed. It may be further limited in duration if only a copy of the will is produced.

(d) Where there is no executor and the heir or residuary legatee is out of the Island and such person's attorney applies for administration. Or where the guardian of a minor legatee or the manager of a lunatic is given letters of administration whether under a will or in intestacy.

(e) Wherever the Court considers a larger grant unnecessary (*q*).

Powers of administrator or executor.

Where no limitation is expressed in the order making the grant, then the power of the executor or administrator extends over all the property of the deceased, whether movable or immovable, and continues until the administration is completed or the executor or

(*n*) Section 537.
(*o*) Adoris vs. Perera, 17 N. L. R. 212. F. B.
(*p*) Krishnapillai vs. Chellamma, 2 Times 91.
(*q*) Section 539.

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

administrator dies (*r*). The Court may dispense with security from an executor or administrator with limited grant unless it is absolutely necessary for the protection of the estate (*s*). An administrator derives his authority from the letters issued to him (*t*). He is entitled to sell landed property of an intestate when the letters of administration contain no limitation of his powers as to such sale (*u*). The title to immovable property belonging to the estate of a deceased person, however, does not vest in the administrator but in the heirs. His personal representative retains the power to sell the property for the purposes of administration but his non-concurrence in the conveyance by the heirs does not otherwise affect its validity (*v*). An administrator is not justified in putting up a property for sale without taking measures to see that it is not sold at a great undervalue. The Court ought to require the administrator, when he applies for leave to sell, to state under what conditions he proposes to sell and to see that he does not sell under conditions which may involve a sale at a ruinous sacrifice (*w*). An administrator selling his intestate's land is not bound to covenant for title and, when he has conveyed without an express covenant for title, none is implied in law (*x*).

Where person dies intestate.

When any person dies in Ceylon without leaving a will, it is the duty of such person's widow, widower or next of kin, if his estate amounts to over one thousand rupees (*y*), to report his death within one month to the Court within whose jurisdiction he has died, and to verify by affidavit the time and place of his death, and the nature, extent and situation of his property (*z*). The penalty for neglect to furnish this information is a fine not exceeding one thousand rupees (*a*). But before a person can be held liable to the penalty it must be shown that the omission to report was wilful (*b*). The section makes the widow or next of kin liable. The duty

(*r*) Section 540.
(*s*) Section 541.
(*t*) Sorlentina vs. de Kretser, 29 N. L. R. 174.
(*u*) Appuhamy vs. Silva, 18 N. L. R. 496.
(*v*) Silva vs. Silva, 10 N. L. R. 234. F. B. overruling Fernando vs. Dochi, 5 N. L. R. 15.
(*w*) Krause vs. Pathumma, 5 N. L. R. 162.
(*x*) Francisco vs. Peresenty, 2 S. C. C. 1.
(*y*) 2,500 Rupees by Ordinance 15 of 1930.
(*z*) Section 542.
(*a*) Section 543.
(*b*) Mudaliyar East Girawa Pattu vs. Wijesuriya, 4 Times 130.

seems first to be laid on the widow and, if there be no widow, then on the next of kin. Therefore both should not be convicted unless it is proved that they acted in concert (*c*). The best working provisions, however, regarding the reporting of deaths is to be found not in section 542 of the Code but in section 18 of Ordinance 18 of 1867 (*d*). Where a deceased is married in community of property he leaves only half the property at his death. If that is less than a thousand rupees in value, the provisions of the section will not apply (*e*).

Where a person has died intestate any person interested in the administration of his estate may apply for grant of letters of administration to himself (*f*). Where no one applies and the Court thinks that administration is necessary, it has a discretion to—and where the estate is over one thousand rupees (*g*) in value it must—appoint some person whether under ordinary circumstances he would be entitled to take out letters or not (*h*). If there is not resident within the local limits of its jurisdiction some next of kin or other person entitled to take out letters of administration, the Court can issue letters *ad colligenda* to some person to take charge of the property until it is claimed by some executor or administrator lawfully entitled to administer it (*i*).

Actions for recovery of property.

Not maintainable without probate.

No action shall be maintainable for the recovery of any property movable or immovable in Ceylon belonging to, or included in the estate or effects of, any person dying testate or intestate in or out of Ceylon where such estate or effects amounts to or exceeds one thousand rupees (*j*) in value, unless grant of probate or letters of administration duly stamped shall have first been issued to some person as executor or administrator of the deceased. If any such property is transferred without probate or administration being first taken out, every transferor and transferee of such property is guilty of an offence and liable to a fine not exceeeing one

(*c*) Toussaint vs. Alima Kandu, 1 N. L. R. 305.
(*d*) Mudianse Korale vs. Appuhamy, 1 N. L. R. 47.
(*e*) Wijesekera vs. Fernando, 4 N. L. R. 188.
(*f*) Section 544.
(*g*) 2,500 Rupees by Ordinance 15 of 1930.
(*h*) Section 545.
(*i*) Section 546.
(*j*) 2,500 Rupees by Ordinance 15 of 1930.

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

thousand rupees. In addition to any fine, the Crown may also recover from such transferor and transferee or either of them such sum as would have been payable to defray the costs of stamps necessary to be affixed to any probate or letters of administration. The amount so recoverable shall be a first charge on the estate of the deceased and may be recovered by action accordingly (*k*).

Object is protection of revenue.

The primary object of section 547 is to protect the revenue (*l*). An action instituted without taking out probate is therefore not necessarily bad. The words *no action shall be maintainable* do not mean *no action shall be instituted*. An action may be instituted without taking out probate but it cannot be carried to completion until the necessary stamp duty on probate has been paid (*m*). An intention not to prosecute the action may, however, be inferred, unless the plaintiff takes steps to lift the prohibition (*n*). Any one who has an interest in the property can institute an action and get an *interim* injunction to prevent damage being done to the estate prior to letters of administration being granted (*o*).

Nature of actions prohibited.

The action prohibited by this section is an action for the *recovery* of property. It is inapplicable, for example to an action brought by a creditor to recover a debt due from the deceased (*p*). This section is a statutory bar to the maintenance of an action for the recovery of any property belonging to the estate of any person dying testate, or which amounts to or exceeds the sum of one thousand rupees (*q*) in value unless grant of probate or letters of administration have been issued to some person (*r*). It is in effect to declare that the executor or, administrator is the only person who can sue for the recovery of any property included in the estate (*s*). It cannot be got over by the implied or express agreement of the parties to the action that, as the title to be deduced from the deceased is not contested, his estate need not be administered (*t*). A person may,

(*k*) Section 547.
(*l*) Ramasamy Pillai vs. Vengadasamy, 31 N. L. R. 118 following Hassan Hadjiar vs. Levane Marikar, 15 N. L. R. 275.
(*m*) Allagakavandi vs. Muttumal, 22 N. L. R. 111.
(*n*) Jayasekera vs. Korala, 5 Bal Notes 3.
(*o*) Allagakavandi vs. Muttumal, 22 N. L. R. 111.
(*p*) Sevalingam vs. Kumarihamy, 9 S. C. C. 181.
(*q*) 2,500 Rupees by Ordinance 15 of 1930.
(*r*) Gunaratne vs. Hamine, 7 N. L. R. 299.
(*s*) Fernando vs. Fernando, 4 N. L. R. 201.
(*t*) Gunaratne vs. Hamine, 7 N. L. R. 299.

however, without taking out administration intervene in an action in order to resist the claim of a person who is not edtitled to the same (*u*).

Possession need not be asked for.

An action does not necessarily cease to be one for the recovery of property because possession is not asked for. So an action to have it declared that the signature of a deceased person to the discharge of a mortgage bond and the transfer of a land were forgeries comes within the meaning of the section (*v*). A *chose in action* belonging to the deceased can be enforced only by his legal representative (*w*). An action for partition may be (*x*) but is not necessarily (*y*) an action for the recovery of property. But an action by a widow (*z*) or the heirs of a deceased wife (*a*) to have a deed of gift by the husband set aside on the ground of its being in fraud of the community is not an action for the recovery of the property of the deceased. Nor is an action by an heir to redeem a mortgage an action for the recovery of property (*b*.) The section is not intended to bar claims against the estate, and a mortgagee who brings an action on a mortgage bond does not seek to recover, in the sense used in section 547, property belonging to or included in the estate of the mortgagor.

Duly stamped.

An administrator is not entitled to maintain an action in respect of property alleged to form part of the estate which is not mentioned in the inventory and the value of which has not been included in the sum on which the stamp duty has been paid (*c*). In such a case the letters of administration are not duly stamped but an application for time to remedy the defect should be allowed. (*d*) The expression *duly stamped*, however, must be construed with reference to the date of issue of the instrument. At the time when the Court determines the amount payable as probate duty it has only before it the affidavit required by section 27 of the stamp Ordinance of 1890. Upon that sum the Court assesses the duty and the executor pays it into Court (*e*).

(*u*) Lebbe vs. Samu, 3 C. L. Rec. 70.
(*v*) Kandiah vs. Carthigesu, 31 N. L. R. 172.
(*w*) Fernando vs. Unnanse, 20 N. L. R. 376.
(*x*) Ponnama vs. Arumugam, 5 N. L. R. 223. P. C.
(*y*) Hassen Hadjiar vs. Levane Marikar, 15 N. L. R. 275.
(*z*) Lewishamy vs. Cornelis de Silva, 3 Bal 43.
(*a*) Weerasooriya vs. Weerasooriya, 13 N. L. R. 376.
(*b*) Wastuhamy vs. Banda, 4 Bal Notes 25.
(*c*) Silva vs. Appuhamy, 13 N. L. R. 293.
(*d*) Silva vs. Weerasooriya, 10 N. L. R. 73. F. B.
(*e*) Perera vs. Krickenbeck, 10 N. L. R. 119, distinguishing Silva vs. Weerasooriya, 10 N. L. R. 73. F. B.

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

Transfer of property.

The penal provisions to section 547 contemplates the transfer of the assets of the deceased without the formality of taking out probate or letters of administration at all and not a mere deficiency in stamp duty. Where an executor or administrator transfers property belonging to the estate of the deceased to a *bona fide* purchaser, such transfer cannot be invalidated on the ground that the value of such property had not been included in the amount on which stamp duty had been paid in the administration proceedings and that, therefore, probate or grant of administration had not been duly stamped (*f*). A mortgage is not a transfer and does not come within the purview of this section (*g*).

Compensation to executor.

Where a sole or sole surviving executor or administrator dies leaving a part of the property of the deceased unadministered, the Court can make a fresh grant of administration in respect of the part of the property left unadministered (*h*). Compensation is allowed to executors and administrators both on the property sold and on that retained by the heirs at a rate not exceeding three per cent: on cash and specially bequeathed property at one and a half per cent. The maximum compensation allowed is five thousand rupees unless the Court thinks that extra remuneration should be allowed owing to the unusual trouble taken (*i*). An executor is entitled to his out of pocket expenses in addition to the compensation provided for. Section 551 deals only with compensation in the sense of remuneration for trouble. The first part of the section prescribes the maximum rates allowable. The second part limits the gross amount recoverable. But neither that amount nor any additional compensation allowed by the Court may increase the rates prescribed by the earlier part of the section (*j*). Each executor or administrator is entitled to the full amount of compensation unless there are more than three. In such a case the compensation to which three would be entitled must be divided among them according to the services rendered by them. But where the will provides a specific compensation for an executor or administrator, he will not be entitled to more unless he files in Court a written renunciation of the specific compensation (*k*). Every

(*f*) Perera vs. Krickenbeck, 10 N. L. R. 119.
(*g*) Mudianse vs. Wilson, 12 N. L. R. 134.
(*h*) Section 549.
(*i*) Section 551.
(*j*) Soysa vs. Abeydeera, 12 N. L. R. 349.
(*k*) Section 552.

executor or administrator must, before the expiration of twelve months from the grant of probate or administration, file in Court a true account of his administration verified by affidavit with all receipts and vouchers attached. He may at the same time pay into Court any money which may have come into his hands in the course of the administration to which any minor may be entitled (*l*). If any executor or administrator fails to pay over to the creditors, heirs, legatees or other persons the sums of money to which they are entitled within one year after the grant of probate or administration, he will be liable to pay interest out of his own funds for all money which he retains after that period unless he can show good cause for such detention (*m*).

Person withholding property from executor.

Where property belonging to the estate of the deceased is in the possession of some person who withholds it from the executor or administrator, or where information regarding such property is withheld so that it cannot be inventoried and valued, the Court may, on a petition supported by affidavits from the executor or administrator, issue a citation to the person withholding the property or the necessary information (*n*). The citation must be accompanied by an order signed by the Judge requiring such person to attend personally on a day specified. The citation and order must be served personally and *batta* must be paid to such person as is paid to a witness in a civil action. Failure to obey the citation will be contempt of Court (*o*). On the day appointed the person cited to attend must be examined on the allegations in the petition on oath or affirmation. If he puts in an affidavit that he is the owner of any of the said property or is entitled to its possession by virtue of a lien or otherwise, the application will be dismissed (*p*) and the executor or administrator referred to his legal remedy (*q*). In such a case no examination or cross-examination of the respondent can be permitted (*r*). The heirs of a deceased person cannot bring themselves under the provisions of this section. They do not become the owners nor do they acquire a special property therein within the meaning of the

(*l*) Section 553.
(*m*) Section 554.
(*n*) Section 712.
(*o*) Section 713.
(*p*) Section 714.
(*q*) Vanniah vs. Marikar, 4 Lead 127.
(*r*) In *re* the last will of Cornelis Dias, 2 N. L. R. 252.

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

section (*s*). Nor can money be withheld from the administrator which has been entrusted to a person by the deceased for the purposes of paying debts or defraying the funeral expenses (*t*). Where such a petition is dismissed on the respondent claiming the property, the Court has power to condemn the respondent in costs if his conduct warrants it (*u*).

If, after the inquiry, the Court is of opinion that the person cited is withholding or concealing money or other property belonging to the deceased, it must make a decree requiring him to deliver the property, which must be specified, to the petitioner (*v*). It is not a proper order to require the person cited to pay the money into Court (*w*). Where, however, the person cited gives security by a bond entered into with the petitioner as obligee for the payment of the money or delivery of the property or, in default, for the payment of its value and damages, the Court may award costs to the petitioner and dismiss the proceedings (*x*). The person cited must be allowed a reasonable time to give the required security (*y*).

Inventory to be filed.

If an executor or administrator fails to file in Court within the prescribed time the required inventory and valuation, a creditor or any person interested in the estate may present a petition to that effect to the Court from which grant of probate or administration issued. The Court may then order the executor or administrator to file the inventory or show cause why he should not be attached. If he fails to obey the order the Court may issue a warrant of attachment against him and punish him for contempt of Court (*z*). If he is committed to jail he may be discharged upon his delivering all moneys and other property of the deceased and all papers relating to the estate under his control (*a*). This applies only to cases where the executor has wilfully kept out of the inventory goods which ought to have been included. The Court cannot inquire into disputes as to whether certain properties belonged to the deceased or

(*s*) Marikar vs. Marikar, 1 Times 129.
(*t*) In re the estate of Marikar Hadjiar, 25 N. L. R. 73.
(*u*) Neina vs. Neina, 2 Times 166.
(*v*) Section 716.
(*w*) In re the estate of Pransappu, 7 N. L. R. 170.
(*x*) Section 716.
(*y*) In re the estate of Pransappu, 7 N. L. R. 170.
(*z*) Section 718.
(*a*) Section 719.

to the administrator or to third parties. These are questions appropriate to a judicial settlement (*b*).

Creditor may compel payment of debt.

A creditor or legatee may present a petition to Court to compel payment by the executor or administrator of any debt due or legacy payable under the will at any time after the expiration of twelve months from the grant of probate or administration (*c*). On the presentation of such a petition a citation shall issue to the executor or administrator. Where, however, the executor files an affidavit disputing the petitioner's claim or where the Court is not satisfied that there is money or other movable property applicable to the satisfaction of the petitioner's claim, or where it cannot be satisfied without affecting the rights of others entitled to priority or equality of claim, the petition will be dismissed. Such dismissal will not, however, affect the petitioner's right to an action for an accounting (*d*). Such an application may be entertained in any case where the estate is not wholly distributed notwithstanding any final account (*e*). There is nothing, however to prevent a creditor (*f*) or a legatee (*g*) from asserting by action his claim to any debt or legacy at any time after the grant of probate or administration. He is not bound to wait till the expiration of one year from such grant.

Accounting and settlement.

Intermediate accounts.

An executor or administrator may at any time voluntarily file in Court an intermediate account and vouchers in support of it (*h*). The Court may also, of its own account, or on the petition of a creditor or person interested in the estate, order the executor or administrator to submit an intermediate account (*i*). A judicial settlement of accounts may be applied for by a creditor or any person interested in the estate including a child born after the making of the will, or by any person on behalf of such child, or by a surety in the official bond of the person required to account or by the legal representative of such surety (*j*). A person

(*b*) Pavistina vs. Veyachechy, 5 Bal Notes, 22.
(*c*) Section 720.
(*d*) Section 721.
(*e*) In re the last will of Baban, 1 C. L. R. 41.
(*f*) Perera vs. Fernando, 3 C. L. R. 3.
(*g*) Fernando vs. Soysa, 2 N. L. R. 40.
(*h*) Section 723.
(*i*) Section 724.
(*j*) Section 726.

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

interested in the estate is a person interested in the estate viewed as a judicial entity. Thus a person who has purchased a widow's half share belonging to the estate of her deceased husband cannot impeach the accounts of the administrator (*k*). Where a minor is represented by a guardian *ad litem*, no other person can claim to be interested in the minor for the purposes of these proceedings (*l*). One of several joint administrators who is also one of the next of kin of the deceased may petition for the judicial settlement of accounts by the other administrators as well as himself but, where the joint administrators have filed their final accounts, one of them cannot compel them to exhibit their accounts over again without disclosing material *prima facie* probative errors in those accounts (*m*). A judicial settlement will be allowed

When judicial settlement is allowed.

(a) Where one year has expired since the grant of probate or administration.

(b) Where the grant has been revoked, or where for any other reason the powers of the executor or administrator have ceased.

(c) Where the executor or administrator has sold, or otherwise disposed of, any immovable property of the deceased or any devisable interest or any rents, profits or proceeds thereof pursuant to a power in the will where one year has elapsed since the grant of probate to him (*n*).

The rendering of a final account does not make an administrator *functus officio* (*o*).

Executor himself may ask for settlement.

The executor or administrator himself may petition for the judicial settlement of his accounts at any time after the expiration of one year from the grant of probate or letters of administration. He must cite the creditors, heirs, next of kin and legatees of the deceased and his co-executors or co-administrators, if any. On the petition a citation must issue accordingly (*p*). The Court must then take the account and determine any contest (*q*). Any creditor or person interested in the estate, although

(*k*) Karonchi Appu vs. Don Siman, 1 C. W. R. 21.
(*l*) Saibo vs. Marikar, 3 Bal. Notes 31.
(*m*) In *re* the estate of Dharma Gunawardene, 2 C. L. R. 105.
(*n*) Section 725.
(*o*) Subramaniam Chetty vs. Palaniappa Chetty, 3 Bal 57.
(*p*) Section 729.
(*q*) Section 730.

not cited, is entitled to appear and make himself a party to the proceedings (*r*). An executor or administrator whose grant has been revoked may also petition for a judicial settlement of accounts in the same manner (*s*). With regard, however, to the plea of *plene administravit*, the English law applies and it is not obligatory on an administrator to obtain a formal judicial settlement under section 729 from the Court as a preliminary to such plea (*t*).

Affidavits.

The accounting party must file an affidavit with each account to the effect that the account contains, to the best of his knowledge, a full statement of all receipts and disbursements on account of the estate and of all money and other property which has come into his hands or which has been received on his behalf by any one else. Also that he does not know of any error or omission to the prejudice of any creditor or any person interested in the estate (*u*). An affidavit in support of an intermediate account under this section is not chargeable with stamp duty under Ordinance 3 of 1890 (*v*). The accounting party must also file a voucher for every payment except in the following cases.

(1) Any proper payment not exceeding twenty rupees may be supported by his own uncontradicted oath. But all items so allowed must not amount to more than two hundred rupees.

(2) He may prove by his own evidence on oath, or that of someone else, that he did not take a voucher when he made the payment, or that the voucher has been lost or destroyed. No such item shall however be allowed unless the Court is satisfied that it is correct or just (*w*).

Executor may prove debts due to him.

When the judicial settlement is made the executor or administrator may prove any debt due to him by the deceased provided such debt, with the intention to prove it, has been stated in the petition. If a contest arises between him and any other party with regard to any debt alleged to be due to him from the deceased or by him to the deceased it must be determined in the same manner as in any ordinary civil trial (*x*).

(*r*) Section 731.
(*s*) Section 732.
(*t*) Arunasalem Chetty vs. Mootatamby, 2 A. C. R. 90.
(*u*) Section 733.
(*v*) In *re* the estate of Margaret Wernham, 4 N. L. R 236. F. B.
(*w*) Section 734.
(*x*) Section 736.

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

Nature and scope of judicial settlement.

A judicial settlement (*y*) is a proceeding of a limited nature. It proceeds upon the footing that the inventory is a full and true inventory of the estate. If the correctness of the inventory is to be challenged it should be challenged under section 718. It is not the business of the executor to make a distribution of the estate. He is required to pay the debts, discharge the liabilities, give effect to the legacies and account for the management of the estate so long as it is under his control. Subject to the payment of debts and legacies, all the property movable and immovable vests as directed by the will. No conveyance from the executor is necessary for the purpose of vesting title in the heirs. A claim for damages for alleged negligence and mismanagement of the estate in the hands of the executor cannot be entertained in a judicial settlement (*z*). Nor is the executor responsible for the income of any property after it has been handed over to the heirs. An executor in a judicial settlement is, however, accountable not only for the money which he actually collected but also for the money which he ought to have collected and failed to collect through his own default (*a*). The administrator of an estate upon a judicial settlement has, however, the discretion to abandon a debt due to the estate which in the exercise of his common sense and judgment he considers to be irrecoverable (*b*). When a Judge is supervising a judicial settlement he must bear in mind not only the position of the executor and those whom he employs, but also that of the beneficiaries and the effect of any principle that may be laid down upon other cases. It is most necessary that in these settlements a Judge should exercise a strict control over the practitioners employed who, it must be remembered, are officers of the Courts. Any special agreement between a solicitor and a person in the position of a trustee where the burden of the agreement falls not upon the trustee but upon the *cestuique trust* must be regarded with special jealousy (*c*).

Prescription.

Prescription will not run against the accounting party in respect of any debt due from, or cause of action against, the deceased until the first judicial settlement of

(*y*) de Zoysa vs. de Zoyza, 26 N. L. R. 472.
(*z*) See contra Holsinger vs. Nicholas, 20 N. L. R. 417.
(*a*) Obiter. See contra Mohamedu Jan vs. Ussen Bebe, 1 C.L.R. at p. 54.
(*b*) Mohamedu Jan vs. Ussen Bebe, 1 C. L. R. 53.
(*c*) Holsinger vs. Nicholas, 20 N. L. R. 417.

an account. If, however, he had been appointed on the revocation of a former grant to some one else, then prescription is suspended from the grant to him until the first judicial settlement of his account. After the first judicial settlement of an account by an executor or administrator prescription will begin to run against him with regard to any debt due from, or other cause of action against, the deceased (*d*).

Manner of taking the account.

The convenient and proper manner for taking the account is for the Court to call upon the accounting party to file his account on a certain appointed day. The Court should then allow reasonable time to the opposing party to examine the account and to present a statement of his objections to it. This account must be verified by the oath or affirmation of the accounting party and each item on the credit side, that is, each item of the disbursement on his part, objected to by the opposing party must be proved by sufficient evidence. And the opposing party has the right to meet this by evidence produced for the purpose of falsifying the account in any particular, or of adding new items to the debit side. The evidence adduced in support of the account should first be taken and then that of the opposing party and the Court should, finally, on consideration of the whole, determine as nearly as possible the true state of the account as against the accounting party, the matter of the account being in fact taken and dealt with as a separate subject of trial isolated for the time being from the rest of the suit. The like course should be taken with regard to the inquiries (*e*).

Effect of judicial settlement.

What a settlement is evidence of.

A judicial settlement is conclusive evidence against all parties who were duly cited to appear, and all persons deriving title from them, of the following facts and no others.

(a) That the items allowed to the accounting party for money paid to creditors, legatees, heirs and next of kin, for necessary expenses and for his services is correct.

(b) That the accounting party has been charged with all the interest for money received by him and embraced in the account for which he was legally accountable.

(*d*) Section 737.
(*e*) Fernando vs. Fernando, 1 S. C. C. 52.

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

(c) That the money charged to the accounting party, as collected, is all that was collectible at the time of the settlement on the debts stated in the account.

(d) That the allowances made to the accounting party for the decrease, and the charges against him for the increase, in the value of the property were correctly made (*f*).

Distribution of estate.

When the account has been judicially settled and any part of the estate remains and is ready to be distributed to the creditors, heirs, legatees, next of kin, husband or wife of the deceased or their assigns, the decree must direct the payment and distribution to the persons entitled. If any person who is a necessary party for the purpose has not been cited, a supplemental citation must be issued. Where the validity of a debt, claim or distributive share is not disputed or has been established, the decree must determine to whom it is payable, the sum to be paid and all questions concerning it. The decree will be conclusive with respect to all such matters upon all parties who were cited to appear, or did in fact appear, and to all persons deriving title through them (*g*). The decree may direct the delivery of unsold property movable or immovable or the assignment of an uncollected demand or any other movable property to a party entitled to payment in lieu of such payment if all the parties appearing consent to it by a writing filed in Court, or if it appears that a sale for the purpose of payment or distribution would cause a loss to the parties entitled thereto (*h*). Where an admitted debt of the deceased is not yet due and the creditor will not accept present payment with a rebate of interest, or where an action is pending between the executor or administrator and a person claiming to be a creditor of the deceased, the decree must direct that a sum sufficient to satisfy the claim be retained in the hands of the accounting party or paid into Court for the purpose of being applied to the payment of the claim when it is due. Whatever is not needed for that purpose will afterwards be distributed according to law (*i*). Where a legacy or distributive share is payable to a lunatic or minor, the decree may direct it to the manager or curator of the estate of such lunatic or minor. If the sum due to a minor is less than

(*f*) Section 739.
(*g*) Section 740.
(*h*) Section 741.
(*i*) Section 742.

one hundred rupees, it may be applied to his maintenance or education. The manager or curator must account for all sums received by him (*j*).

Appealable.

Every order or decree made under the provisions of this chapter will be subject to an appeal to the Supreme Court (*k*).

(*j*) Section 743.
(*k*) Section 744.

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

CHAPTER V.

ARBITRATION.

Application for arbitration.

If all the parties to an action desire that any matter in difference between them in the action be referred to arbitration, they may, at any time before judgment is pronounced, apply in person, or by their respective proctors specially authorized in writing in this behalf, to the Court for an order of reference (*a*). A partition action cannot be referred to arbitration (*b*) but an action under section 247 of the Civil Procedure Code may be so referred (*c*). A reference to arbitration in the course of an action can only be made on the application of *all* the parties to it. An award on a reference by *some* of the parties only is not binding even on those who have consented to the reference (*d*). So where an action in which two defendants were jointly sued was referred to arbitration on a motion signed by the plaintiff and the first defendant only, the proceedings were invalid even though the award was against the first defendant only (*e*). And where the plaintiff who had signed the reference to arbitration, being dissatisfied with the award, moved to set it aside on the ground that the defendants had not signed it, the objection was held to be valid (*f*). Every such application must be in writing and must state the particular matter for reference. The written authority of the proctor to make it must refer to it and must be filed in Court at the time when the application is made. This authority is quite distinct from the general power in the proxy to compromise or refer to arbitration (*g*). This special authority to a proctor to refer a matter to arbitration need not be stamped (*h*). Where matters in dispute in a pending case are referred to arbitration by consent of parties, one of the parties is not estopped from

(*a*) Section 676.
(*b*) Mather vs. Thamotheram Pillai, 6 N. L. R. 246.
(*c*) Vinary Putan vs. Nakan Putan, 3 A. C. R. 43.
(*d*) In the matter of an application for restitutio in integrum, 30 N. L. R. 144.
(*e*) Asia Umma vs. Abdulla, 28 N.L.R. 391.
(*f*) Arachi Appu vs. Mohoth Appu, 23 N.L.R. 500.
(*g*) Section 676.
(*h*) Aitken Spence & Co. vs. Fernando, 4 N.L.R. 35.

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

showing the irregularity of the reference to arbitration from his having signed a proxy in favour of his proctor authorising the latter in general terms to refer the matter in the suit to arbitration if necessary (*i*).

How it should be made.

A reference to arbitration is bad unless it is made on an application made in writing either by the parties or by the proctors specially authorized in that behalf. The want of these formalities is not cured by the parties subsequently appearing before the arbitrator (*j*). The signatures of the consenting parties should appear on the proceedings (*k*). The allowance by a judge, however, of the agreement of the parties to refer a matter to arbitration, and the authentication of that agreement not merely by his signature but by the marks of the parties themselves, would constitute good evidence that there was such an application to the Court as would satisfy even the letter, and certainly the spirit, of the section (*l*). In the absence of an application in writing, a reference to arbitration is irregular in spite of the consent of parties, and any award thereunder is void and inoperative (*m*). A reference to arbitration is also bad if it omits to state the particular matters sought to be referred (*n*). The arbitrator may be nominated by the parties or by the Court if the parties so desire it (*o*).

Reference by Court.

The Court must, by order, refer to the arbitrator the matter in difference which he is required to determine, and specify in the order a reasonable time for the delivery of the award. Thereafter the Court shall not deal with the matter in the same action except as provided by the Code (*p*). Where an action is referred to arbitration by Court, an order in terms of form 108 in schedule 2 of the Code is signed by the Judge and sent to the arbitrator as his mandate. It cannot, however, be presumed from the absence of such a form that no order of reference had been made to the arbitrator (*q*). If the reference is to two or more arbitrators, provision must be made for a difference of opinion among them by the appointment of an umpire or by empowering the arbitrators themselves

(*i*) Gonsales vs. Holsinger, 7 S. C. C. 101. F. B.
(*j*) Casim Lebbe Marikar vs. Samel Dias, 2 N.L.R. 319.
(*k*) Morgan's Digest 50. F. B.
(*l*) Menika vs. Ukku Umma, 18 N. L. R. 413.
(*m*) Gonsales vs. Holsinger, 7 S. C. C. 101. F. B.
(*n*) Thigisa vs. Sandarisa, 6 C.L. Rec. 25.
(*o*) Section 676.
(*p*) Section 677.
(*q*) Kadiravel vs. Ponnasamy, 27 N. L. R. 222.

to appoint an umpire; by declaring that the decision shall be with the majority or by any other manner as the parties agree or the Court determines (*r*). If the arbitrator or any one of several arbitrators or the umpire dies or refuses or neglects or becomes incapable to act, or leaves the Island not intending to return at an early date, the Court may appoint a new arbitrator or umpire in his place or supersede the arbitration and proceed with the action (*s*). These provisions, however, apply only in cases where, in fact, an arbitrator has assumed duties as such and has subsequently died or refused to act or become incapable of acting, and not to a case where the arbitrator who was nominated has, at the outset, refused to act (*t*).

Issue of process.

The Court can issue the same processes to the parties and witnesses whom the arbitrators desire to examine as the Court may issue in actions tried before it. Persons not attending or refusing to give evidence or guilty of any contempt to an arbitrator may be punished as for like offence in an action tried before the Court (*u*). Arbitration proceedings, however, cannot be held on a public holiday unless the parties agree (*v*).

Where award is not completed in time.

If, from the want of the necessary evidence or for any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may at its discretion either grant a further time and, from time to time, enlarge the period for the delivery of the award or make an order superseding the arbitration and proceed with the action (*w*). An application for extension of time and the order of the Court thereon must be in writing (*x*). The Court can extend the time for the delivery of the award on the motion of the arbitrator himself (*y*) without the consent of, or even notice to, the parties to the action (*z*). It cannot, however, leave it to the secretary to fix a date (*a*). But where an award has been filed after the returnable date, the Court has no power thereafter to extend the time allowed for making the award so as to make it valid (*b*).

(*r*) Section 678.
(*s*) Section 679.
(*t*) Konar vs. Govindan, 22 N. L. R. 31.
(*u*) Section 682.
(*v*) Stephens vs. Gaffor, 26 N.L.R. 493.
(*w*) Section 683.
(*x*) Perera vs. Andris, 26 N. L. R. 289.
(*y*) Perera vs. Francisco, 3 N. L. R. 384.
(*z*) Mohamedu vs. Perera, 1 S. C. R. 134.
(*a*) Subaneris Appu vs. Appuhamy, 14 N. L. R. 82.
(*b*) Perera vs. Andris, 26 N. L. R. 289.

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

Award must be filed in court.

When an award has been made, the person who makes it must sign it and cause it to be filed in Court together with any depositions and documents which have been taken and proved before him. Notice of the filing of the award must be given to the parties (c.) An award not delivered within the period allowed by Court is not valid (d). Within fifteen days from the receipt of such notice, any party to the arbitration may, by petition, apply to the Court to modify or correct it or remit it to the arbitrator for reconsideration (e). The provisions of the Code in regard to arbitration must be rigorously and literally complied with. Fifteen days' notice of the filing of an award should be given to the parties to the case prior to the confirmation of the award by Court. The notice should be to the parties themselves and not to their proctors (f). But the notice need not be in writing and, where the parties have knowledge of the filing of the award, the Court may presume that notice had been duly given (g).

Award may be modified or sent back.

The Court may also modify or correct an award or send it back to the arbitrator of its own motion without any application by a party to it (h). The Court may modify or correct an award when it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred, or where the award is imperfect in form or contains any obvious error which can be amended without affecting the decision (i). An award may be remitted to the same arbitrator for reconsideration on any matter where the award has left undetermined any of the matters referred to arbitration or has determined any matter not so referred; where it is so indefinite as to be incapable of execution, or where an objection to its legality is apparent on the face of it (j). An award so remitted becomes void if the arbitrator refuses to reconsider it (k).

Award may be set aside.

An award cannot be set aside except on one of the following grounds :—

(c) Section 685.
(d) Subaneris Appu vs. Appuhamy, 14 N. L. R. 82.
(e) Section 687.
(f) Pitche Tamby vs. Fernando, 14 N. L. R 73.
(g) Perera vs. Cosmas, 2 Times 126.
(h) Hendrick Appu vs. Juanis Naide, 3 C. L. R. 60.
(i) Section 688.
(j) Section 690.
(k) Section 691.

(a) Corruption or misconduct of the arbitrator or umpire. The question of misconduct is one of fact (l). The expression does not necessarily involve personal turpitude on the part of the arbitrator. The term really does not amount to much more than such a mishandling of the arbitration as is likely to amount to some miscarriage of justice (m). Thus an arbitrator is guilty of misconduct where he refuses to hear evidence upon a material issue (n) or if he proceeds in the absence of one of the parties (o). But the receipt by a surveyor, who was appointed arbitrator, of his fees from one party only does not amount to misconduct if it was not paid with the object of influencing, and did not in fact influence, his award (p). Nor is it misconduct if an arbitrator makes use of his personal knowledge in deciding a case (q).

(b) Where either party has been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading and deceiving the arbitrator.

(c) Where the award has been made after the issue of an order by the Court superseding the arbitration and restoring the action (r). The sending back of the case to Court with the consent of the parties for decision of a point of law does not supersede the arbitration, and a party cannot object to an award in that the case was not properly referred to the arbitrator (s.)

Judgment according to award.

If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, and if no application has been made to set aside the award, or if it has been made and the Court has refused it, the Court must, after the time for making such application has expired, on a day of which notice

(l) Fernando vs. de Mel, 21 N. L. R. 103.
(m) Goonewardene vs. Goonewardene, 24 N. L. R. 385.
(n) Goonewardene vs. Goonewardene, 24 N. L. R. 385.
(o) Aitken Spence & Co. vs. Fernando, 4 N. L. R. 35.
(p) Fernando vs. de Mel, 21 N. L R. 103. See Contra Fernando vs. Migel Appu, 16 N.L. R. 157.
(q) Marisal vs. Chenniah, Lem and Aser. 58. F. B.
(r) Section 691.
(s) Mudiyanse vs. Appuhamy, 24 N. L. R. 458.

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

No appeal.

must be given to the parties, give judgment according to the award. No appeal lies from a decree framed on such judgment except in so far as the decree is in excess of, or not in accordance with, the award (*t*). Where a person files objections to an award and the objections are disallowed, the Court should not enter judgment in terms of the award at once. There ought to be an interval between the disallowance of the objections and the giving of judgment in terms of the award, and notice of the day fixed for judgment must be given to the parties. If objections to an award are overruled, it is open to the objecting party to appeal. The last clause in section 692 prohibits appeals only from decrees entered up on judgment in pursuance of the award (*u*). Where no notice of filing award has been given to any of the parties and no notice is given by Court of the day fixed for entering judgment, the aggrieved party can appeal. He need not first move the Court to set aside the order declaring the decree absolute (*v*). If the proceedings before the arbitration and the award are irregular, the remedy is by way of application to the Supreme Court for revision and not by way of appeal (*w*). Where the matter in dispute has been legally and regularly submitted to arbitration, the award should be held conclusive unless some very strong circumstances such as fraud, partality and the like, should appear to vitiate it (*x*) and unless it is challenged within the prescribed time (*y*).

Reference by the parties.

Where a suit is pending, a reference to arbitration can only be made by the Court itself in the suit (*z*) with the consent of the parties (*a*). But parties, instead of coming to Court, may agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates. The parties must then apply by petition by way of summary procedure to have the agreement filed in such Court and must name as respondents any parties to the agreement who are not parties to

(*t*) Section 692.
(*u*) Thepanissa vs. Allissa, 14 N. L. R. 222.
(*v*) Dingiri Mahatmaya vs. Appuhamy, 19 N. L. R. 202.
(*w*) Prolis vs. Amerasuriya, 5 N. L. R. 178.
(*x*) Saravanamuttu vs. Teywane, 3 Lor 206. F. B.
(*y*) Costa vs. Silva, 3 C. L. Rec. 121.
(*z*) Hadjiar vs. Raheem, 21 N. L. R. 397.
(*a*) In the matter of an application for restitutio in integrum, 30 N. L. R. 144.

the petition (*b*). The Court may then order the agreement to be filed and make an order of reference thereon (*c*), and the proceedings thereafter will be similar to those when a reference has been made by Court (*d*). When the award is made, any person interested in the award may within six months apply to the Court having jurisdiction over the matter that the award be filed in Court (*e*) and, if no cause is shown to the contrary, the Court shall order it to be filed and the award shall take effect as an award made under the provisions of the Chapter (*f*).

Summary procedure on liquid claims.

What are liquid claims.

All actions where the claim is for a debt or liquidated demand in money arising upon a bill of exchange, promissory note, cheque, instrument or contract in writing for a liquidated amount of money, or on a guarantee where the claim against the principal is in respect of such debt or liquidated demand, bill, note or cheque, may, if the plaintiff desires to avail himself of the special procedure in respect of liquid claims, be instituted by presenting a plaint as in an ordinary action (*g*) together with the instrument on which the plaintiff sues and an affidavit that the sum he claims is justly due to him from the defendant (*h*). If the plaintiff is out of the Island, his attorney may swear the affidavit. But he must depose from his own personal knowledge to the matters contained therein (*i*). If the instrument appears to be properly stamped and not to be open to suspicion by reason of any alteration or erasure or other matter on the face of it and not to be barred by prescription, the Court may order summons on the defendant (*j*). The summons will be in form 19 contained in the second schedule to the Code or in such other form as the Supreme Court shall from time to time prescribe (*k*), and the day for the defendant's appearance to the summons must be as early as can be conveniently named, regard being had to the distance of the defendant's

(*b*) Section 693.
(*c*) Section 694.
(*d*) Section 695.
(*e*) Section 696.
(*f*) Section 698.
(*g*) Section 703.
(*h*) Section 705.
(*i*) Tyagarajah vs. Letchiman Chetty, 4 Times 80.
(*j*) Section 705.
(*k*) Section 703.

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

residence from the Court (*l*). The service of summons need not be personal. Where two defendants are in business in partnership, summons may be served on one as agent of the other (*m*).

Limits within which action may be brought.

The procedure allowed by Chapter 53 is applicable only to actions in which the claim is for money due upon certain classes of instruments. Where the plaintiff has a second cause of action as for money lent, he is not entitled to a summons in form 19 and his plaint should be returned for amendment (*n*). But once the defendant has been given leave to appear and defend, the action becomes a regular action and the Court can allow the amendment of the plaint by the addition of an alternative cause of action (*o*). Where a note is not properly stamped, a plaintiff is not entitled to the privileges afforded by the chapter (*p*). The signing and delivery of a blank stamped paper, however, in order that it may be converted into a promissory note operates as a *prima facie* authority to fill it up for any amount that may be covered by the stamp. Any agreement restricting such authority must be specially pleaded and is not provable under a mere traverse of the making of the note (*q*).

Defendant must obtain leave to defend.

The defendant in such an action shall not appear or defend the action unless he obtains leave from the Court to appear and defend (*r*). Such leave will be given if the defendant pays into Court the sum mentioned in the summons or produces affidavits satisfactory to the Court which disclose a defence, or such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support his application and on such terms as to security, framing and recording issues, or otherwise as the Court thinks fit (*s*). The defendant shall not be required, as a condition of being allowed to appear and defend, to pay into Court the sum mentioned in the summons or to give security therefor unless the Court thinks his defence not to be prima facie sustainable or feels reasonable doubt as to its good faith (*t*).

(*l*) Section 705.
(*m*) Mather vs. Peri Tamby Chetty, 28 N. L. R. 443.
(*n*) Allie vs. Mohideen, 1 N. L. R. 39.
(*o*) Noorbhay vs. Mohideen, 31 N. L. R. 3.
(*p*) Ulaganathan Chetty vs. Vavassa, 3 N. L. R. 52.
(*q*) Murugappa Chetty vs. Perumal Kangany, 2 C. L. R. 55.
(*r*) Section 704.
(*s*) Section 706.
(*t*) Section 704.

A defendant cannot be heard or allowed to take any objection as to the regularity of the procedure without first having the leave of the Court to appear and defend (*u*). Such leave, if granted *ex parte*, may subsequently be vacated by the Court making the order (*v*). A defendant may appear and admit the claim, in which case he may be granted permission to pay it by instalments (*w*). There are only two cases in which the Court can order the defendant, as a condition of being allowed to defend, to bring the money into Court. They are either where the defence set up is bad in law or where the defence set up is good in law but the Court has reasonable doubts as to the bona fides of the defence (*x*). A reasonable doubt does not mean a doubt for which a reason can be given although a Judge should always be able to give a reason for his belief (*y*). It is not sufficient for the defendant merely to say that he does not owe anything (*z*) but a claim for unliquidated damages is a good defence (*a*). Even where no valid defence is disclosed by the defendant he is entitled to appear and defend if he deposits in Court the amount claimed (*b*).

If the defendant fails to obtain leave to defend the action or, having obtained such leave, fails to appear and defend it, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest to the date of the payment, and such costs as the Court may allow at the time of making the decree (*c*). But the Court may, under special circumstances, set aside the decree and, if necessary, stay or set aside execution and give leave to appear to the summons and defend the action if it seems reasonable to the Court (*d*). The failure on the part of a proctor to inform his client of an order of Court to furnish security before defending the action is not a special circum-

(*u*) Carpen Chetty vs. Mamlan, 3 C. L. R. 11.
(*v*) Mohamedo vs. Abubakker, 28 N. L. R. 58. See however Suppiah Pulle vs. Ohlmus, 8 C. W. R. 141.
(*w*) P. and O. Banking Corporation vs. Selvathurai, 28 N. L. R. 289.
(*x*) Suppramaniam Chetty vs. Kristnasamy Chetty, 10 N. L. R. 327.
(*y*) Rengasamy vs. Pakeer. 14 N. L. R. 190.
(*z*) Kumarappa Chetty vs. Kristnasamy Chetty, 10 N. L. R. 330.
(*a*) Witham vs. Pitche Muttu, 4 N. L. R. 74.
(*b*) Ramanathan vs. Fernando, 31 N. L. R. 495.
(*c*) Section 704.
(*d*) Section 707.

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

stance (e). But cases may occur in which, notwithstanding the failure of the defendant to avail himself of leave to defend, he may make out a case for setting aside the decree and obtaining leave to defend (f). If he does show sufficient cause why the decree passed against him for default of appearance should be set aside, he is entitled to be allowed to enter into his defence and cannot be called upon to give security except for very good reasons (g). The privilege of proceeding under section 707 does not, however, extend to a defendant who has been duly served with summons and has, nevertheless, failed to apply in time for leave to appear and defend. Even under the ordinary procedure, the probability of a good defence to the action is not of itself a sufficient ground for setting aside a decree entered by default. It is less so under the summary procedure (h).

(e) Silva vs. Goonesekera, 1 A. C. R. 100.
(f) Silva vs. Goonesekera, 1 A. C. R. 100.
(g) Allie vs. Mohideen, 1 N. L. R. 39.
(h) Rodrigo vs. Rodrigo, 3 C. W. R. 285.

CHAPTER VI.

INCIDENTAL PROCEEDINGS.

The continuation of actions after alteration of a party's status.

On the death of a party to an action.

The death of a plaintiff or defendant does not cause the action to abate if the right to sue on the cause of action survives (a). In the event of the death of a sole plaintiff, his legal representative, if he makes an application to that effect, may be substituted in place of the deceased plaintiff (b). If no such application is made the action will abate (c). If there is more than one plaintiff, on the death of one his legal representative may be substituted if the right to sue survives to the rest jointly with the legal representative of the deceased (d). If it does not, the surviving plaintiffs will be allowed to proceed with the action (e). A similar procedure must be followed in the event of the death of a defendant. In the event of a dispute as to who is the legal representative of a deceased plaintiff, the Court may stay the action until the question is decided in a separate action or decide the matter itself as an issue preliminary to the trial of the merits of the action (f). Where the right to sue survives in the case of the death of a sole or surviving defendant, or where it does not survive against the surviving defendant or defendants alone, the plaintiff must apply to the Court specifying the name, description and place of abode of the person whom he alleges to be the legal representative of the deceased defendant and whom he desires to be substituted in place of such defendant. The Court must then issue a summons on such legal representative, enter his name on the record and proceed with the action. Such person, however, may object that he is not the legal representative of the deceased defendant or make any defence appropriate to his character as such representative. He may also of

(a) Section 392.
(b) Section 395.
(c) Section 6.
(d) Section 4.
(e) Section 3.
(f) Section 397

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

his own accord apply to be so substituted (g). On the death of a defendant, however, his next of kin cannot be substituted except on proof that he has adiated the inheritance (h).

The insolvency of a plaintiff.

The bankruptcy or insolvency of a plaintiff in any action which his assignee might maintain for the benefit of his creditors does not bar the action unless the assignee declines to continue the action and give the necessary security for costs (i). Where he does not choose to continue the action, the defendant may apply for its dismissal on the ground of the plaintiff's insolvency, and he may be awarded his costs to be proved as a debt against the plaintiff's estate (j).

Abatement of action.

When action abates.

If a period exceeding twelve months in the case of a District Court, or six months in a Court of Requests, elapses subsequently to the date of the last entry of an order or proceeding (k) in the record without the plaintiff taking any steps to prosecute the action where any such step is necessary, the Court may pass an order that the action shall abate (l). A Court can act under this section only where the *plaintiff* has failed to take the necessary steps (m). An order that the case be struck off the roll is not a proper order under this section and will not bar a fresh action (n). A necessary step in this connection means a step rendered necessary by some positive requirement of the law. It does not refer to any step to prosecute the action which a prudent man would take under the circumstances (o). A Court may make such an order of abatement *ex mero motu*. But before making it the Court should notice the parties, as far as it conveniently can, to give them an opportunity of showing cause against the order (p). The Court may set aside the order of abatement if the plaintiff can show, within a reasonable time, that he was prevented by any sufficient cause from continuing the action. Otherwise such an

(g) Section 398.
(h) Punchi Menika vs. Sawsiri, 5 Lead 42.
(i) Section 400.
(j) Section 401.
(k) Salman Appuhamy vs. Punchi Appuhamy, 7 C. W. R. 190.
(l) Section 402.
(m) Suhuda vs. Sovena, 1 Bal. Notes 87.
(n) Siriwardene vs. Banda, 2 C. L. R. 99.
(o) Lorensu Appuhamy vs. Paaris, 11 N. L. R. 202.
(p) Suppramaniam vs. Symons, 18 N. L. R. 229.

abatement will operate as *res judicata* (q). If an order of abatement is made without notice to the plaintiff, he can proceed under this section (r). An action which has abated and which has been restored to the roll must be regarded as having commenced at the date of its original institution for the purpose of a plea of prescription (s). Such an action cannot be regarded as having been *lis pendens* during the period between the passing of the order of abatement and its being set aside (t). Where in a partition action the Court strikes the case off the roll till a party vindicates his title to what he claims in a separate action, and the party unduly delays in bringing that action, the Court cannot therefore order the original action to abate. It must restore the action to the roll and may dispose of it on the ground that a separate action is necessary to decide the question of title (u).

Assignment pending action.

Assignee may be substituted.

In other cases of assignment, creation or devolution of any interest pending the action, that is before final decree (v), the action may, with the leave of Court given either with the consent of all the parties or after service of notice in writing on them and hearing their objections, be continued by, or against, the person to whom such interest has come either in addition to, or in substitution for, the person from whom it passed as the case may require (w). Even if, as a matter of procedure, the assignment of the rights of a party in a pending action after *litis contestatio* was prohibited by the Roman Dutch law, such a prohibition is removed by section 404 (x). A hypothecary action is not pending till a sale of the hypothecated property takes place so that where, after decree has been entered in a hypothecary action, the mortgage bond upon which the action is raised is assigned by the Fiscal in pursuance of a sale in execution against the plaintiff, the assignee is not entitled to have himself substituted as plaintiff in the action (y). Where an order of abatement is made before the assignment, the

(q) Section 403.
(r) Suppramaniam vs. Symons, 18 N. L. R. 229.
(s) Sharieff vs. Marikar, 27 N. L. R. 349.
(t) Cooray vs. Perera, 17 N. L. R. 460. F. B.
(u) Setua vs. Cassim Lebbe, 7 C. W. R. 28.
(v) Kulasekera Appuhamy vs. Malluwa, 28 N. L. R. 246.
(w) Section 404.
(x) Pless Pol vs. Lady de Soysa, 15 N. L. R. 57. P. C.
(y) Kulasekera Appuhamy vs. Malluwa, 28 N. L. R. 246.

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

action is no longer pending and the assignee cannot have himself substituted in place of the assignor (*z*).

Withdrawal and adjustment.

When leave will be granted.

If, at any time after the institution of the action, the Court is satisfied, on the application of the plaintiff, that the action must fail by reason of some formal defect, or that there are sufficient grounds for permitting him to withdraw from the action or abandon part of his claim with liberty to bring a fresh action for the subject matter of the action or the part so abandoned, the Court may grant such permission. One of several plaintiffs, however, may not withdraw without the consent of the others. If the plaintiff withdraws his action or abandons part of his claim without such permission, he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh action for the same matter or in respect of the same part (*a*). In any fresh action instituted on permission granted, the plaintiff will be bound by the law of prescription in the same manner as if the first action had not been brought (*b*).

Bar to fresh action.

This provision embodies a rule of public policy that it is to the interest of the State that there should be an end to litigation, and creates a statutory bar to the institution of a fresh suit where a suit is withdrawn without liberty to re-institute it (*c*). The fact that an action is withdrawn before the service of summons does not take a case out of the provisions of the section for an action is instituted when the plaint is presented (*d*). Where a plaintiff is allowed to withdraw an action with liberty to institute another on condition that he pays the defendant his costs before instituting such action, the condition must first be complied with (*e*). He cannot institute the fresh action and then pay the defendant his costs in the previous action (*f*). The Supreme Court in its appellate jurisdiction has power, in dismissing an action, to give the plaintiff liberty to bring a fresh action on the same cause of action. Where such permission has been granted, it is not competent for the defendant to

(*z*) Nagalingam vs. Chittampalam, 24 N. L. R. 152.
(*a*) Section 406.
(*b*) Section 407.
(*c*) Fernando vs. Perera, 25 N. L. R. 197.
(*d*) Fernando vs. Perera, 25 N. L. R. 197.
(*e*) George vs. Ferera, 4 C. W. R. 202.
(*f*) Scriwen & Co. vs. Perera, 19 N. L. R. 503.

raise the plea of *res judicata* (*g*). It is doubtful whether the provisions of this section apply to partition actions (*h*).

Compromise or adjustment.

If an action is adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfies the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise or satisfaction must be notified to Court by motion made in the presence of, or on notice to, all the parties concerned and the Court shall pass a decree in accordance therewith so far as it relates to the action. Such decree shall be final so far as relates to so much of the subject matter of the action as is dealt with by such agreement, compromise or satisfaction (*i*).

Settlement must be stated to Court.

The Court can only recognize a settlement between the parties to the action (*i*). The settlement must not only be mutually arrived at but also stated to Court by both parties. If one party denies, though falsely, that there was any settlement, there is an end of the matter and the case must take its ordinary course (*k*). Such agreements, if they relate to land, are not required to be notarially executed (*l*). An award which cannot be dealt with as such under the arbitration sections of the Code may yet be treated as an adjustment or compromise arrived at between the parties (*m*). Where a party to an action undertakes to take the decisory oath and agrees at the same time that the action should be decided in a particular way according as he takes or does not take the oath, judgment may be entered in terms of the agreement. Such an agreement would constitute an adjustment of the action (*n*). Parties to litigation may settle by consent not merely the immediate issues in the case but matters germane to these issues and directly involved in the pleadings (*o*).

(*g*) Cornelis Appuhamy vs. Appuwa, 10 N. L. R. 161. F. B.
(*h*) Perera vs. Punchi Rala, 2 C. L. Rec. 58.
(*i*) Section 408.
(*j*) Ramayah vs. Meera Lebbe, 26 N. L. R. 126.
(*k*) Meis Singho vs. Josie Perera, 31 N. L. R. 168, following Ramayah vs. Meera Lebbe, 26 N. L. R. 126. See *contra* Suppiah vs. Abdulla, 26 N. L. R. 79 and Silva vs. Hadjiar, 3 Bal Notes 7.
(*l*) In *re* the estate of Alim, 3 C. L. Rec. 5.
(*m*) Hadjiar vs. Raheem, 21 N. L. R. 397.
(*n*) Tirignasambanthapillai vs. Namasivayampillai, 26 N. L. R. 344. F. B.
(*o*) Nannitamby vs. Vytilingam, 20 N. L. R. 33. F. B.

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

Payments into Court.

Money to be actually paid.

A defendant in an action for debt or damage may at any stage of the action, with notice in writing to the plaintiff (*p*), deposit in Court a sum of money which he considers a satisfaction in full of the plaintiff's claim (*q*). No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice whether the sum deposited is in full satisfaction or falls short of it (*r*). When the defendant, on filing answer, deposits the money in Court in the presence of plaintiff's proctor, the plaintiff must be deemed to have had notice and is not entitled to interest from that date (*s*). Where a party to an action either by answer or petition professes to pay money into Court the money must be actually paid. Otherwise the answer or petition must not be received (*t*). If, however, the answer is not rejected but is received and filed as the defence, it is too late thereafter to apply section 414 (*u*). If money is deposited in Court by the defendant, the plaintiff may accept it in part satisfaction or full of his claim. If he does the former and prosecutes the action for the balance, he will have to pay the costs of the action incurred after the deposit if the Court eventually decides that the payment was in full satisfaction of his claim (*v*). If he accepts it in full, the costs of the action will have to be borne by the party who was most to blame for the litigation (*w*).

Security for costs.

Where party resides outside jurisdiction.

A plaintiff may be ordered to give security for all costs incurred or likely to be incurred by the defendant if it appears to the Court at any stage of the action that the plaintiff (*x*) or the defendant (*y*) is residing outside the jurisdiction of the Court. Such an order may be made by the Court either *ex mero motu* or on the application of the defendant. Such an order, however, should not be made *ex parte* (*z*). The security need not be in

(*p*) Section 410.
(*q*) Section 409.
(*r*) Section 411.
(*s*) Bandara vs. Attygalle, 30 N. L. R. 109.
(*t*) Section 414.
(*u*) Nalla Carrupen Chetty vs. Asana, 24 N. L. R. 55.
(*v*) Section 412.
(*w*) Section 413.
(*x*) Section 416.
(*y*) Section 417.
(*z*) Samarasinghe vs. Atchy, 19 N. L. R. 219. Scott vs. Mohammedu, 18 N. L. R. 53 not followed.

cash. Even where a cash payment has been ordered it should not be insisted upon where a bond is offered by the plaintiff as long as it is sufficient security (*a*). Whoever leaves, or is about to leave, the jurisdiction of the Court under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs must be deemed to be residing outside the jurisdiction of the Court (*b*).

If security is not given.

In the event of the security not being furnished within the time fixed, the Court must dismiss the action unless the plaintiff obtains permission to withdraw the action with liberty to bring a fresh action on the same cause of action or unless the Court, on cause shown, extends the time for security (*c*). Such a dismissal will operate as *res judicata* (*d*). The plaintiff may, however, within thirty days from the dismissal and after due notice in writing to the defendant, apply for an order to set aside the dismissal. If he can prove to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court must set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and appoint a day for proceeding with the action (*e*).

Commissions.

When commission may issue.

A Court may, in any action, issue a commission to any person whom it thinks fit (*f*) for the examination of any person within its jurisdiction who, from sickness or other infirmity, is unable to attend Court, or of women who, according to the customs and manners of the country, ought not to be compelled to appear in public (*g*). A Court may also issue a commission for the examination of a person residing outside its jurisdiction or about to leave such jurisdiction before the date on which he is required to give his evidence in Court. Such commission must be issued to the Court within whose jurisdiction the person resides or, in special cases, to any person whom the Court thinks fit to appoint (*h*). A Court may

(*a*) Sebastian vs. Gunaratne, 5 C. W. R. 283.
(*b*) Section 419.
(*c*) Section 418.
(*d*) Palaniappa vs. Gomes, 11 N. L. R. 285.
(*e*) Section 418.
(*f*) Section 421.
(*g*) Section 420.
(*h*) Section 422.

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

further issue a commission for the examination of a person resident outside the Colony if it is satisfied that such evidence is necessary (*i*). On an application to examine a witness resident outside the Island on commission, it must be clearly proved that such witness cannot be expected to attend; that the party applying for the commission cannot reasonably be expected to bring him and that he cannot be induced to come (*j*). The question whether or not a commission shall issue to examine witnesses abroad is in the discretion of the Judge. But it is in the power of the Supreme Court to review that discretion. The question in each case is a question of fact on which the Court must form its determination (*k*).

When evidence on commission is admissible.

Evidence taken on commission is not admissible without the consent of the party against whom it is offered unless the person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined; or is a person whom the Court, in accordance with the customs and manners of the country, sees reason to exempt from personal appearance in Court; or where the Court, in its discretion, for good cause to be assigned by it, authorizes the admission of such evidence notwithstanding proof that the cause for taking such evidence by commission had ceased at the time of admitting the same (*l*).

Local investigation.

A commission may be issued when the Court deems a local investigation to be necessary for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property or the amount of any *mesne* profits or damages or annual nett profits, and the investigation cannot conveniently be conducted by the Judge in person (*m*). When a Judge is unable to adjudicate on an issue without further information on the point, he may issue a commission even after both parties have closed their case (*n*). A commission may also be issued where, in any action, an examination or adjustment of accounts is necessary (*o*).

(*i*) Section 423.
(*j*) Mohideen vs. Mohamedu, 1 Br. 234.
(*k*) Mausden vs. Habibhoy, 21 N. L. R. 43.
(*l*) Section 426.
(*m*) Section 428.
(*n*) Canapathipillai vs. Adanappa Chetty, 21 N. L. R. 217.
(*o*) Section 430.

Powers of Commissioner.

A Commissioner so appointed has the power to examine on oath or affirmation the parties themselves and any witness whom they, or any of them, may produce or any person whose evidence the Commissioner thinks necessary; to call for and examine documents and other things relevant to the subject of the inquiry and to enter any land or building mentioned in the order (*p*). The parties must appear before him either in person or by proctor, otherwise he may proceed *ex parte* (*q*). He has the same power to compel the attendance of witnesses or the inspection and examination of documents as is given to a Court under the Code (*r*).

Evidence by affidavit.

Evidence may also be taken by affidavit (*s*). The Supreme Court, however, will not accept an affidavit which purports to supply unrecorded statements made by a witness in the lower Court (*t*). An affidavit sworn before a person who is a proctor in the suit is inadmissible (*u*). An affidavit sworn before a Justice of the Peace by a person who is not resident within his jurisdiction is not invalid, but a Commissioner of Oaths can administer the oath only to a person residing within his jurisdiction (*v*). If the declarant is a blind or illiterate person or cannot read English, the affidavit must be read and interpreted to him in his own language. The *jurat* must express that it was read and interpreted to him in the presence of the Justice of the Peace or Commissioner of Oaths and that he appeared to understand its contents. It must also state that he made his mark or wrote his signature in the presence of the Justice of the Peace or Commissioner. Where a mark is made instead of a signature, the person who wrote the marksman's name against the mark must also sign his name and address in the presence of the Justice of the Peace or Commissioner (*w*). A signature in Sinhalese is not a mark. It is a signature and not invalid (*x*).

Alterations in affidavit.

Every affidavit must be fairly written and must exhibit no erasures or blotting or blanks. If any alteration is needed to be made in the original writing before

(*p*) Section 434.
(*q*) Section 436.
(*r*) Section 435.
(*s*) Section 437.
(*t*) Orathinahamy vs. Romanis, 1 Br. 188.
(*u*) Saibo vs. Beebi, 4 N. L. R. 130.
(*v*) The King vs. Wijetunge, 18 N. L. R. 343.
(*w*) Section 439.
(*x*) Thuraisami vs. Sellachi, 6 N. L. R. 25. F. B.

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

it is sworn or affirmed to, every excision of a word or letter or figure must be made by so drawing a line through it as to leave the word, letter or figure still legible. Every added word, letter or figure must be added by interlineation, not by superposition or alteration. And every interlineation and excision must be initialled by the Justice of the Peace or Commissioner before whom the affidavit is affirmed or sworn (*y*).

(*y*) Section 440.

CHAPTER VII.

PROVISIONAL REMEDIES.

Arrest and sequestration before judgment.

Arrest before judgment.

If a plaintiff, either at the commencement of the action or at any time before judgment, satisfies the Court by way of motion on petition supported by his affidavit and *viva voce* examination, if necessary, that he has a sufficient cause of action against the defendant either in respect of a money claim of, or exceeding, two hundred rupees or because he has sustained damages to that amount; if he can further satisfy the Court that the defendant has no adequate security to meet his demand and that he believes that the defendant is about to quit the Island, the Judge, may issue a warrant for the arrest of the defendant. The warrant may be executed within one calendar month from the date of issue including the day of such date and may be executed in any district of the Island. If the plaintiff is in possession of any security he must mention it in his application on pain of punishment as for contempt of Court. The amount of such security will be deducted from the amount of security required from the defendant to secure his release from arrest (*a*). Before issuing a warrant of arrest before judgment, the Court must have materials before it tending to show that the debtor is about to quit the Island under circumstances rendering it improbable that the debt will be paid. It is not necessary and, in most cases, it is impossible to prove intention by direct evidence. It is sufficient if circumstances are established from which a reasonable inference may be drawn. A man's intention must be collected from his acts (*b*). The mere existence of malice in the mind of a creditor who is applying for the arrest of the debtor before judgment will not expose him to any legal liability provided always that he does not obtain the arrest by maliciously putting false materials before the Court. Where he does so, the debtor is entitled to recover damages against him (*c*).

(*a*) Section 650.
(*b*) Creasy vs. Stephen, 24 N. L. R. 264.
(*c*) Raman Chetty vs. Vallipuram, 13 N. L. R. 337.

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

Procedure on arrest.

The defendant arrested on such a warrant must be brought up immediately before the Court which issued it unless he gives reasonable security to the Fiscal to appear and answer the plaintiff's claim and to abide by and perform the judgment of the Court or to surrender himself to be charged in execution of the same in which case the Fiscal can discharge him. If he is brought up on the warrant he may be released on bail or, if he is unable or unwilling to give bail, he must be committed to prison until he does give bail or the action is determined. If the decree is against him he may be detained in jail until the execution of the decree. But no person can in any case be imprisoned under these provisions for a longer period than three months before the decree (*d*). The defendant may, instead of giving bail, deposit with the Fiscal the sum mentioned in the warrant in which case he must be discharged. The sum so deposited must be applied in satisfaction of the judgment should it be against the defendant. Any surplus should be refunded to him (*e*).

Sequestration of property.

In like manner a plaintiff may obtain the sequestration of the defendant's property before judgment if he can prove to the satisfaction of the Court that the defendant is fraudulently alienating his property with intent to avoid payment of his debt, or that he has with such intent quitted the Island leaving therein property belonging to him. The sequestration of immovable property has the effect of sequestering all rents and profits which proceed thereout pending the sequestration (*f*). In an application for sequestration before judgment there must be proof of the matters referred to in section 653. A mere statement in an affidavit that the applicant verily believes that the defendant is not possessed of any other property and that he is about to alienate the subject matter of the action fraudulently, is insufficient. The grounds of his belief must be set forth in his affidavit (*g*).

Object of sequestration.

The power of District Courts to issue writs of sequestration is limited to cases of fraudulent alienation of property. They have no jurisdiction to issue writs of sequestration as a *remedial* measure for the protection of property, the subject of litigation, *pendente lite* (*h*).

(*d*) Section 651.
(*e*) Section 652.
(*f*) Section 653.
(*g*) Samarakoon vs. Ponniah, 32 N. L. R. 257.
(*h*) Siyadoris vs. Hendrick, 2 C. L. R. 63. F. B.

The affidavit must therefore state that the defendant is *fraudulently* alienating his property (*i*). The affidavit need not be by the plaintiff himself. It may be that of any person having knowledge of the facts (*j*). The object of the section is to protect the plaintiff against the fraud of the defendant. It does not alter the position of the plaintiff with reference to third parties nor give him any priority which he would not otherwise have had over them (*k*).

A Court of Requests can issue mandate of sequestration.

There is no distinction in procedure between an application under section 653 for sequestration on the ground of fraudulent alienation and an application under section 87 of the Courts Ordinance for an injunction. The Courts Ordinance only created the jurisdiction of the Court to grant injunctions and the Civil Procedure Code prescribed the procedure to be adopted in applications for injunctions (*l*). The power to issue a mandate of sequestration before judgment is not limited to the District Court. A Court of Requests may order such a mandate in appropriate cases (*m*). The issue of a mandate of sequestration before judgment is not an ordinary step in the proceedings and such a mandate should not be issued by a Court unless and until it is satisfied on the two grounds referred to in section 653. These two grounds require the serious attention of the Court, and the Court should not exercise its discretion in favour of allowing the application for sequestration unless the applicant has strictly complied with the requirements of that section (*n*). A Court can also, on good cause shown by the party aggrieved, vacate an *ex parte* order for sequestration which has been made at the instance of the plaintiff (*o*).

Security.

Before a warrant of arrest or mandate for sequestration of property can be issued, the plaintiff must give sufficient security for the payment of all costs that may be awarded and all damages sustained by reason of such arrest or sequestration by the defendant or by any other person in whose possession such property shall have been sequestered (*p*). The sequestration must be made

(*i*) Hing Appu vs. Douchamy, 1 Br. 376.
(*j*) Bank of Madras vs. Ponnusamy, 2 C. L. R. 22. F. B.
(*k*) Letchiman Chetty vs. Abdul Rahiman, 11 N. L. R. 123.
(*l*) Alibhoy vs. Mohideen, 2 C. W. R. 10.
(*m*) Isaac Perera vs. Baba Appu, 3 N. L. R. 93.
(*n*) Careem vs. Appuhamy, 25 N. L. R. 190.
(*o*) Muttiah vs. Muttusamy. 1 N. L. R. 25. F. B.
(*p*) Section 654.

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

in the manner provided for the seizure of property for sale in execution of a decree for money (*q*). If any claim is preferred to the property sequestered before judgment, such claim must be investigated in the manner provided for the investigation of claims to property seized in execution of a decree for money (*r*). If, upon any such investigation, the Court is satisfied that the property sequestered was not the property of the defendant, it shall pass an order releasing such property from seizure and shall order the plaintiff to pay such costs and damages as the Court shall deem meet. If otherwise, the Court shall disallow the claim (*s*).

Claims to property sequestered.

Under section 659 the Court has to be satisfied, before releasing the property from seizure, that the property was not the property of the defendant and the Court should disallow the claim when the property is the property of the defendant. The question of possession is not decisive in such an investigation. The question the Court has to decide is "Who has title to the property seized"? and its decision must be guided by the conclusion to which it comes upon the question of ownership (*t*). An appeal lies from an order allowing or disallowing a claim to the property sequestered. Section 658 provides that claims to sequestered property shall be investigated *in the manner hereinbefore provided for the investigation of claims to property seized in execution of a decree for money.* But this direction merely means that the investigation shall be summary. Section 247 does not regulate the investigation of claims in execution but defines the effect of the consequent order. Having regard to the difference in the scope of the two investigations—the Court having, in the case of sequestration, to adjudicate on title and award damages—there is reason for the distinction as to the right of appeal (*u*). A person whose property has been wrongfully seized upon a mandate of sequestration can, moreover, maintain a separate action to recover damages. It is not necessary in such a case for him to prove malice (*v*).

Order appealable.

Rights of third parties.

Sequestration before judgment does not affect the rights existing prior to sequestration of persons not

(*q*) Section 657.
(*r*) Section 658.
(*s*) Section 659.
(*t*) Careem vs. Appuhamy, 25 N. L. R. 190.
(*u*) Jafferjee vs. Pavin, 3 Bal. 69.
(*v*) Muttiah Chetty vs. Emmanuel, 32 N. L. R. 47.

parties to the action, nor bar any person holding a decree against the defendant from applying for the sale of the property under sequestration in execution of such decree (*w*). Where the Fiscal has already seized property upon a mandate of sequestration and a decree is given in favour of the plaintiff, it shall not be necessary to seize the property again as a preliminary to sale or delivery in execution of his decree (*x*). The receipt, moreover, by the Fiscal of a writ of execution from a judgment creditor of the defendant while plaintiff's case is still pending, operates as a seizure of such goods under such writ without any further action on the part of the Fiscal (*y*).

Injunctions.

Petition and affidavit.

Every application for an injunction, except where it is prayed for in the plaint, must be by petition together with an affidavit by the petitioner, or some other person having knowledge of the facts, containing a statement of the facts on which the application is based (*z*). An injunction may be granted by any District Court or Court of Requests

(a) Where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance which would produce injury to the plaintiff.

(b) Where it appears that the defendant, during the pendency of the action, is committing, or permitting or threatening the commission of, an act or nuisance in violation of the plaintiff's rights respecting the subject matter of the action and tending to render the judgment ineffectual.

(c) Where it appears that the defendant, during the pendency of the action, is about to remove or dispose of his property with intent to defraud the plaintiff.

(*w*) Section 660. Letchimanen Chetty vs. Abdul, 3 A. C. R. 143.
(*x*) Section 661.
(*y*) Letchimanen Chetty vs. Muttusamy Pillai, 11 N. L. R. 83.
(*z*) Section 662.

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

A defendant who makes a claim in reconvention may ask for an injunction in such claim and for this purpose his claim in reconvention will be treated as a plaint (*a*). The provisions of section 87 of the Courts Ordinance and Chapter 48 of the Civil Procedure Code apply only to interim and interlocutory injunctions and not to perpetual injunctions which can be ordered only in the final decree in an action. An interim injunction may be applied for in the plaint or it may be made in the course of the action though not asked for in the plaint. The only difference in the procedure to be followed is this. Where the interim injunction is not prayed for in the plaint a petition is required by section 662 but this section says that a petition is not necessary where the injunction is prayed for in the plaint. In both cases, however, an affidavit is essential, this requirement being imposed by section 662 (*b*).

Must be served on opposite party.

Except where a delay would defeat the object of the injunction, the petition and affidavit must be served on the opposite party. Where the application is made after the defendant has filed his answer, such service is a condition precedent to the granting of the injunction. But the Court may in its discretion enjoin the defendant until the hearing and decision of the application (*c*). An injunction granted by a competent Court must be obeyed by the party whom it affects until it is discharged. Disobedience thereto is punishable as for a contempt of Court (*d*) notwithstanding that it was irregularly issued (*e*). An order for an injunction may be discharged, varied or set aside by the Court on application by petition by way of summary procedure by any party who is dissatisfied with the order (*f*). The Court if it thinks fit, is entitled to require security before granting an injunction (*g*).

Compensation where injunction was wrongful.

If it appears to the Court that the injunction was applied for on insufficient grounds or if, after the injunction has been granted, the action is dismissed or judgment is given against the applicant by default or otherwise and it appears to the Court that there was no probable ground for applying for the injunction, the

(*a*) Section 87 of the Courts Ordinance 1 of 1889.
(*b*) Rambukpotha vs. Jayakoddy, 29 N. L. R. 383.
(*c*) Section 664.
(*d*) Section 663.
(*e*) Silva vs. Appuhamy, 4 N. L. R. 178.
(*f*) Section 666.
(*g*) Don Mathes vs. Dissanayake, 6 C. W. R. 158.

Court may, on the application of the party against whom the injunction issued, award against the party obtaining the same in its decree such sum as it deems a reasonable compensation for the expense or injury caused to such party by the issue of the injunction. An award under this section will bar any action for compensation in respect of the issue of the injunction (*h*). This section is intended to punish persons for obtaining injunctions on more or less frivolous pretexts and not to punish persons for possible errors of the District Judge who grants them an injunction. It would be going too far to lay it down that, unless the damage sought to be restrained is irremediable, the grounds of the application are insufficient (*i*).

Interim orders.

Sale of perishables.

The Court may, on the application of any party to an action, order the sale by any person named in such order and in such manner and on such terms as it thinks fit, of any movable property, being the subject of such action, which is subject to speedy and natural decay. The party carrying out the sale shall, within such time as the Court shall limit and after deducting thereout such expenses as the Court shall allow him, deposit the proceeds of the sale in Court to the credit of the action (*j*). The Court may also make an order for the detention, preservation, inspection and survey of any property which is the subject of the action and for that purpose authorize any person to enter upon or into any land or building in the possession of any party to the action. It may also authorize any samples to be taken or any observations to be made or experiments to be tried which may seem necessary or expedient for the purpose of obtaining full information or evidence (*k*). Application for any such order must be by petition in the way of summary procedure and every party who is sought to be affected by the order must be made a respondent to the petition. Any such application may be made by a plaintiff after service of summons or by a defendant after he has appeared in the action (*l*).

The appointment of Receivers.

Custody of property.

Whenever it appears to the Court to be necessary for the restoration, preservation or better custody or

(*h*) Section 667.
(*i*) Silva vs. Silva, 6 N. L. R. 225.
(*j*) Section 668.
(*k*) Section 669.
(*l*) Section 670.

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

management of any property movable or immovable, the subject of an action or under sequestration, the Court may, on the application of any party who can establish a *prima facie* right to or interest in the property,

(a) Appoint a receiver of such property and, if necessary, remove the person in whose possession or custody the property may be from possession or custody thereof (*m*). The Court cannot, however, so remove any person whom the parties to the action, or any of them, have not the present right to remove (*n*).

(b) Commit the property to the custody or management of such receiver and grant to the receiver a fee or commission or the rents and profits of the property by way of remuneration and all such powers for bringing and defending actions and for the realization, management, protection, preservation and improvement of the property; the collection of rents and profits and their application and disposal and the execution of instruments in writing as the owner himself has or such of these powers as the Court thinks fit (*o*). The possession of land by a receiver appointed by a Court is possession by the Court and a contumacious interference with the possession of the receiver is punishable as a contempt of Court (*p*).

Security by receiver.

Before a receiver can be appointed, notice of the application must be served on the adverse party or, if he is out of the Island, on his recognized agent if he has one (*q*). The receiver appointed must give sufficient security; pass his accounts at such periods and in such form as the Court directs; pay any balance due from him therein and be responsible for any loss occasioned to the property by his wilful default or gross negligence (*r*). The Court may at any time on sufficient cause shown remove a receiver or require him to give fresh security (*s*).

(*m*) Section 671.
(*n*) Section 675.
(*o*) Section 671.
(*p*) The King vs. Samaraweera, 19 N. L. R. 433. F. B.
(*q*) Section 672.
(*r*) Section 673.
(*s*) Section 674.

CHAPTER VIII.

ACTIONS IN A COURT OF REQUESTS.

Pleadings in C.R. actions.

The procedure in a Court of Requests differs but slightly from that ordinarily followed in a District Court. The general provisions of the Code apply also to Courts of Requests (*a*), except when they are inconsistent with the special rules provided for in actions in the Court of Requests (*b*). The pleadings, however, are limited to the plaint and answer together with a claim in reconvention, if any, and, where such a claim in reconvention is made by the defendant, the plaintiff has the right to reply to such claim (*c*). The plaint must state in a plain and direct manner the facts constituting the cause of action (*d*).

Joinder of causes of action.

In a Court of Requests a plaintiff may unite in the same plaint two or more causes of action when they all arise out of the same transaction connected with the same subject of action or out of a contract express or implied. But it must appear on the face of the plaint that all the causes of action so united are consistent with each other, that they entitle the plaintiff to the same kind of relief and that they affect all the parties (*e*).

Claim in reconvention.

Where the defendant in an action for breach of a contract neglects to interpose a claim in reconvention consisting of a cause of action in his favour for a like cause which might have been allowed to him at the trial of the action, he, and every person deriving title thereto through him, is precluded from maintaining an action to recover the same (*f*). The terms of this section are wide enough to include a claim on a promissory note payable on demand. The case might be different if the note has not matured at the date of the institution of the action (*g*). But an action by a mortgagee for foreclosure of the mortgage and for all the necessary accounts and inquiries is not

(*a*) Isaac Perera vs. Baba Appu, 3 N. L. R. 93.
(*b*) Section 801.
(*c*) Section 802.
(*d*) Section 804.
(*e*) Section 805.
(*f*) Section 817.
(*g*) Perera vs. Silva, 13 N. L. R. 339.

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

an action founded on a breach of contract (*h*).

A claim in reconvention need not be made, however,

(a) Where the amount of the claim in reconvention is over three hundred rupees.

(b) Where it consists of a judgment rendered before the commencement of the action in which it might have been interposed.

(c) Where the claim is for unliquidated damages.

(d) Where it consists of a claim upon which another action was pending at the time the action commenced.

(e) Where judgment is taken against the defendant without personal service of summons upon him or an appearance by him (*i*).

Jurisdiction of a Court of Requests.

Monetary jurisdiction.

The monetary jurisdiction of the Court of Requests is three hundred rupees. Subject to this limitation the Court can try

(a) Actions in respect of any debt, damage or demand if the defendant resides, or the cause of action arises, within its jurisdiction.

(b) Hypothecary actions if the land hypothecated, or any part of it, is situated within its jurisdiction.

(c) Actions in which the title to, interest in or right to possession of, any land shall be in dispute and

(d) All actions for the partition or sale of land provided, in these last two cases, that the land or any part of it is situated within its jurisdiction.

A Court of Requests can in no case try actions for seduction or breach of promise of marriage or any matrimonial action (*j*). The monetary limit does not apply in claims for any sums due to any person for wages or for piecework or for work as a servant, artificer or labourer. Such a claim may be prosecuted even by a minor (*k*). Consent of parties cannot give jurisdiction to a Court of

No jurisdiction by consent.

(*h*) Perera vs. Pesonhami, 15 N. L. R. 438.
(*i*) Section 818.
(*j*) Section 77 of Ordinance 1 of 1889.
(*k*) Section 78 of Ordinance 1 of 1889.

Requests (*l*) but this principle applies only where the law confers no jurisdiction. It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question of jurisdiction where that question depends on facts to be proved (*m*). A plaintiff in order to bring his claim within the jurisdiction of the Court of Requests may waive a portion of it if his claim sounds in damages alone but he cannot do so where his claim is the measure of his right to possession of land. Thus where the rent of leased property is three hundred and ten rupees, he cannot waive the ten rupees and bring his action in the Court of Requests (*n*).

Test of jurisdiction.

Although the monetary jurisdiction of the Court of Requests is three hundred rupees, it does not follow that the Court is powerless to award to a plaintiff anything in excess of that sum. The test of jurisdiction is the amount demanded, not the amount awarded (*o*). The fact that, owing to some circumstance or other, the amount ultimately awarded exceeds three hundred rupees cannot divest the Court of jurisdiction where it originally had jurisdiction (*p*). A plaintiff may include in his plaint, besides his proper claim, a claim for additional or continuing damages. Where the action involves a mere money claim, such as an action sounding in damages only, the continuing damages are not incidental but are part of the cause of action and must be reckoned in determining the monetary jurisdiction of the Court (*q*). In a land case, however, the test of jurisdiction is the value of the land or interest in dispute irrespective of any damage or other relief claimed on the cause of action. Any claim for damages is only incidental and subsidiary and does not affect the question of the jurisdiction of the Court (*r*). Although section 77 of the Courts Ordinance limits the jurisdiction in actions for debt, damage or demand to three hundred rupees, no such limitation is imposed as regards the damages which may be claimed in actions for the recovery of possession. Where a plaintiff claims continuing damages for being kept out of the possession of any land, the relief as regards damages which the Court can grant is not restricted to

Continuing damages.

(*l*) Jusey Appu vs. Ukkurala, 3 Lor 280.
(*m*) Andris vs. Siriya. 27 N. L. R. 70.
(*n*) Hewavitarne vs. Marikar, 19 N. L. R. 239.
(*o*) Caro vs. Arolis, 10 N. L. R. 173.
(*p*) Assistant Government Agent Matara vs. Pedris, 25 N. L. R. 336.
(*q*) Banda vs. Menika, 21 N. L. R. 279. F. B.
(*r*) Banda vs. Menika, 21 N. L. R. 279. F. B.

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

the ordinary limit of its jurisdiction. The Court has jurisdiction to award damages prayed for even though it exceeds three hundred rupees (*s*).

Damages in respect of land over Rs. 300 in value.

Where a plaintiff's claim for damages for the wrongful use of land admittedly over three hundred rupees in value is within the monetary jurisdiction of the Court of Requests and the defendant disputes plaintiff's title to the land, it is open to the defendant to make a claim to the land himself in reconvention and move for a transfer of the case to a Court of competent jurisdiction. Otherwise the Court of Requests has jurisdiction to adjudicate on the plaintiff's claim (*t*). Where a defence is raised which involves consideration of a question which could not be made the direct subject matter of a prayer for relief by the Court, the Court can deal with and decide the question for the purpose of deciding whether the plaintiff is entitled to the relief he claims (*u*). The mere fact that incidentally the Court may have to go into matters which involve disputes relating to lands and interests beyond the jurisdiction of the Court is not a sufficient reason for saying that the Court cannot determine a claim which is clearly within its jurisdiction (*v*). A mere assertion of title to land cannot oust the jurisdiction of the Court of Requests (*w*).

Jurisdiction in actions on contracts.

A Court of Requests has jurisdiction in respect of an action for enforcing a contract if the contract sought to be enforced was made within the local limits of its jurisdiction. The definition of *cause of action* in section 5 of the Civil Procedure Code cannot be applied to section 77 of the Courts Ordinance which creates the jurisdiction of the Court of Requests. There is a great deal in section 77 of the Courts Ordinance which is repugnant to the meaning of *cause of action* as defined in section 5 of the Civil Procedure Code. It is obvious that *cause of action* in the Courts Ordinance has a much wider significance than in the interpretation section of the Code (*x*).

In a 247 action.

The question for determination in an action under section 247 of the Civil Procedure Code relates to and involves a declaration of title to the property and the

(*s*) Pedris vs. Mohideen, 25 N. L. R. 105. F. B. overruling Usoof vs. Zainudeen, 21 N. L. R. 86.
(*t*) Heen Banda vs. Aluvihare, 31 N. L. R. 152. F. B.
(*u*) Section 81 of Ordinance 1 of 1889; Heen Banda vs. Aluvihare, 31 N. L. R. 152. F. B.
(*v*) Rasiah Joseph vs. Appuhamy, 29 N. L. R. 159.
(*w*) Mohamedu Ismail vs. Wijeya, 3 Lor 107. F. B.
(*x*) Sithamparam vs. Paran, 19 N. L. R. 33.

action, subject to other factors which may affect the jurisdiction of the Court, should be brought in the Court within whose local limits the property is situated (*y*). In such an action the monetary test of jurisdiction is the *amount* for the recovery of which the seizure is made (*z*).

A possessory action.

The value of the subject matter of a *possessory* action for the purposes of jurisdiction, where the suit is brought by a lessee, is not the value of the unexpired term of the lease but the value of the land itself (*a*). But where the lessee sues in ejectment and for damages alleging that the defendant unlawfully disputes his title, the leasehold interest and not the whole land must be valued for the purposes of jurisdiction (*b*). Where the claim is for a right of way, the test of jurisdiction is the depreciation in value caused to the land by the recognition of the right of way (*c*). An action by a lessee to compel his lessor to accept rent due is not an action brought in respect of land. The mere fact that the land is situated within the jurisdiction of the Court does not give the Court the right to try it (*d*). A Court of Requests has no jurisdiction to entertain an action on a bond mortgaging immovable property unless the property is situated within its jurisdiction (*e*).

Right of way.

Answer of defendant.

If the defendant on appearance to the summons admits the plaintiff's claim, the Court must enter the admission in the form 135 in schedule 2 and get the signature of the defendant to it. If the defendant is unable to attend Court, he can forward to the chief clerk his admission signed by himself in the presence, and under the attestation, of a Justice of the Peace or notary public and, upon receipt of such admission, the Commissioner shall enter judgment for the plaintiff accordingly. If the defendant denies the claim he will be given a date to answer to it. He may state his defence orally in which case the Commissioner must record his answer on a separate sheet of paper in the record upon a proper stamp supplied by the defendant. He may deliver to the chief clerk an answer in writing duly stamped setting out his defence and any claim in reconvention he may have against the plaintiff. Such answer must be signed by the

(*y*) Janis Appu vs. Baba Appu, 19 N. L. R. 406.
(*z*) Nagar vs. Rodrigo, 17 N. L. R. 348.
(*a*) Lebbe vs. Banda, 20 N. L. R. 343.
(*b*) Appuhamy vs. Agidahamy, 23 N. L. R. 473.
(*c*) Elwes vs. Van Starrex, 30 N. L. R. 462.
(*d*) Appuhamy vs. Gunasekera, 2 Leader 155.
(*e*) Davith Appuhamy vs. Perera, 11 N. L. R. 150.

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

defendant, his proctor or advocate (*f*). He may even send his answer by post but in that case it must be sent to the chief clerk, not the Commissioner (*g*). In a Court of Requests a suitor may employ any person he chooses to draw his pleadings provided such pleadings are signed by the party himself (*h*).

List of witnesses and documents.

On the defendant answering to the plaint, the Court must fix a date for trial. The parties must then file a list of their witnesses and of the documents which they propose to read at the trial, and no witness shall be examined and no document received in evidence at the trial without the special leave of the Commissioner unless the name of such witness and the description of such document appears on the list (*i*). A document may be rejected on the ground that it has not been listed even though it may have been tendered without objection (*j*). The Court may allow a pleading to be amended at any time before the trial or during the trial if substantial justice will be promoted thereby. Where a party amends his pleadings after joinder of issue, the Court may grant an adjournment to enable the other party to meet the amendment (*k*). The plaintiff is entitled to frame issues which do not arise directly on the pleadings and no replication is necessary for the purpose (*l*). Technicalities should not be allowed to cloud the real issue in a case in the Court of Requests. Under our Code the burden is cast on the Commissioner to frame the issues himself and even to examine the plaintiff and defendant for the purpose of framing those issues (*m*).

When parties are absent.

If plaintiff is absent at trial.

If, upon the day specified in the summons or upon any day fixed for the hearing of the action, the plaintiff does not appear or sufficiently excuse his absence, his action may be dismissed unless the defendant on that day admits his claim (*n*). If neither party is present the plaintiff's action must be dismissed but without costs (*o*). But if the plaintiff can satisfy the Court by affidavit or

(*f*) Section 809.
(*g*) Ratwatte vs. Appuhamy, 3 N. L. R. 270.
(*h*) C. R. Ratnapura, 9981. 7 S. C. C. 29.
(*i*) Section 820.
(*j*) Sadris Appu vs. Piyaratne Terunnanse, 32 N. L. R. 237.
(*k*) Section 816.
(*l*) Agonis vs. Nona Baba, 1 Times 156.
(*m*) Appunaide vs. Sinappuhamy, 32 N. L. R. 292.
(*n*) Section 823 Sub Section 1.
(*o*) Ibid. Sub Section 4.

otherwise that he was prevented from appearing by accident, misfortune or unavoidable cause, the Commissioner may grant him permission to institute a fresh action upon payment of any costs due to the defendant in the previous action (*p*). The plaintiff need not necessarily appear in person. It is sufficient if he is represented by a proctor (*q*). But where the plaintiff and his proctor were both absent but the plaintiff was represented by an advocate who did not in any way explain the absence of the plaintiff, it was held to be within the discretion of the Court to consider the absence of the plaintiff a default and to dismiss his action (*r*).

If defendant does not appear.

If, on the day specified in the summons or on any day fixed for the hearing of the action, the defendant does not appear or sufficiently excuse his absence, the Commissioner, upon due proof of the service of the summons, notice or order requiring such appearance, may enter judgment by default against the defendant (*s*). The defendant must be present when the case is called and not at any time on that day (*t*). He need not, however, appear in person. Where his proctor appears for him in his absence the Commissioner should not proceed as in case of default (*u*). Whether the proctor appears or not when he is physically present in Court is largely a question of fact and would depend on the circumstances of the case (*v*). Where the defendant is absent and his proctor asks for a postponement on the ground of such absence which is refused, the Court should not proceed as in case of default but should treat the appearance of the proctor as the appearance of the defendant (*w*). And where a postponement is granted under such circumstances and the defendant appears on the postponed date, the Court cannot, if dissatisfied with his explanation of his absence on the previous date, eliminate him from the action and proceed to trial *ex parte* (*x*).

In land cases the plaintiff must lead evidence.

In all cases, however, in which the title to, interest in or right to the possession of any land is in dispute, the plaintiff must, in spite of the absence of the defendant,

(*p*) Ibid. Sub Section 5.
(*q*) Rabiman Levi vs. Nagamany, 3 C. W. R. 43.
(*r*) Philippu vs. Kanapathy, 2 Times 82.
(*s*) Section 823. Sub Section 2.
(*t*) Schrader vs. Joseph, 15 N. L. R. 111.
(*u*) Cannon vs. Telesinghe, 30 N. L. R. 372.
(*v*) Kandappa vs. Marimuttu, 14 N. L. R. 395. See Andiappa Chetty vs. Sanmugam Chetty, 11 C. L. Rec. 193. F. B.
(*w*) Perumal Chetty vs. Goonetilleke, 4 Bal 2.
(*x*) Tikiri Banda vs. Jeelis Appuhamy, 6 C. W. R. 305.

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

adduce evidence in support of his claim before judgment can be entered in his favour (*y*). The requirements set out in this proviso are substantive law and cannot be waived as a matter of procedure (*z*). In an action for house rent and ejectment, for example, the Court cannot enter judgment by default against the defendant without *prima facie* proof of plaintiff's claim (*a*). Where in a land case the Court enters judgment for plaintiff *ex parte* without his having led evidence, the defendant is entitled, apart from the reasons for his default, to have it set aside on the ground that it was entered in contravention of the provisions of the Code (*b*).

No ex parte trials in C. R. cases.

The requirements of section 85 with regard to an *ex parte* trial and a decree *nisi* do not apply to cases in the Court of Requests. The Code provides for the summary and speedy disposal of actions in the Court of Requests and, in case of the default of the defendant in appearing or filing answer, dispenses with any evidence in verification of the plaintiff's claim except where title to land is concerned or where, in the discretion of the Court, such verification is considered necessary (*c*). So in an action for debt, demand or damage, if the defendant fails to appear on the summons returnable date, judgment will immediately be entered for plaintiff (*d*). Where he has taken time to file answer and fails to do so or is present in Court on that day and refuses to answer, the plaintiff is entitled to judgment without any evidence in support of his claim (*e*). But where the defendant has answered and, on the pleadings, the burden of proof lies on the plaintiff, he will probably not be entitled to judgment without adducing evidence though on the trial day the defendant is not present in Court (*f*). And where the defendant is absent on a date to which the hearing had been adjourned, the Commissioner has no power to enter judgment by default (*g*).

Judgment by default may be vacated.

If the defendant within a reasonable time after such judgment or order can satisfy the Commissioner by

(*y*) Section 823. Sub Section 2.
(*z*) Amarasekera vs. Mohamedu Umma, 31 N. L. R. 36.
(*a*) Amarasekera vs. Mohamedu Umma, 31 N. L. R. 36.
(*b*) Banda vs. Fernando, 1 Bal Notes 69.
(*c*) Cassim vs. Abdeen, 19 N. L. R. 409.
(*d*) Section 823. Sub Section 2.
(*e*) Cassim vs. Abdeen, 19 N. L. R. 409.
(*f*) See Mohamedu Khan vs Mariamina, 5 S. C. C. 65 and Pitche vs. Mastan, 7 S. C. C. 29.
(*g*) Nanni vs. Murugen, 4, N. L. R. 96.

affidavit or otherwise that he was prevented from appearing in due time by accident, misfortune or other unavoidable cause or by not having received sufficient information of the proceedings; that he did not absent himself for the purpose of avoiding service of the summons or notice, and that he has a good and valid defence on the merits of the case, the Commissioner may set aside the judgment or order and admit the defendant to proceed with his defence upon such terms and notice to the plaintiff as he thinks fit (*h*). Where there is no proof of the service of summons, judgment by default must be set aside (*i*). An order refusing to set aside a judgment by default is not appealable (*j*).

(*h*) Section 823. Sub Section 3.
(*i*) Nonohamy vs. Divunahamy, 25 N. L. R. 414.
(*j*) Terunnanse vs Silva, 2 C. W. R. 259. See also S. C. 180, C. R. Gampola 4874, (30 September 1921).

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

CHAPTER IX.

APPEALS.

What is appealable.

Except where expressly denied, an appeal lies to the Supreme Court from every order, final or interlocutory, made by a Judge in a civil suit. The Supreme Court has, besides, the power to call for and examine in revision the proceedings of a lower Court (*a*). This power will not, however, be exercised where a party aggrieved has a right of appeal (*b*). Interlocutory appeals do not *ipso facto* stay proceedings in the action pending the determination of the appeal (*c*) and are generally to be deprecated. But where the point is not a mere incidental matter but goes to the root of the case, an interlocutory appeal is convenient especially if it would prevent necessary evidence being shut out and thus obviate a second trial for the reception of such evidence (*d*). The refusal of a Judge to frame an issue, the determination of which depends on *viva voce* evidence, is an order which, under ordinary circumstances, ought to be made the subject of an immediate interlocutory appeal (*e*). A final decree is one that determines conclusively the matter in issue between the parties. An expression of opinion on one of several issues which, for the sake of convenience, is heard separately from the others is not an order which is appealable (*f*). If a litigant alleges that his proctor by mistake or negligence consented to judgment contrary to his instructions, his remedy is not by way of appeal but by application for *restitutio in integrum* (*g*). The Supreme Court will not interfere in appeal with the discretion of a District Judge in making an order as to costs unless it is clear that a manifest injustice has been caused by its exercise (*h*).

(*a*) Section 753.
(*b*) Goonewardene vs Orr, 2 A. C. R. 172.
(*c*) Arunasalem vs Somasunderam, 20 N. L. R. 321; Aunamalai Chetty vs Thornhill, 9 C. L. Rec. 10.
(*d*) Arumugam vs Thampu, 15 N. L. R. 253.
(*e*) Don Andris vs Jameshamy, 14 N. L. R. 347.
(*f*) Costa vs Silva, 15 N. L. R. 230.
(*g*) Narayan Chetty vs Azeez, 23 N. L. R. 477.
(*h*) The Government Agent Uva, vs Banda, 13 N. L. R. 341. F. B.

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

The petition of appeal.

Every appeal to the Supreme Court must be in the form of a written petition in the name of the appellant (*i*). It must contain a plain and concise statement of the grounds of objection and a sufficient statement of the facts of the case and of the judgment. It should not plunge *in medias res* and state only the grounds of objection to the decree. The proctor who prepares such a petition will not be allowed his costs and the petition itself may be altogether rejected (*j*). The omission of the name of the appellant in the caption, where it is obviously a clerical error, can be amended by the insertion of his name (*k*). The petition must be drawn up and signed by an advocate or proctor (*l*). A proctor cannot act without a proxy. He cannot delegate his authority to another. A petition of appeal signed by a proctor who is not the proctor on the record is bad (*m*). An appeal petition signed by one proctor for another is inadmissible (*n*) but not so if countersigned by an advocate (*o*). Where the appellant is himself an advocate or proctor, it is sufficient if he draws up and signs the petition of appeal himself (*p*). A party desirous to appeal may, however, within the time limited for presenting a petition of appeal, upon producing the proper stamp required for a petition of appeal, be allowed to state *viva voce* his wish to appeal together with the particular grounds of such appeal. The same shall, so far as they are material, be concisely taken down in writing from the mouth of the party by the secretary or chief clerk of the Court in the form of a petition of appeal when it shall be signed by such party and attested by the secretary or the chief clerk and be received as a petition of appeal without the signature of any advocate or proctor (*q*). The power given to the secretary of the District Court to take down in writing from the mouth of the party the grounds of appeal does not, however entitle him to draw up the petition of appeal (*r*). But a draft petition of appeal signed by the appellant himself in the presence of the secretary and certified by the

(*i*) Section 754.
(*j*) Dingiri Appuhamy vs Siyatu, 7 N. L. R. 304.
(*k*) Meyappa Chetty vs. Weerasooriya, 19 N. L. R. 79
(*l*) Section 755.
(*m*) Reginahamy vs. Jayasundere, 4 C. W. R. 390.
(*n*) Agris Appu vs David Appu, 6 N. L. R. 223.
(*o*) Assauw vs. Billimoria, 1 S. C. R. 221. F.B.
(*p*) Perera vs. Perera, 10 N. L. R. 378.
(*q*) Section 755.
(*r*) Anthoniz vs. Derolis, 6 N. L. R. 161.

latter as such is valid (*s*). If the petition of appeal is in order and purports to be signed by the appellant's proctor it should be received by the secretary. It is not necessary for the proctor himself to hand it personally to the secretary (*t*).

Stamps.

A petition of appeal in insolvency must bear a stamp of Rs. 2-50 at the time it is presented to Court. The Court has no power to allow it to be stamped after the time for appealing has expired (*u*). The failure of an appellant to supply stamps for the judgment of the Supreme Court and for the certificate of appeal together with the petition of appeal is fatal to the whole appeal (*v*).

Time limit for petition.

The petition of appeal must be presented to the Court of first instance within *ten* days—or, in the case of a Court of Requests, within *seven* days—from the date when the decree or order appealed against was pronounced, exclusive of that date itself and of the day when the petition is presented and of Sundays and public holidays (*w*). For a third of a century or more it has been the practice to treat an appeal as in order if it is presented on the day after the expiration of the ten days or, if that day be a Sunday or public holiday, on the first available day thereafter. It has been held by a Bench of five Judges that such practice should receive judicial sanction (*x*). The petition must, however, be presented within ten days of the decree being pronounced and not from the date of entering up of the decree which is a purely ministerial act. In the event of there being great delay in preparing and signing the decree whereby the appellant was prevented from filing his petition of appeal within the time fixed, the Supreme Court can always give leave to appeal notwithstanding lapse of time (*y*).

Security for costs of appeal.

Tender of security.

Having presented the petition of appeal to Court the appellant must forthwith give notice to the respondent that he will, on a day to be specified in such notice, and within twenty days—or fourteen days if the

(*s*) Vengadasalem Chetty vs. Rawter, 3 C. L. R. 39 F.B.
(*t*) Demmer vs. Goonewardene, 7 N. L. R. 286.
(*u*) Salgado vs. Peris, 12 N. L. R. 379. F. B.
(*v*) Sathasivam vs. Cadiravel Chetty, 21 N. L. R. 93. But see contra an obiter of Ennis A. C. J. in Nonal vs. Appuhamy, 21 N. L. R. 170.
(*w*) Section 754.
(*x*) Boyagoda vs. Mendis, 30 N. L. R. 321. F. B.
(*y*) Emalishamy vs. Ego Appu, 7 N. L. R. 38. F. B.

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

Court is a Court of Requests—from the date when the decree or order appealed against was pronounced, tender security for the respondent's costs of appeal and deposit a sum sufficient to cover the expense of serving notice on the respondent (z).

Notice of tender.

The terms of section 756 must be strictly complied with. The appellant must *forthwith* give notice of the tender of security. "Where the terms of an enactment," said Bertram C.J.(a) "direct that a thing shall be done, *forthwith*, the word is to be construed as meaning *in a reasonable time*. What is reasonable must depend upon the circumstances of the case. The word *reasonable*, however, is to be interpreted not as meaning reasonable from the point of view of its effect upon the person to whom, or in relation to whom, the act is to be done but reasonable from the point of view of the person who is called upon to do it as soon as he reasonably can. Where the act is one which in its nature can be done without any delay at all, the act must be done at once. In such a case all that it is necessary to inquire is whether the act was done without any delay that could possibly be avoided. This is particularly the case when the act to be done is closely connected with another act which it follows so that, in the intention of the Legislature, they are one continuous act."

How it may be made.

Notice of tender of security need not be made on the respondent personally. It may be made on his proctor (b). The respondent can waive notice of tender of security. Under certain circumstances he may be deemed to have waived it (c). Where an appellant, instead of giving notice of tender of security, gives respondent notice that he would be paying a certain sum into Court and, on the day fixed, does not make a formal tender, he fails to comply with the provisions of the section (d). If the conditions of section 756 have not been complied with, it is competent to a District Court to make an order that the appeal has abated and to refrain from forwarding the record to the Supreme Court. It is desirable, however, if it is in the power of the respondent to do so, that he should raise the point in

(z) Section 756.
(a) Fernando vs Nicolas Appu, 22 N. L. R. 1.
(b) Perera vs. Hendrick, 1 A. C. R. 25.
(c) Helenis vs. Hendrick, 23 N. L. R. 479.
(d) Basnayake Hamine vs. Pathiratne, 23 N. L. R. 457.

the District Court. If he prefers to wait until the case comes before the Supreme Court before taking the point, he runs the risk of losing his costs (e).

Proctor may waive security.

An appeal lies without security for costs where the respondent's proctor waives security (f). The Crown is not bound to give security for the costs of the respondent in appeal (g). Security is not required in appeals in insolvency cases (h) nor in pauper appeals (i). A wife who appeals in a divorce case, even though she is possessed of separate property, need not give security for her husband's costs (j). The costs of several respondents need not be separately secured (k).

Acceptance of security.

The acceptance of security tendered by an appellant is a judicial act and should be evidenced by an order of Court. Even where it is consented to by the respondent the Court should sanction the acceptance (l). Security cannot be accepted by the Court conditionally subject to any objection by the respondent (m).

Where appellant fails to give security.

Where a petition of appeal has been received but the petitioner fails to give security and make the deposit as required, the petition of appeal must be held to have abated (n). But in the case of any mistake, omission or defect on the part of the appellant in complying with the provisions of the section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just (o). The amending Ordinance has no application, however, where there has been a substantial non-compliance with the provisions of the section (p).

Nature of security.

The security required from a party appellant shall be by bond with one or more good and sufficient sureties or shall be by way of mortgage of immovable property or deposit and hypothecation by bond of a sum of money sufficient to cover the cost of appeal (q). It is doubtful whether the terms of Ordinance 7 of 1840 apply to a

(e) Kangamy vs. Ramasamy, 21 N. L. R. 106.
(f) Ukkawa vs. The Alluta Rubber and Produce Co. Ltd., 18 N. L. R. 341. F. B.
(g) Kekulawala vs. The Attorney General, 30 N. L. R. 64.
(h) In re Goonawardene, 24 N. L. R. 431. F. B.
(i) Aiyar vs. Tambayah, 15 N. L. R 41.
(j) Joseph vs. Alexander Elizabeth, 28 N. L. R. 411.
(k) Costa vs. Silva, 18 N. L. R. 281.
(l) The Demodera Tea Co. vs Pedric Appu, 22 N. L.R. 381.
(m) Charles vs. Jandris, 16 N. L. R. 159.
(n) Section 756.
(o) Section 2 of Ordinance 42 of 1921.
(p) Silva vs. Gunasekera, 31 N. L. R. 184.
(q) Section 757.

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

judicial hypothec. A mortgage bond hypothecating immovable property as security for appeal signed by the principal and surety in the presence of the secretary of the Court and one witness has been held to be in order (*r*), but such a bond executed before a Justice of the Peace was considered bad (*s*). The bond cannot, however, be drawn up in favour of the secretary by the proctor in his office without complying with the provisions of section 2 of Ordinance 7 of 1840 (*t*). Where the appellant's bond does not purport to be a hypothecation of the amount deposited but is merely a personal undertaking in the way of a surety bond to pay the money, the appeal is not duly perfected (*u*). But where the omission to comply with the requirements of hypothecation by bond is not a deliberate omission but due clearly to an oversight, the Supreme Court can grant relief by allowing the money to be hypothecated before the hearing of the appeal (*v*). An appeal, moreover, does not abate merely because the appellant's security bond has not been fully stamped within the appealable time. The bond is a valid security which can be enforced on payment of the deficiency and penalty under section 36 of the Stamp Ordinance of 1909 (*w*). Not only must security be tendered but the bond must be completed within the time limit (*x*).

Notwithstanding lapse of time.

When allowed.

The Supreme Court may admit an appeal notwithstanding lapse of time although the provisions of sections 754 and 756 have not been complied with, provided it is satisfied that the petitioner has a good ground of appeal, that he was prevented from complying with the requirements of the appeal by causes not within his control and that nothing has occurred to render it inequitable to the other party that the decree or order appealed from should be disturbed (*y*). The power of the Court extends to all cases in which a regular appeal has not reached the Court under the provisions of sections 754 and 756 including cases in which a petition of appeal had been filed in time but the appeal had abated owing to

(*r*) Menikhamy vs. Pinhamy, 23 N. L. R. 189.
(*s*) Kanapathipillai vs. Kannakai, 23 N. L. R. 455.
(*t*) Fernando vs. Fernando, 23 N. L. R. 453.
(*u*) Wickremeratne vs. Fernando, 20 N. L. R. 279.
(*v*) Mendis vs. Jinadasa, 24 N. L. R. 188.
(*w*) Ibrahim Neina vs. Kosumma, 15 N. L. R. 46.
(*x*) Muttu Nader vs. Peris Appu, 4 C. W. R. 310.
(*y*) Section 765.

default in the subsequent steps (*z*). But the practice is not to give leave to appeal where the only ground relied on is that the appellant or his proctor made some miscalculation of time or some other mistake or that failure was due to the proctor's neglect (*a*). The delay occasioned by the refusal of one's proctor to sign a petition of appeal is no ground for leave to appeal notwithstanding lapse of time. There is nothing to prevent a party from lodging a petition of appeal in person (*b*).

Conditions precedent to such appeal.

The petition of appeal notwithstanding lapse of time must name the judgment creditor a respondent and must be accompanied by a certified copy of the decree or order appealed from, of the judgment on which it is based and, by affidavits, of facts which constitute *prima facie* evidence that the conditions precedent to the petition of appeal being entertained are fulfilled. The petition must be presented immediately to the Supreme Court in its appellate jurisdiction and, in addition to the prayer for relief in respect of the subject of the appeal, it must contain a prayer that the appeal be admitted notwithstanding lapse of time (*c*). The Court must first consider whether such latter prayer should be granted. If so, it may order the petition to be admitted whereupon the lower Court will be directed to forward to the Supreme Court the record of the proceedings in the action (*d*).

Execution pending appeal.

Not necessarily stayed by appeal.

Execution of a decree shall not be stayed by reason only of an appeal being preferred against the decree. But if any application is made for the stay of execution of an appealable decree before the expiry of the time allowed for an appeal, the Court of first instance may stay the sale for sufficient cause if it is satisfied

(1). That substantial loss may result to the party applying for stay of execution unless the order is made
(2). That the application has been made without unreasonable delay, and
(3). That security is given by the applicant.

When the judgment creditor applies for execution of his decree pending appeal, the judgment debtor must be made a respondent to the application and security must

(*z*) Peris vs. Silva, 3 C. L. R. 21. F. B.
(*a*) Julius vs. Hodgson, 11 N. L. R. 25.
(*b*) Punchi Banda vs. Appuhamy, 3 N. L. R. 96.
(*c*) Section 766.
(*d*) Section 767.

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

be given for the restitution of any property which may be taken in execution of the decree or for the Payment of the value of such property and for the due performance of the decree or order of the Supreme Court. When the order is for the sale of immovable property in execution of a decree for money, the sale will, on the application of the judgment debtor, be stayed till the appeal is disposed of on such terms as to security or otherwise as the Court which passed the decree thinks fit (*e*).

Hearing of the appeal.

Appellant first heard

When the appeal comes on for hearing the appellant must first be heard in support of the appeal. If the appellant is not represented either in person or by Counsel the appeal may be dismissed (*f*). Where, for the convenience of Counsel, a case is allowed to stand at the bottom of the cause list for the day and when it is dismissed for want of appearance even when it is called a second time, the Supreme Court will not reinstate the appeal (*g*). In such a case it is not open to the appellant to make a second application for reinstatement by another Counsel (*h*). At the close of the appellant's argument the Court may hear the respondent against the appeal in which case the appellant has the right of reply (*i*). If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that notice of appeal was duly served on him or his proctor, or if it appears to the Court that any person who was a party to the action in the Court of first instance but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing, direct that such person be made a respondent and issue the requisite notices of appeal to the Fiscal for service (*j*). It is necessary for the proper constitution of an appeal that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties. Unless they are, the petition of appeal should be rejected. Notice of the appeal must be given to the respondents (*k*). An appeal defective owing to non-joinder of necessary respondents can be remedied in a proper case by an order of the Supreme Court under section 770 directing those parties to be added or

(*e*) Section 763.
(*f*) Section 769.
(*g*) Appuhamy vs Appuhamy, 14 N. L. R. 255.
(*h*) Appuhamy vs. Appuhamy, 14 N. L. R 233.
(*i*) Section 769.
(*j*) Section 770.
(*k*) Ibrahim vs. Beebee, 19 N. L. R. 289.

noticed (*l*). But such an order is entirely discretionary and should not be exercised unless some good excuse is given for the non-joinder or unless it was not very apparent that the parties not joined might be affected by the appeal (*m*).

Rights of a respondent to an appeal.

A respondent who has not appealed cannot ask for anything but the dismissal of the appeal (*n*). But any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below but take any objection to the decree which he could have taken by way of appeal provided he has given to the appellant or his proctor seven days' notice in writing of the objection (*o*). The language of the section confines objections to the decree itself and not to the matter contained in the judgment and not in the decree (*p*). A respondent to an appeal may support the judgment of the Court below on other grounds than those on which the judgment is based even though he has filed no cross appeal (*q*).

Cross objections.

A respondent to an appeal who wishes to take an objection to the decree which he might have taken by way of appeal need not furnish to the Supreme Court before the day of hearing a statement of the grounds of objection set forth in duly numbered paragraphs. It is sufficient merely to serve on the appellant notice that certain specific objections will be taken (*r*). Where, on the appeal being called on for hearing, Counsel for the appellant withdraws the appeal, the respondent is nevertheless entitled to be heard on the cross objections of which he has given notice (*s*). The provisions of section 772 would apply in Insolvency cases as well (*t*). But they are not available to a respondent who desires to question the decree in favour of another respondent. If he wishes to do so, he must appeal (*u*). An exception may, however, be allowed in cases where there is an

(*l*) Arnolis vs. Dias 17 N. L. R. 200. F. B.
(*m*) Ibrahim vs. Beebee, 19 N. L. R. 289.
(*n*) Shaik Ali vs. Jafferjee, 3 N. L. R 372. P.C.
(*o*) Section 772.
(*p*) Silva vs. Silva, 27 N. L. R. 287.
(*q*) Ghouse vs. Beddawala, 2 A. C. R. 156.
(*r*) Suberat Menika vs. Baron, 7 N. L. R. 348. F. B.
(*s*) Palingu Menika vs. Mudianse Banda, 11 N. L. R. 110. F. B.
(*t*) Ebrahim vs. Raman Chetty, 31 N. L. R. 205.
(*u*) Paldano vs. Horatala, 3 Times 58

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

identity of interest between the appellant and the respondent against whom the statement of objections is directed (*v*).

Question raised for the first time in appeal.

A question cannot be raised for the first time in appeal (*w*). On the other hand, a party who makes an admission on a point of law at the trial is not bound by that admission in appeal (*x*). Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focussed in the issues of law and fact framed. Whatever is not involved in the issues is taken as admitted by one party or the other and, under our procedure, it is not open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under some one or other of the issues framed, and when such a ground, that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in The Tasmania may well be observed (*y*). In The Tasmania case (*z*), Lord Herschall said "A Court of Appeal ought only to decide in favour of an appellant on a ground put forward there for the first time if it is satisfied beyond doubt first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and next, that no satisfactory explanation could have been offered by those whose conduct had been impugned if an opportunity for explanation had been afforded them when in the witness box". An objection to the status of a party may, however, be taken for the first time in appeal subject to an appropriate order as to costs (*a*).

When Appeal Court may interfere in finding of facts.

Where a controversy is about the veracity of witnesses, immense importance attaches not only to the demeanour of witnesses but also to the course of the trial and the general impression left on the mind of the Judge of first instance who saw and noted everything that took place in regard to what was said by one or other witness. It is rarely that a decision of a Judge of first instance upon a point of fact purely is overruled by a Court of

(*v*) Doloswella Rubber and Tea Estate Co. vs. Swaris Appu 31 N. L. R. 60.
(*w*) Manicam vs. Sanmugam, 22 N. L. R. 249.
(*x*) Eliatamby vs. Gabriel, 25 N. L. R. 373, Perera vs. Samarakone, 23 N. L. R. 502.
(*y*) Appuhamy vs. Nona, 15 N. L. R. 311.
(*z*) (1890) 15 Appeal Cases 223.
(*a*) The Attorney General, vs. de Croos, 26 N. L. R. 451.

Appeal (*b*). But while a Court of Appeal will always attach the greatest possible weight to any finding of fact of a Judge of first instance based on oral testimony given before that Judge, it is not absolved by the existence of these findings from the duty of forming its own view of the facts, more particularly in a case where the facts are of such complication that their right interpretation depends not only on any personal impression that a Judge may have formed by listening to the witnesses but also upon documentary evidence and upon the inferences to be drawn from the behaviour of these witnesses both before and after the matters on which they give evidence (*c*). Thus in Herath Singho vs. Appuhamy (*d*) a will was impugned as a forgery. The District Judge wrote a strong judgment upholding the genuineness of the will. The Supreme Court allowed expert evidence to be led and found that the will was a deliberate forgery and a forgery of a very gross and scandalous character. Where in a case involving a decision of a question of fact the Judge fails to discuss the evidence in his judgment, a Court of Appeal would be justified in interfering with the decision (*e*).

Fresh evidence in appeal.

Upon hearing the appeal, the Supreme Court may order a new or further trial on the ground of the discovery of fresh evidence subsequent to the trial (*f*). But a motion to admit fresh evidence can only be made at the hearing of the appeal and not thereafter (*g*). As a general rule, however, parties should not be allowed to bolster up their cases by adducing fresh evidence in appeal. It is obviously dangerous to allow an important witness to be called after the pinch of the case has been ascertained and the precise points located at which the effect of fresh evidence might be expected to be decisive (*h*). If the case is not sent back for further trial, the Supreme Court must pronounce judgment in open Court (*i*). When the Bench hearing the appeal is composed of two Judges and the Judges disagree, the appeal must be re-heard by three Judges on a day of which notice must be given to the parties or their Counsel. When the appeal is referred to two Judges from the

(*b*) Fradd vs. Brown, 20 N. L. R. 282. P. C.
(*c*) Falalloon vs. Cassim, 20 N. L. R. 332.
(*d*) 22 N. L. R. 361
(*e*) de Zoysa vs. Mendis, 26 N. L. R. 497. F. B.
(*f*) Section 773.
(*g*) Gunasekera vs. Don Andris, 2 Br 298.
(*h*) Muttar vs. Kathirasapillai, 14 N. L. R. 144.
(*i*) Section 774.

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

decision of a Judge sitting alone, if the two Judges do not agree the original judgment will stand confirmed (*j*). The decree must be sealed with the seal of the Court (*k*). When a party entitled to any benefit under a decree passed in appeal desires to obtain execution of the same, he must apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in an action (*l*). The date of a decree in a case is the date of the decree in the lower Court. All that is done in appeal is to affirm that decree (*m*).

Appeals from a Court of Requests.

No appeal except on the law.

There is no appeal from a final judgment of a Commissioner of Requests in any action for debt, damage or demand except on a matter of law or upon the admission or rejection of evidence or with the leave of Court. If the Commissioner refuses leave to appeal, an application for leave to appeal, which will be heard *ex parte*, must be made to the Supreme Court (*n*). Where a Commissioner after hearing two witnesses for the defendant declines to hear further evidence and enters judgment for plaintiff, the proper remedy for the defendant is not to apply for leave to appeal from the judgment but to appeal on the ground of the improper rejection of evidence (*o*). The policy of the Ordinance is to make the decision of a Commissioner on questions of fact final. It is only when he has any doubt as to the justice of his decision or, if not feeling a doubt himself, yet thinks that other persons might reasonably take a different view of the case that he should grant leave to appeal (*p*). A Commissioner of Requests who has refused leave to appeal on the facts cannot reconsider his decision (*q*). A final order is the ultimate or last order that the Court could make in a case (*r*). An order of a Commissioner of Requests confirming a sale and directing the issue of a Fiscal's conveyance is a final judgment on the matters at issue (*s*).

(*j*) Section 775.
(*k*) Section 776.
(*l*) Section 777.
(*m*) Silva vs. Wattuhamy, 24 N. L. R. 279.
(*n*) Section 13 of Ordinance 12 of 1895.
(*o*) Wettachi vs. Alwis, 4 N. L. R. 126.
(*p*) Siyadoris vs. Girigoris, 4 N. L. R. 76.
(*q*) Matthes vs. Rottan, 2 N. L. R. 366.
(*r*) Culantavelu vs. Somasunderam, 2 Bal 122.
(*s*) Somethara Unnanse vs. Samaliya, 26 N. L. R. 65.

No appeal from interlocutory order.

There is, in any case, no appeal from an interlocutory order made in a Court of Requests (*t*) or the finding of a Commissioner as to costs (*u*). Where, for example, an issue as to jurisdiction is determined in plaintiff's favour and the case is adjourned for the trial of the issue on its merits, the defendant should not appeal against the order as to jurisdiction but should wait until the final judgment and then appeal, if it be against him, not only on the merits but also on the ruling as to jurisdiction (*v*). An order made by a Commissioner on an application under section 326 is not an appealable order (*w*).

Point of law must be taken in petition.

A party desiring to appeal on the law and the facts in a case in the Court of Requests other than a land case, must file his appeal on the law within the appealable time. If, subsequently, his leave to appeal on the facts be granted by the Supreme Court, both appeals may be argued together (*x*). Where an appeal is on a point of law only, the point must be taken in the petition of appeal and no matter of law not so stated in the petition can be argued in appeal (*y*). In any case a party desiring to appeal from a judgment of a Commissioner of Requests must file his petition in the Court below (*z*).

Appeal in land cases.

A decree in an action for debt, demand or damage is not appealable on the facts without leave of Court. This prohibition does not extend to actions in which an interest in land is involved for section 77 of the Courts Ordinance makes it clear that an interest in land is not intended to fall within the words "debt, damage or demand" (*a*). The character of an action is to be determined by the issues raised and tried (*b*). Where a purchaser of land brought an action against the vendor for a refund of the purchase money and for damages on the ground that the vendor had not put him in possession of the land, the main issue framed was whether the defendant failed to give the plaintiff effective possession of the premises sold. This issue, it was held, involved no question of right or title to any immovable property. It was clearly an issue based upon an alleged breach of contract and the action

(*t*) Manchohamy vs. Appuhamy, 8 N. L. R. 307.
(*u*) Mudiyanse vs. Loku Banda, 24 N. L. R. 190.
(*v*) Ibrahim vs. Marikar, 3 N. L. R. 166.
(*w*) Fernando vs. Fernando, 4 C. L. Rec 71.
(*x*) Northway vs. Natchia, 15 N. L. R. 30.
(*y*) Govin vs. Fernando, 3 Bal Notes. 34. Gordon Brook vs. Peera Vede, 9 N. L. R 302.
(*z*) Arnolis vs. Lewishamy, 2 N. L. R. 222.
(*a*) Appuhamy vs. Appuhamy, 16 N. L. R. 365.
(*b*) Ali Marikar vs. Omardeen, 23 N. L. R. 65 following Punchirala vs. Appuhamy, 16 N. L. R. 360.

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

was essentially one for damage or demand consequent on a breach of contract (*c*). An action for cancellation of a deed of transfer of immovable property in which the trial proceeded on issues as to whether possession had been given and what was the quantum of damages, was held to be an action for damage or demand (*d*).

Rent and ejectment.

In Meedin vs Meedin (*e*) it was held that an action for rent and ejectment was an action involving an interest in land. But in that case Middleton J. said *obiter* "I cannot resist the conclusion that the rent of a house is an interest in land whether it be for a month or a year." It is derived from the value of the land as augmented by the building of the house on it". This *dictum* has not, however, found support and in Maricar vs Ismail (*f*) it was expressly held that an action for rent only, and not one for rent and ejectment or declaration of title, was not an action affecting an interest in land. But where, in an action for rent and ejectment, the judgment is for rent only, the issue on ejectment being decided against the plaintiff, an appeal lies on the facts without the leave of the Commissioner (*g*).

As regards land cases in the Court of Requests, parties have a right to appeal without the leave of the Commissioner. Such an appeal would lie against an order refusing to set aside a judgment by default in an action for declaration of title to land for this order finally decides the question of title to the land (*h*). No leave to appeal is required in a hypothecary action (*i*). But an action for damages caused by trespassing cattle is not an action involving an interest in land (*j*). And, in an action objecting to assessment under the Municipal Councils Ordinance, there is no appeal on the facts without the leave of the Commissioner (*k*).

Title to movables.

The uniform practice of the Courts has been to allow actions in the Court of Requests for declaration of title to movable property as coming under the head of "demand". So in an action in the Court of Requests under section

(*c*) Punchirala vs. Appuhamy, 16 N. L. R. 360.
(*d*) Ali Marikar vs. Omardeen, 23 N. L. R. 65.
(*e*) 5 A. C. R. 42 followed in Amerasekera vs. Mohamedu Umma, 31 N. L. R. 36.
(*f*) 16 N. L. R. 362.
(*g*) Ranasinghe vs. Silva, 32 N. L. R. 46.
(*h*) Nonohamy vs. Divunahamy, 25 N. L. R. 414.
(*i*) Kurukal vs. Kanathapillai, 1 C. W. R. 19.
(j) Terunnanse vs. Silva, 2 C. W. R. 259.
(*k*) Weerasinghe vs. The Kandy Municipal Council, 25 N. L. R. 409.

247 that certain movables seized in execution of plaintiff's writ are liable to be seized and sold, there is no appeal against a finding of fact without the leave of Court (*l*).

Arbitration by Commissioner.

Where parties to an action in the Court of Requests agree to abide by the decision of the Commissioner after an inspection of the premises in dispute, the Commissioner becomes in fact an arbitrator and no appeal lies from his decision (*m*). The case is different where issues are framed and evidence is led. Under such circumstances an invitation to the Commissioner to inspect the land does not constitute him an arbitrator and an appeal lies against his judgment (*n*). Where the reference to arbitration is a compulsory one by the Commissioner, an appeal lies from his order entering up judgment in terms of the award to the same extent that an appeal lies generally from orders and judgments of a Commissioner of Requests (*o*).

Privy Council appeals.

Where appeal lies as of right.

Appeals to the Privy Council are governed by Ordinance 31 of 1909. Any party to an action or any person who is prejudicially affected by a judgment of the Supreme Court (*p*) may, if certain conditions are observed, appeal to His Majesty in Council from any final or, in certain circumstances, interlocutory judgment of the Supreme Court. He has an appeal *as of right* from any *final* judgment of that Court where the matter in dispute on the appeal amounts to, or is of the value of, five thousand rupees or upwards or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to, or of the value of, five thousand rupees or upwards (*q*).

Test of value of subject matter.

For the purpose of giving leave to appeal to the Privy Council the value of the subject matter of the suit is to be determined by the statement in the plaint whether proved or not (*r*). This rule, however, would not apply to cases in which no loss of profits or emoluments is alleged, no damages are claimed and the alleged right asserted in the action is one on which no pecuniary value can be placed. The Court should not in such a case be guided as to the value of the action by the scale

(*l*) Mohideen vs. The proprietors of the Kellie Group, 18 N. L. R. 506.
(*m*) Punchi Banda vs. Noordeen, 30 N. L. R. 481.
(*n*) Issan appu vs. Cooray, 25 N. L. R. 257.
(*o*) Abanchi Appu vs. Fernando, 18 N. L. R. 88.
(*p*) Fernando vs. Fernando, 9 N. L. R. 129.
(*q*) Schedule 1 Rule 1 (*a*).
(*r*) Delmege vs. Delmege, 1 N. L. R. 27[illegible].

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

under which the process in it had been stamped (*s*). Where the subject matter in dispute is not valued either in the District Court or the Supreme Court but appears indirectly to involve a claim to a civil right amounting to, or of the value of, five thousand rupees or upwards, it is competent for the Supreme Court under the provisions of schedule 1, rule 1, of Ordinance 31 of 1909 to accept evidence as to value in connection with an application for leave to appeal to the Privy Council (*t*). Where there has been no fraud on the part of the appellant and where he has not consented to a lower valuation for the purposes of obtaining some advantage, he will be allowed to prove the value of his claim, and, where that value has appreciated since the date when the action was first taken, he will be allowed to prove the value at the time of the appeal (*u*). The general rule is that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it (*v*). It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, it would be very unjust that he should be bound not by the value to himself but by the value originally assigned to the subject matter of the action by his opponent (*w*). Conversely the loss to the plaintiff, if he is wrongly adjudged not to be entitled to recover, is measured by the amount of his claim. That is not in the least enhanced by the fact that the whole of the property has been claimed by the other side (*x*).

Where dispute concerns property.

No appeal lies against a refusal to grant letters of administration as the interest of an administrator is worth nothing (*y*). The case, however, is different if the grant of letters to a person also declares him to be the sole heir of the intestate (*z*). The value of the matter at issue so far as regards the particular case and the parties to it, irrespective of its possible bearing on other cases and other parties, must exceed five thousand rupees.

(*s*) Pitche Tamby vs. Cassim Marikar, 18 N. L. R. 117. F. B.
(*t*) Hollandia Anglo-Dutch Milk and Food Co. vs. The Anglo-Swiss Milk Co., 5 C. L. Rec. 15
(*u*) de Alwis vs. Appuhamy, 30 N. L. R. 421
(*v*) Kurukal vs. Kurukal, 31 N. L. R. 165, following Allan vs. Pratt, 13 A. C. 780.
(*w*) Allan vs. Pratt, 13 Appeal Cases 780.
(*x*) Munampulle vs. Madar Saibo, 2 Br. 304.
(*y*) In re the estate of Rawter, 2 Bal 25.
(*z*) Thiagarajavs. Paranchothipillai, 4 Bal 0.

The fact that the case may be a representative one will not affect the matter at issue (*a*). Where the dispute between the parties is one with respect to property, the only practical way of dealing with the question of value is to treat the appeal as involving a question respecting the actual concrete land itself (*b*). But where both parties have proceeded on the footing that the subject matter of the action was below five thousand rupees in value, the defendant will not be permitted to show that the property is worth more than five thousand rupees for the purpose of an appeal to the Privy Council (*c*). A possessory action involves a question of title and an appeal would lie if the land is over five thousand rupees in value (*d*). But where an appellant is seeking to establish his status and position as a trustee of a temple, the value of the temple property cannot be regarded as the criterion of his interest (*e*).

A final order.

An order is final only when it is made upon an application which must, whether such application fail or succeed, determine the action (*f*). A decree *nisi* for divorce is a final judgment as regards the parties to the decree (*g*). A decree ordering a party to a suit to render an account is a final decree. But an appeal to the Privy Council would not lie against such a decree inasmuch as it is impossible to say till after the account has been taken that the decree is for, or in respect of, a sum or matter at issue above the amount or value of five thousand rupees (*h*). Where a decree is qualified with the option to the plaintiff to amend his plaint, it is nevertheless a final decree if the plaintiff does not choose to exercise his option but treats the judgment against him as final and definitive and desires to appeal against it (*i*). An order directing the case to be remitted to the District Court for a new trial is not a final order and no appeal lies (*j*). Where the Supreme Court in dealing with a matter is not acting in its appellate jurisdiction nor the District Court in any jurisdiction vested in it by the Courts Ordinance, the judgment or order is not one in a civil

(*a*) Jayawardena vs. Fernando, 4 S. C. C. 133. F. B.
(*b*) Subramaniam Chetty vs. Soysa, 25 N. L. R. 344. F. B.
(*c*) Appuhamy vs. Corea, 1 Br. 165.
(*d*) The O. B. C. Estates Co. vs. Brook & Co. 1 S. C. R. 1.
(*e*) Nugawela vs. Ratwatte, 13 N. L. R. 207.
(*f*) Dassanaike vs. Dassanaike, 9 C. L. Rec. 203.
(*g*) Lucy Nona vs. Bandara, 5 C. L. Rec. 17.
(*h*) The Ceylon Tea Plantation Co. Ltd vs. Carry, 12 N. L. R. 367. F. B.
(*i*) Abdul Aziz vs. Abdul Rahiman, 13 N. L. R. 79
(*j*) Bank of Madras vs. Weerapen Chetty, 4 S. C. C. 75. F. B.

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

suit or action and no appeal would lie (*k*). There is, moreover, no appeal to the Privy Council from a judgment of the Supreme Court in insolvency proceedings (*l*).

Appeal as of grace.

Where no appeal lies as of *right*, a party may appeal with the permission of the Supreme Court from any judgment of that Court, whether final or interlocutory if, in the opinion of the Supreme Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be, submitted to His Majesty in Council for decision (*m*). Where the alleged right asserted in an action is one on which no pecuniary value can be placed, special leave to appeal to the Privy Council will be given only when the case is of gravity involving matters of public interest or affecting property of considerable amount or where the case is *otherwise* of public importance or of a very substantial character. The word *otherwise* ought to receive an *eiusdem generis* interpretation (*n*). No special merit need be shown where the question concerns the validity of marriage, title to dower, questions of legitimacy, the status of the issue, or the custody of children which are all civil rights and may be said to be beyond pecuniary value (*o*).

Time limit for making application.

An application for leave to appeal to the Privy Council must be made to the Supreme Court within thirty days from the date of the judgment appealed from and the applicant must, within fourteen days from the date of such judgment, give the opposite party notice of such intended application (*p*). The notice of the application for leave to appeal must be given to the respondent before the filing of the petition in the Registry (*q*). A notice by the appellant given by a document addressed to the respondent without the aid of Court is not an act of Court (*r*). Where an applicant for leave to appeal to the Privy Council is allowed by the Supreme Court to effect substituted service on the respondent, there is a sufficient compliance with the requirements of the rule if he transmits by registered post a copy of the notice addressed to a respondent who is resident abroad (*s*).

(*k*) Soertsz vs. The Colombo Municipal Council, 32 N. L. R. 62.
(*l*) Sokalingam Chetty vs Manicam, 32 N. L. R. 65.
(*m*) Schedule 1 Rule 1 (*b*).
(*n*) Pitche Tamby vs. Cassim Marikar, 18 N. L. R. 117. F.B. See also Soysa vs Soysa, 17 N. L. R. 391.
(*o*) Lucy Nona vs. Bandara, 5 C. L. Rec 17.
(*p*) Schedule 1, Rule 2.
(*q*) Condert vs. Elias, 18 N. L. R. 80.
(*r*) Hayley and Kenny vs. Zainudeen, 25 N.L. R. 312 F.B.
(*s*) Joseph vs. Sockalingam Chetty, 32 N. L. R. 59.

Security

Leave to appeal will be granted by the Supreme Court only if the appellant, within one month from the date of the hearing of the application for leave to appeal, enters into good and sufficient security to the satisfaction of the Court, in a sum not exceeding three thousand rupees, for the due prosecution of the appeal and the payment of all costs payable to the respondent in the event of final leave to appeal being refused or the dismissal of the appeal for non-prosecution or an order for costs made against him in the Privy Council (*t*). In an appeal to the Privy Council the appellant is entitled to give security for the respondent's costs by the mortgage and hypothecation of immovable property. The lower Court must be satisfied as to the valuation of the property tendered as security. The surety must sign an affidavit to the effect that he is seized and possessed of the property he tenders as security and lodge a certificate of freedom from encumbrances. The usual steps for the due execution of the bond by appellant and surety before a notary public and its due and proper registration must follow before it can be accepted (*u*). The Supreme Court has no power to order that the costs of several respondents should be separately secured (*v*). At any time before giving final leave to appeal, the Supreme Court may revoke the acceptance of security (*w*), or if, after final leave to appeal has been given, the security appears to be inadequate, the Court may order the appellant to furnish within a specified time other and sufficient security (*x*).

Execution pending appeal.

Where the judgment appealed from requires the appellant to pay money or perform a duty, the Court has power, when granting leave to appeal, to direct that the judgment be executed if the person in whose favour it was given should, before its execution, give sufficient security for the due performance of any order made in the action by the Privy Council (*y*). But if the appellant establishes to the satisfaction of the Court that real and substantial justice requires that, pending the appeal, execution should be stayed, the Court may order the stay of execution if the appellant gives sufficient security (*z*). Where after an appeal, proceedings are taken by a party with a view to appealing to His Majesty in Council

(*t*) Rule 3 (*a*)
(*u*) de Silva vs. de Silva, 28 N. L. R. 350.
(*v*) Silva vs. Silva and King, 27 N. L. R. 243.
(*w*) Rule 4.
(*x*) Rule 5.
(*y*) Rule 7.
(*z*) Rule 8.

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

the proper Court to entertain an application for stay of execution pending such proceedings is the District Court and not the Supreme Court (*a*). The ordinary rule is that execution should issue on security being given by the person who has obtained the judgment. It is only a concession given to an appellant that execution may be stayed in certain cases after security is given (*b*). In deciding whether an application for a stay of execution pending an appeal to the Privy Council should be allowed or refused, the Supreme Court is not entitled to go into the merits of the case, or to dispose of them on any assumption that the decisions of the Supreme Court or the District Court are correct (*c*). Where a successful party in appeal applies for execution of his decree in the District Court after application has been made for conditional leave to appeal to the Privy Council, he should give notice to the appellant of his application for execution. Section 763 requires that the judgment debtor shall be made a respondent when the decree to be executed is appealed against and there is no reason why the provisions of that section should not apply, *mutatis mutandis*, when an appeal against the decree is being made to the Privy Council (*d*).

No security in actions for immovables.

Where the action relates to immovable property and the judgment appealed from does not change or affect the actual occupation of it, no security is required either from the appellant or respondent. Otherwise security must be given, but it need not be of greater amount than may be necessary to secure the restitution, free from all damage or loss, of such property or of the intermediate profit which, pending the appeal, might probably accrue from the intermediate occupation of it (*e*). Where the action relates to money or other chattels or any personal debt or demand, the security to be demanded either from the respondent or the appellant must be either a bond in the amount or value of the subject matter of the action by sufficient sureties, or a mortgage of immovable property to the full value of the subject of litigation over and above the amount of all mortgages and charges affecting such property (*f*).

(*a*) The Attorney General vs. Perera, 12 N. L. R. 35.
(*b*) The Colombo Hotels Co. Ltd. vs. Topunsing Mootoomul, 3 C. W. R. 233.
(*c*) Abeyesekera vs. Allahakoon, 19 N. L. R 413.
(*d*) Senathiraja vs. Muttunayagam, 19 N. L. R. 50.
(*e*) Rule 9.
(*f*) Rule 10.

Several appeals consolidated

Where there are two or more applications for leave to appeal arising out of the same matter, the Court may direct the appeals to be consolidated and grant leave to appeal by a single order (*g*). When all the conditions are fulfilled, the party appellant must apply to the Supreme Court for final leave to appeal. He can, before that, withdraw his appeal (*h*) or, if there is a delay in applying for leave, the Court, on the application of the respondent, can rescind the order giving conditional leave to appeal (*i*). If, on the other hand, there is no delay and an application is made for final leave with notice to all the parties concerned, the Court may grant such final leave (*j*), and the appellant must then prosecute his appeal in accordance with the rules for the time being regulating the general practice and procedure in appeals to His Majesty in Council (*k*).

(*g*) Rule 19.
(*h*) Rule 20.
(*i*) Rule 21.
(*j*) Rule 22.
(*k*) Rule 23.

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

GENERAL INDEX.

A

	Page.
Abatement of Action	168
Absence:—	
Procedure in absence of parties ...	40
In the Court of Requests	190
Action:—	
Definition of action	1
Application incidental to	2
How and when instituted	3
Date of	3
Transfer of	21
Summary procedure	31
Continuation after death of plaintiff ...	167
Continuation after death of defendant ...	167
Abatement of	168
Withdrawal and adjustment	170
Character to be determined by issues ...	207
Action under Section 247:—	
Judgment debtor cannot bring	69
What plaintiff must prove	69
To whom allowed	69
Can be brought when property has been sold	70
Procedure in 247 action	70
Is with regard to title	71
What must be proved	71
Prescriptive title of debtor	71
Res judicata	72
Test of jurisdiction	73
Time for bringing action	74
Administration:—	
When no Executor is in the Island ...	135
Widow or widower preferred	136
Application for	138
What issues may be tried	138
Objections to application	138
Recall of letters	140
Limitation of grant	141
Application in intestacy	143
Administration suit	134
Administrator:—	
Bankrupt may be	135
Secretary of Court	135

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

PAGE

Powers of 141
Title does not vest in 142
Not bound to covenant for title ... 142
Must file inventory... 148
Does not became *functus officio* on final account 150
May abandon a debt 152

ADVOCATE:—
Fees of 55

AFFIDAVIT:—
Evidence by 175

AGENT 16

ALIENATION:—
Of movables pending seizure 65
Pending seizure void 65
But not where seizure is unregistered ... 66

ALIMONY:—
Pending action for divorce 132
Cannot be enhanced on wife's application ... 133
Where wife is possessed of property ... 133

ANSWER:—
Requisites of 31
Must be written 31
Out of time 31
May be returned for amendment ... 33
In Court of Requests 189

APPEAL:—
When appeal is available 195
No appeal from judgment on award ... 162
Where objections to award are overruled ... 162
Interlocutory appeals do not stay proceedings 195
Form of appeal 196
Must be signed by party or pleader ... 196
Party may state appeal *viva voce* ... 196
Failure to supply stamps 197
Time for presenting appeal 197
Security for costs 197
Notwithstanding lapse of time 200
Hearing of appeal 202
Question raised for first time in appeal ... 204
Veracity of witnesses 204

PAGE

From order of Court of Requests ... 206
Appeals to Privy Council 209
Value of subject matter in such appeals ... 209

APPEARANCE:—
What is an appearance 37, 39

ARBITRATION:—
Application in writing 157
By all the parties 157
Special authority to proctor 157
When reference is bad 158
Reference by Court... 158
Appointment of umpire 158
Proceedings cannot be held on public holiday 159
Provisions must be rigorously complied with 160
Reference by parties 162

ARREST:—
No warrant unless writ is issued ... 90
Notice of warrant unnecessary... ... 91
No arrest for less than two hundred rupees... 91
Who may not be arrested 92
When debtor may be released 93
Arrest before judgment 177

ASSETS:—
Realization of 113

ASSIGNMENT:—
Assignee of decree can sue 105
Of rights in pending action 105
Assignment pending action 169

AWARD:—
When not completed in time 159
Must be filed in Court 160
May be modified or sent back 160
When it may be set aside 160
Judgment in terms of 161
Objections to 162
When conclusive 162

B

BANKRUPT:—
Not disqualified from being Administrator ... 135

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

PAGE

BATTA:—
May be recovered 55

C

CAUSE OF ACTION:—
Definition of 2
Joinder of causes of action 8, 28, 185
No relation to defence of defendant ... 19
Test of identity 23
Plaintiff may split 24
Exceptions to joinder 28

CAVEAT 138, 140

CIVIL PROCEDURE CODE 1

CLAIM IN RECONVENTION:—
Must be stated in answer 31
May be rejected 32
Nature of claim 32
When it arises 32
Injunction may be asked for 182
In Court of Requests 185

CLAIM:—
To money seized 64
To property seized 67
Not where decree is seized 67
Owner need not make 68
What claimant must prove 68
Inquiry into claims 68
Subject to lien 69
To property sequestered before judgment ... 180

CLAIM INQUIRY:—
Is with regard to possession 71
When order is final... 70
Costs of 74

CONCURRENCE:—
Notice of claims 109
Property seized under decrees of several Courts 110
Who can claim 110
Scope of right to concurrence 111
Decrees of other Courts 112
Decrees of same Court 112
When assets are realized 113
Rights of mortgagees 113

PAGE

CONFIRMATION OF SALE:—
Is step in execution 83
When decree is reversed in appeal ... 83
Title in debtor till sale is confirmed ... 87

CONTEMPT OF COURT:—
Failure to attend under section 219 ... 59

CONTRACT:—
Failure to perform... 2

COMMISSION:—
When issued 173
When evidence on commission is admissible 174
For local investigation 174
Powers of Commissioner 175

COMMON INTEREST:—
Numerous parties with 12

CO-OWNERS:—
When they must be joined 6

CO-RESPONDENT:—
Must be named in plaint 129
Damages against 134
Nature of damages awarded 134

COSTS:—
What are 54
What may be recovered 54
Where more parties than one 55
Criterion of liability 55
Taxation of 56
Proctor's lien 56
Of claim inquiry 74
In actions for divorce 133, 134
Security for 172

COURT:—
Definition of 2

COURT OF REQUESTS:—
Procedure in 185
Jurisdiction of 186
Appeals from 206

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

PAGE

CROSS-EXAMINATION 44

CROWN:—
Actions by 116
Who may represent 116

CURATOR:—
Cannot sue on behalf of minor 119, 123
Must file inventory 124
Accounts may be impeached 124
May be removed from office 125

D

DEBTS:—
Property insufficient for payment of ... 53

DEBTOR:—
Should pay at creditor's residence under English Law 21

DECREE:—
Judge who is *functus officio* cannot sign ... 3
By default not appealable 38
In terms of judgment 48
Amendment of 48
Date of 206
For delivery of movables 50, 51, 95
For recovery of immovables 53, 96
How executed 57
Kinds of decrees 57
To pay money 57
For costs alone is decree for money ... 91
Assignment of 103
In favour of several persons 103
Assignment by operation of law ... 104
No separate action on decree 105
Cross decrees may be set off 107
Payment must be certified 108

DECREE NISI:—
Service on defendant 38
Made absolute 36
Made absolute in defendant's presence ... 39
In divorce action extends for three months 131

DEFENDANT:—
Must appear to summons 31
Joinder of 7
Acting in concert 10
Parties liable on contract 11
Action against wrong defendant ... 15
Absence on trial date 36
Illness no excuse 38

DELIVERY OF POSSESSION:—
Fiscal's purchaser entitled to 86
Not purchaser under Partition Ordinance ... 87
Nor under mortgage decree 87
Nor purchaser from Fiscal's purchaser ... 87
Only execution purchaser can move for ... 98

DESERTION. What is 130

DILIGENCE:—
Want of 59
Subsequent application for execution 100
Not condition precedent 101
Failure to examine under section 219 ... 101

DIVORCE:—
Procedure in action for 128
Co-respondent must be named 129
When it may be refused 130
No decree of consent 130
No conditional decree 131
Order Nisi extends for three months ... 131
Husband must pay wife's costs... ... 133
But not where wife has property ... 134

DOCTRINE OF RELATION BACK 88
Does not apply to registration of sale ... 89

DOCUMENTS:—
Plaintiff's must be filed with plaint ... 5
Discovery of 41
Notice to admit genuineness 41
Inspection of 42
Penalty for refusal to produce 42
Proof at trial 42
Putting in evidence 43
Must be formally tendered 45
Certified copies 45
Where objected to 45
Should not be accepted provisionally ... 45
Insufficiently stamped 45

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

PAGE

E

ESTATE:—
Distribution of deceased's 154

EVIDENCE:—
Party beginning must call 44
How taken 47
On affidavit or commission 47
Refusal of Court to take 44
By affidavit 175
Discovery of fresh evidence after trial ... 205

EXECUTION:—
Procedure in 61
Resistance to 96
Subsequent application for 101
Where debtor dies before execution ... 105
Stay of 106
Questions between parties relating to execution 106
Pending appeal 201

EXECUTOR:—
Powers of 141
Compensation to 146
Must file inventory 148
May ask for judicial settlement ... 150

F

FIDEI COMMISSARY RIGHTS 59

FINAL ORDER 211

FISCAL'S CONVEYANCE:—
Where purchaser delays to apply ... 86
Transfer after purchaser's death ... 86
Who may ask for 86
Title relates back to date of sale ... 89
Debtor may possess till conveyance ... 89

FRAUD:—
In making of a will 139
Judgment by. How set aside 50

G

GARNISHEE ORDER 62, 63

PAGE

GUARDIAN
Appointment of 123
Powers of 123
Right of mother to be 124
Of minor's person 124

H

HYPOTHECARY ACTION 73
Not pending till sale takes place ... 169

I

IMPLEMENT. What is 58

IMPRISONMENT:—
When debtor may be discharged ... 94, 95
Creditor must pay subsistence 94

INJUNCTION 181
Compensation where wrongful 182

INSOLVENCY:—
Of plaintiff in an action 168

INSTALMENTS. Payment by 52

INTEREST:—
Payment of 51
Method of awarding 51

INTERIM ORDERS 183

INTERPLEADER ACTIONS:—
Who can bring action 117
What plaint must state 118
Agent cannot sue principal 118
Where action is already pending ... 118

INTERROGATORIES 41
Penalty for refusal to answer 42

INTERVENTION:—
In pending action 14, 15

INTESTACY:—
Death of intestate must be reported ... 142
Otherwise penalty... 142
Application for administration 143

INVENTORY:—
Executor or administrator must file ... 148

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

PAGE

ISSUES:—
Judge must rule on different sets ... 43
Issues of law before issues of fact ... 43

J

JUDGMENT:—
Must be on material on the record ... 48
Requisites of 48
Not on point in issue is not judicial pronouncement 48
By fraud or mistake. How set aside 50
Re-opening of 50, 192

JUDGMENT DEBTOR:—
Examination under section 219... 59

JUDICIAL SEPARATION:—
Grounds for 131
Rights of wife during 132

JUDICIAL SETTLEMENT OF ACCOUNTS:—
Who may apply for 149
When allowed 149
Executor may ask for 150
Executor may prove debts due to him ... 151
Nature and scope 152
Prescription of debts 152
Administrator may abandon a debt ... 152
Manner of taking accounts 153
Effect of judicial settlement 153
Distribution of estate 154

JURISDICTION:—
Must be expressly traversed by defendant ... 33
When causes of action are joined ... 28
Residence of defendant 18
Situation of land 19
Where cause of action arises 19
Breach of contract 20
Claims to property seized 67
Test of, in 247 action 73
In matrimonial action 128
Of a Court of Requests 186

L

LABOURER. Who is 58

PAGE

LEAVE TO DEFEND:—
What defendant must prove 164
When security will be required... ... 164, 165
If defendant fails to obtain leave ... 165
Court may grant special leave 165

LIEN:—
Garnishee order creates 62
Claims subject to 69
Proctor's lien for costs 56

LIQUID CLAIMS:—
What are 163
Summary procedure 163
Attorney may swear affidavit 163
Limits within which action may be brought 164
Second cause of action. When allowed ... 164

LUNACY. ACTIONS IN:—
Inquiry into lunacy 125
Issue at inquiry 126
When lunatic recovers 128
No stamps in proceedings 128

LUNATIC. Who is 125
Manager of estate 126
Guardian of person... 126

M

MANAGER:—
Powers of manager of lunatic's estate ... 127
May be removed from office 127

MARRIAGE:—
Action for nullity of 131

MATERIAL IRREGULARITY 75, 79, 81
Grounds must be notified to Court 82

MATRIMONIAL ACTIONS:—
Jurisdiction in 128

MESNE PROFITS:—
In decree 53

MINORS ACTIONS BY
Must sue by next friend 119
Curator cannot bring action 119

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

PAGE

May sue in person for wages in Court of Requests 119
Who can be next friend 119
When minor comes of age 120
Order where minor is not represented ... 121
Guardian ad litem 121
Minor is ward of Court 122
When guardian can compromise ... 122
Allowance for minor's maintenance ... 124

MISCONDUCT:—
Of arbitrator 161

MISJOINDER:— 12
When objection should be taken ... 13

MORTGAGEE:—
Rights of, in concurrence 113

N

NEXT FRIEND:—
Who can be 119

O

OATH:—
Judgment in term of 171

P

PARTY:—
Who can appear for 16
May be added by Court 13

PARTITION ACTION
Not founded on cause of action 2
Res judicata 27

PAULIAN ACTION:—
May be combined with 247 action ... 72
When available 72
Effect of decree in 73
Consideration no defence 73

PAUPER. Who is 115

PAUPER ACTIONS:—
Who is a pauper 115
Inquiry into cause of action 115
When he may be dispaupered 116

PAGE

PAYMENT OF PRICE 76

PAYMENT INTO COURT:—
Money to be actually paid 172

PLAINT:—
Return for amendment 3
Requisites of 3
Filed in Court not having jurisdiction ... 4
By wrong plaintiff 7

PLAINTIFF:—
Joinder of 5
Absence on trial date 35
Need not appear in person 35
Generally has right to begin 44
Insolvency of 168

PLEADINGS:—
Strict pleadings not insisted on.... ... 3
Amendment of 41

PRE-EMPTION 54

PESCRIPTION:—
Judgment debtor may prescribe after sale ... 88
Of debt due to Executor 152

PROBATE:—
Application for 135
Stale application. When allowed ... 136
Conflict of claims 136
When it may issue... 137
Must be registered 140
Recall of 140
Not where order has been made absolute ... 141

PROCESS:—
In arbitration proceedings 159

PROCTOR:—
Appointment must be in writing ... 16
Omission of name in proxy can be rectified ... 16
Physically present in Court 38

PROOF:—
Burden of 44, 46

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

PAGE

PROXY:—
How revoked 16
In favour of partnership is good ... 16
How long in force 17

PUBLIC OFFICER:—
Notice of action in suit against 117
Even where action is based on contract ... 117

R

RECEIVER:—
Appointment of 183
Security by 184

RECOVERY OF PROPERTY:—
Action not maintainable without probate ... 143
But not necessarily bad 144
Nature of actions prohibited 144
Possession need not be asked for ... 145
Chose in action of deceased 145
Duly stamped 145

REGISTRATION OF SEIZURES 65

REPLICATION 33

RESISTANCE TO EXECUTION 96
Must be at time of giving possession ... 97
If by *bona fide* claimant 97
Decree or order 98

RES JUDICATA:—
Object and effect 22
Substantive law or procedure 22
Identity of causes of action 23
Omission with leave of Court 24
Final judgment necessary 25
Court of competent jurisdiction... ... 26
Erroneous decision of law 26
Matter in issue is test 26
Judgment by consent is 26
In partition actions 27
Parties must be the same 27
In 247 action 72
Dismissal for non-payment of security for costs 173

RESTITUTIO IN INTEGRUM 39
Proctor's mistake 195

PAGE

S

SALE:—
Of property seized 75
Must be advertised... 75
Decree holder may purchase 77
Of movables 78
Delivery to purchaser 79
Must be reported to Court 79
When set aside 79, 80
Who may apply to set aside 80
Confirmation of 79
Where debtor has no saleable interest ... 85
No sale where decree is seized 105

SECTION 327:—
Inquiry is into title 98

SECURITY:—
For costs where one party is out side jurisdiction 172
When made 172
Cannot be made *ex parte* 172
Need not be in cash 173
Action dismissed if security is not given ... 173
Dismissal is *res judicata* 173
For arrest before judgment 177
For sequestration before judgment ... 179
By receiver 184
For costs of appeal... 197
Notice of tender of security 198
When appeal lies without 199
Nature of security required 199

SEIZURE:—
Property exempt from 58
Application for 60
What creditor must prove 60
Termination of 60, 67
Mode of 62
Of debt 62
Of share in Company 63
Of property in hands of public officer ... 63
Of money decree of same Court ... 64
Of decree of another Court 64
Must be effective 65
Of immovables 65
Regular seizure essential 65

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

PAGE

Registration of 65

SEQUESTRATION BEFORE JUDGMENT:—
Object of sequestration 178
Court of Requests can issue mandate 179
Security must be given 179
Claims to property sequestered ... 180
Order appealable 180
Does not affect rights of third parties ... 180

SETTLEMENT:—
Must be reported to Court 171
Need not be notarially executed if relating to land 171

SIGNATURE 46
In Sinhalese is not a mark 175

SPECIFIC PERFORMANCE 52

SUMMONS:—
Added parties must be served with ... 15
Service must be personal 29
Substituted service... 29
Service on agent 30
Must be in English... 30
Unless served defendant not bound to appear 30

T

TESTAMENTARY ACTIONS:—
Nature of action 134
Will must be produced in Court ... 134
Application for probate 135
Application to have the will proved ... 137
Order nisi 137
Order absolute 139
Caveat 140
Payment of debts 149

TITLE:—
Plaintiff must set out in plaint... ... 3

TRANSFER OF PROPERTY:—
Not invalid if not inventoried by Executor ... 146
Mortgage is not transfer 146

TRIAL:—
Fixing the date for... 35

PAGE

Postponement 35, 36

U

UNDUE INFLUENCE 139

V

VALUE:—
Of subject matter in appeal to Privy Council 209
Test to be applied 209

VINDICATORY ACTION:—
Claimant may bring 72

W

WAGES 62

WARRANT OF ATTORNEY TO CONFESS JUDGMENT:—
To whom given 17
Object of warrant 17
Cannot be signed by agent 17
When judgment is irregular 18

WILL:—
How impeached 139

WITHDRAWAL OF ACTION 170
Bar to fresh action... 170
Not applicable to partition actions ... 171

WITNESS:—
Cannot be called unless name is on list ... 47
May be called by Judge 47
Veracity of 204

WRIT:—
Re-issue of 102, 103
No time limit for first application ... 102
Refusal to re-issue not *res judicata* ... 103

WRONGFUL SEIZURE:—
Liability of creditor for 61

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

INDEX OF SECTIONS.

	Page
Section 5	1, 2, 19
Section 6	1, 2
Section 7	31
Section 9	18
Section 10	21
Section 11	5
Section 12	6
Section 13	7
Section 14	7
Section 15	11
Section 16	12
Section 17	12, 13
Section 18	14
Section 21	16
Section 22	12
Section 23	16
Section 24	16
Section 25	16
Section 27	16, 17
Section 28	17
Section 31	17
Section 32	17
Section 33	22
Section 34	22
Section 35	28, 29
Section 36	28
Section 39	3
Section 42	4
Section 43	4
Section 44	4
Section 46	4
Section 50	5
Section 51	5
Section 54	5
Section 60	29
Section 64	30
Section 65	30
Section 66	30
Section 68	30
Section 69	30
Section 72	31
Section 73	3
Section 74	31
Section 75	32
Section 76	33
Section 79	33

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

	PAGE
Section 80	35
Section 81	35
Section 84	35
Section 85	36
Section 87	38
Section 88	40
Section 94	41
Section 98	41
Section 99	41
Section 101	41
Section 102	41
Section 103	42
Section 104	42
Section 109	42
Section 112	42
Section 114	43
Section 146	43
Section 147	43
Section 149	44
Section 150	44
Section 151	44
Section 152	45
Section 153	45
Section 154	45
Section 155	46
Section 156	46
Section 160	46
Section 163	46
Section 166	46
Section 169	47
Section 174	47
Section 175	47
Section 178	47
Section 179	47
Section 184	47
Section 185	48
Section 187	48
Section 188	48
Section 189	49
Section 191	51
Section 194	52
Section 196	53
Section 197	53
Section 199	53
Section 200	54
Section 207	22
Section 208	54

	PAGE
Section 214	56
Section 215	56
Section 216	56
Section 217	57
Section 218	58
Section 219	59
Section 227	62
Section 228	62
Section 229	62, 63
Section 230	63
Section 231	63
Section 232	63
Section 233	64
Section 234	64
Section 235	64
Section 236	65
Section 237	65
Section 238	66
Section 239	67
Section 241	67
Section 242	68
Section 243	68
Section 244	68
Section 245	68
Section 246	69
Section 247	71
Section 248	75
Section 254	75
Section 255	75
Section 256	76
Section 257	76
Section 259	76
Section 260	76
Section 261	76
Section 262	76
Section 263	76
Section 266	76
Section 270	76
Section 272	77, 78
Section 274	78
Section 275	78
Section 276	78
Section 277	79
Section 278	79
Section 279	79
Section 280	79
Section 281	79

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

	PAGE
Section 282	79, 80
Section 284	85
Section 285	85
Section 286	85
Section 287	86
Section 289	88
Section 290	89
Section 291	90
Section 292	90
Section 298	90, 93
Section 299	91, 92
Section 300	93
Section 301	94
Section 302	93
Section 303	94
Section 304	94
Section 305	94
Section 306	94
Section 307	94
Section 311	94
Section 312	94
Section 313	95
Section 314	95
Section 315	95
Section 317	95
Section 318	95
Section 320	95
Section 321	95
Section 322	96
Section 323	96
Section 324	96
Section 325	97
Section 326	97
Section 327	97
Section 328	97
Section 337	101
Section 338	103
Section 339	104
Section 340	104
Section 341	105
Section 343	106
Section 344	106
Section 345	107, 108
Section 347	102
Section 349	108
Section 350	110
Section 351	110

	PAGE
Section 352	110
Section 365	92
Section 377	97
Section 392	167
Section 393	167
Section 394	167
Section 395	167
Section 396	167
Section 397	167
Section 398	168
Section 400	168
Section 401	168
Section 402	168
Section 403	169
Section 404	169
Section 406	170
Section 407	170
Section 438	171
Section 409	172
Section 410	172
Section 411	172
Section 412	172
Section 413	172
Section 414	172
Section 416	172
Section 417	172
Section 418	173
Section 419	173
Section 420	173
Section 421	173
Section 422	173
Section 423	174
Section 426	174
Section 428	174
Section 430	174
Section 434	175
Section 435	175
Section 436	175
Section 437	175
Section 439	175
Section 440	175
Section 441	115
Section 442	115
Section 444	115
Section 445	115
Section 447	115
Section 448	116

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

	PAGE
Section 449	116
Section 450	116
Section 452	116
Section 453	116
Section 454	116
Section 456	117
Section 457	117
Section 459	117
Section 461	117
Section 476	119
Section 478	119
Section 479	121
Section 481	120
Section 482	120
Section 483	120
Section 484	120
Section 485	120
Section 486	120
Section 487	120
Section 488	120
Section 489	120
Section 490	120
Section 491	121
Section 492	119
Section 493	121
Section 494	122
Section 495	122
Section 496	122
Section 497	122
Section 498	122
Section 499	122
Section 500	122
Section 502	121
Section 516	135
Section 517	135
Section 518	135
Section 519	135
Section 520	136
Section 523	136
Section 524	137
Section 525	137
Section 526	137
Section 527	137
Section 528	137
Section 529	138
Section 530	138
Section 531	138

	PAGE
Section 532	138
Section 533	139
Section 534	140
Section 535	140
Section 536	140
Section 537	141
Section 539	141
Section 540	142
Section 541	142
Section 542	142
Section 543	142
Section 544	143
Section 545	143
Section 546	143
Section 547	144
Section 549	146
Section 551	146
Section 552	146
Section 553	147
Section 554	147
Section 556	125
Section 557	125
Section 558	125
Section 559	126
Section 560	126
Section 562	126
Section 563	126
Section 564	126
Section 565	126
Section 566	126
Section 567	126
Section 568	127
Section 570	127
Section 571	127
Section 572	127
Section 573	127
Section 574	127
Section 575	128
Section 576	127
Section 578	128
Section 580	128
Section 581	128
Section 582	123
Section 587	124
Section 588	124
Section 589	124
Section 590	125

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

	PAGE
Section 591	125
Section 592	125
Section 593	124
Section 596	128
Section 597	128
Section 598	129
Section 599	129
Section 600	129
Section 602	129, 130
Section 604	129, 131
Section 605	131
Section 607	131
Section 608	131
Section 609	132
Section 610	132
Section 612	134
Section 614	132
Section 615	133
Section 617	133
Section 618	133
Section 619	133
Section 620	133
Section 621	133
Section 622	133
Section 627	128
Section 628	118
Section 629	118
Section 630	118
Section 631	118
Section 632	118
Section 634	119
Section 650	177
Section 651	178
Section 652	178
Section 653	178
Section 654	179
Section 657	180
Section 658	180
Section 659	180
Section 660	181
Section 661	181
Section 662	181
Section 663	182
Section 664	182
Section 666	182
Section 667	183
Section 668	183

	PAGE
Section 669	183
Section 670	183
Section 671	184
Section 672	184
Section 673	184
Section 674	184
Section 675	184
Section 676	157, 158
Section 677	158
Section 678	159
Section 679	159
Section 682	159
Section 683	159
Section 685	160
Section 687	160
Section 688	160
Section 690	160
Section 691	160, 161
Section 692	162
Section 693	163
Section 694	163
Section 695	163
Section 696	163
Section 698	163
Section 703	163
Section 704	164
Section 705	163
Section 706	164
Section 707	165
Section 712	147
Section 713	147
Section 714	147
Section 716	148
Section 718	148
Section 719	148
Section 720	149
Section 721	149
Section 723	149
Section 724	149
Section 725	149
Section 726	149
Section 729	150
Section 730	150
Section 731	151
Section 732	151
Section 733	151
Section 734	151

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

	Page
Section 736	171
Section 737	153
Section 739	154
Section 741	154
Section 742	154
Section 743	155
Section 744	155
Section 745	125
Section 746	125
Section 753	195
Section 754	196, 197
Section 755	196
Section 756	198
Section 757	199
Section 763	202
Section 765	200
Section 766	201
Section 767	201
Section 769	202
Section 770	202
Section 772	203
Section 773	205
Section 774	205
Section 775	206
Section 776	206
Section 777	206
Section 801	185
Section 802	185
Section 804	185
Section 805	185
Section 809	190
Section 816	190
Section 817	185
Section 818	186
Section 820	193
Section 823	190 et seq
Section 834	92
Section 838	95

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

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

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