THE INSTITUTES OF THE LAWS OF CEYLON

BY

The Hon. Mr. K. BALASINGHAM

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OPINIONS.

The Right Hon'ble Sir John Winfield Bonser, P.C.—Your "Institutes" has a very workmanlike appearance and ought to be very useful, both to students and practising lawyers.

I am glad to see that the Roman-Dutch Law, which is one of the most precious possessions of Ceylon, has found in you a systematic expositor.

Hon'ble Mr. Walter Pereira, K.C., P.J.—The work, in all its pages, bears evidence of great labour and research.

Sir Thomas E. de Sampayo, K.C., P.J.—The plan is excellent and appears to me to be well carried out.

Criminal Law Journal of India.—The Volume now before us, is an excellent specimen of accuracy, lucidity, terseness, precision and simplicity: and if the promised volumes maintain the same standard, the work will force its way to the library of every practitioner in Ceylon. The Student, lawyer, judge and layman, all will find Mr. Balasingham's work a storehouse of learning and information. We have nothing but unqualified praise for the great industry and research displayed in preparing the volume under review.

The Ceylon Observer.—The learned author, who has with singular devotion to his Profession already contributed a great deal to the legal literature of this Colony, has received the warm praise of the Bench and Bar for his new work, which accurately states the Law relating to Persons and Things. We feel sure that while it will prove indispensable to students, it will also be of great assistance to the Profession and to the Civil Service.

The Times of Ceylon.—The merit of the work lies chiefly in its simplicity and terseness.

The Ceylon Independent.—The Law is accurately and lucidly, though tersely stated in these pages. There is however, hardly any point of importance that has been omitted.

The Ceylon Patriot.—The Law is systematically arranged and the style is so simple and clear as to render the book popular even among laymen.

The Hindu Organ.—Balasingham's *Institutes* states the principles of Law tersely and at the same time clearly with copious footnotes in which reference to Dutch and other authorities are given.

(BY THE HON. Mr. K. BALASINGHAM.)

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THE LAWS OF CEYLON

BY

THE HON. Mr. K. BALASINGHAM,

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VOLUME I.

LAW OF PERSONS.

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HIS EXCELLENCY THE HON'BLE

SIR HERBERT JAMES STANLEY, K.C.M.G.,

GOVERNOR OF CEYLON

A WISE ADMINISTRATOR.

THIS BOOK

IS

WITH PERMISSION

RESPECTFULLY DEDICATED

BY

THE AUTHOR

ABBREVIATIONS USED IN VOL. I.

(Abbreviations of Law Reports are not given here.)

Amir Ali = Amir Ali's Mohammedan Law.
Aru. = Arunachalam's Digest of the Civil Law of Ceylon.
B. / Bur. = Burge's Colonial and Foreign Laws. (2nd Edition).
Cens. For. = Van Leeuwen's Censura Forensis
Dic. = Dicey's Conflict of Laws.
D. / Dig. = The Digest or Pandects of Justinian.
Gan = Ganapathy Ayer's Hindu Law.
Gour = Gour's Hindu Code.
Gr. / Grot. = Grotius' Introduction to Dutch Jurisprudence.
H. / Hal. / Hals. = Halsbury's Laws of England.
Hayley = Hayley's Sinhalese Laws and Customs.
Hol. = Holland's Jurisprudence.
Maine = Maine's Ancient Law.
Mass. = Massdorp's Institutes of Cape Law.
Mby. = Markby's Elements of Law.
Mod. / Modder. = Modder's Kandyan Law.
Nath. = Nathan's Common Law of South Africa.
P. = Pereira's Laws of Ceylon.
Sch. = Schuster's Principles of German Civil Law.
Thom. = Thomson's Institutes of the Laws of Ceylon.
Tyabji. = Tyabji's Principles of Mohammedan Law.
V. / Voet. = Voet's Commentary on the Pandects.
V.D.K. = Van der Keesel's *Theses Selectae.*
V.L. / Lan Leeu. = Lan Leeuween's Commentary on Roman-Dutch Law.
Wessels. = Wessel's Roman Dutch-Law.

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PREFACE.

It was my original intention to issue a revised edition of the Institutes of the Laws of Ceylon published by me in 1906. But after proceeding for some time with the revision I decided to follow the plan adopted in this book. It differs from Balasingham's Institutes and Pereira's Laws of Ceylon, both in the arrangement and in the method of treatment of the subject.

The Institutes, published in the centenary year of the publication of Van der Linden's Institutes of the Laws of Holland, aimed at giving an epitome of the general principles of the whole body of our law and practice based on Van der Linden's Institutes, which was, at once, the most up-to-date treatise on the Roman-Dutch Law as it existed in Holland before the introduction of the Code Napoleon into that country in 1811, and the most popular book of its kind in the Dutch Ceded Colonies, by reason of the precision, clearness, and brevity with which the first principles of the Roman-Dutch Law are stated in it.

A statement of the law so terse and in digest form as in Van der Linden, which has been called the fundamental Code of South Africa, while involving greater labour in the preparation, was found to be less useful to practitioners than an exposition in which the leading cases and other authorities are referred to and discussed at length. *Brevis esse laboro* : *Obscurus fio.* I therefore abandoned in 1912 the method adopted in the Institutes when dealing with Civil Procedure.

A treatise on the Laws of Ceylon which fails to note the differences between the various systems of laws prevailing in Ceylon is on the face of it incomplete. Out of an estimated population of 5,422,000 about 1,311,000 are Kandyans, 375,000 are governed by the Tesawalamai, 370,000 are Muslims. The Indian Tamil population numbers about 726,000 and many of these are subject to Hindu Law. In all, about 2,782,000 persons, that is to say, more than half the population, (less than half if we exclude the Indians having a domicil of choice in Ceylon), are governed in some respects by Special Laws.

Over two-thirds of the area of Ceylon may be said to fall within the jurisdiction of the Special Laws, even if we exclude the Muslims who are scattered all over the Island and occupy about half of the Eastern Province. It is thus clear that a book which ignores our Special Laws cannot be called the Laws of Ceylon. I have therefore deemed it desirable to state under each head not only the general law, but also to point out how far the general law will have to be modified, if the status of the person whose rights are under investigation is not of the standard type.

The English Law has been introduced by legislation with respect to certain matters and it is necessary that the *Laws of Ceylon* should also deal with the English Law on these subjects.

Writing on Codification some years back, I pleaded for the gradual evolution of a uniform legal system. The Seven United Provinces of the Netherlands felt the want of uniform laws, even before the French Code was introduced. The treatises on the Roman-Dutch Law written in the latter half of the eighteenth century were the endeavours of distinguished lawyers to systematize the usages and customs of the different provinces. As soon as the Revolution of 1795 had practically put an end to provincial autonomy, the National Assembly resolved that one complete and general law should be introduced for the whole country, and much of the provincial laws would have gone in any case irrespective of foreign legislation.

Before the Code Napoleon brought the whole of France under one law, she was in the state in which we are in Ceylon today. The provinces of France, differing in their historical origin, in their traditions, and in their constitutions had no system of law common to them all. The German Empire when it was created in 1871 out of several small states was in the same condition. Many of these states had codes of their own, and others were governed by diverse local customs. The realization of the advantages of having one legal system for the whole empire, apart from the desire for national unity, brought into existence the German Civil Code. It should not be more difficult to evolve a uniform Code for this country. If necessary, in the case of the Muslims and even others, exceptions might be provided in the Code itself on certain points on which the differences cannot be adjusted. But these exceptions should be kept within the narrowest possible limits.

Codification had made its influence felt even upon the complicated mass of laws which prevailed in the old Ottoman Empire. The Civil Code which was promulgated in Turkey in 1869 follows the French Code in general outline. If Turkey did this so long ago it is difficult to see why it should be impossible in Ceylon for representatives from all communities to arrive at a reasonable compromise. Diversity of laws is as much an obstacle to the evolution of common nationality as diversity of speech.

All barriers to the evolution of a Ceylonese nation should be gradually removed if it can be done without doing violence to racial sentiment. The fact that every far-reaching changes have been effected both in the distant and in the recent past without protest is a hopeful sign. The Roman-Dutch Law, for example, was willingly accepted as the Common Law of Ceylon during British occupation (and not during Dutch rule); and this happened notwithstanding the fact that the Sinhalese were assured the enjoyment of their native laws not as to succession alone, but even as to contracts, etc., by the Charter of 1801. It had come to be regarded as something in the nature of a Common Law even in the Kandyan Provinces long before the Ordinance of 1852. The institution of associated marriage was abolished with the approval of the Kandyans themselves, though some of the laws which are connected with these peculiar marriage customs continue to remain in force. The entire Mukkuva Law which was akin to the Malabar Law (*Marumakkatayam*) was probably swept away by necessary implication by Ordinance No. 15 of 1876, without any protest from the parties concerned.

The Tesawalamai was considerably modified by the Portuguese and the Dutch, and recently by Ordinance No. 1 of 1911. As our general law as to Matrimonial Rights was out of harmony with, and less equitable than, our Special Laws on a most important matter, I moved for the revision of the Matrimonial Rights Ordinance of 1876 which vested the movable property of the wife in the husband. The Married Woman's Property Ordinance of 1923 was in consequence enacted. This removes one great objection to the general law which the Tesawalamai Tamils had;—for not being governed by a personal law like the Muslims and Kandyans they often became subject to this harsh and inequitable provision of the general law by residence

outside the Northern Province. Another point relating to Matrimonial Rights which differentiates the Tesawalamai from the general law is the provision as to community in respect of property acquired after marriage. This provision of the Tesawalamai which is the same as the *Communio quaestum* of the Roman-Dutch Law is being considered by a Committee presided over by Mr. Justice Drieberg.

The Muslim Law Committee, presided over by Mr. Justice Akbar, and appointed on the motion of the Hon. Mr. Abdul Cader, recently reported that the principles of the general law should be applied to Muslims in the construction of deeds, *fidei commissa*, usufructs and trusts.

A Committee appointed at the instance of the Hon. Mr. G. E. Madawela is engaged now in drafting a Code of Kandyan Laws.

About nine years ago I placed before Government the proposals contained in my three Tracts on Law Reform, *viz.* I Codification, II Public Trustee, and III Conciliation Courts. The Attorney-General of the day was only able to accept at the time the proposal about the Public Trustee. I suggested to H. E. Sir William Manning the appointment of a Commission consisting of Sir Alexander Wood Renton, retired Chief Justice, who was then in Ceylon, Sir Anton Bertram, Chief Justice and Sir Thomas de Sampayo, Puisne Justice, to draft a Code. But the times were not then favourable for the undertaking. I believe the times are more favourable now. As this preface is itself a plea for a Code, it is not out of place to give below some extracts from what I wrote on the subject in 1920.

In conclusion, let me express the hope that the plan adopted in this book of placing the different local laws on each point side by side will focus attention on the merits and defects of the various systems, and help to evolve uniform laws.

K. BALASINGHAM.

"Mangala Nevesa,"
Colombo.
September, 1929.

Excerpts from Tract on Codification.

A good part of our so-called common law is not available in English. It is to be found mainly in the works of Voet, Van Leeuwen, Sande, Grotius, Van der Keesel, Van der Linden, Groenewegen, Matthaeus, Noodt, Huber, Schorer, Vennius, Bynkershoek, Perez, Dekker and other ancient Dutch lawyers who wrote in Latin. To speak of the "eternal laws" expounded by these jurists would provoke laughter in the country of their origin; for there, these writers amuse only the legal antiquarian. In 1811 the Roman-Dutch Law was superseded in Holland by the Code Napoleon, and this gave place in 1838 to another code—Burgelyk Wetbock. The ludicrous nature of our present situation becomes apparent when we find that there are not three men in the legal profession of this Island who can read these ancient writers with any degree of ease. Only a part of their writings has been done into English during 125 years of British rule.

The Roman-Dutch Law is an offshoot of the Roman Law and consequently the large array of Roman Jurists is still regarded as high authorities in our Courts and cited in judgments though they have lost that authority in their own country. Throughout Italy the Codice Civile is in force. Nor have these jurists authority in other European countries which came under Roman sway.

The fact that our common law is in Latin has resulted in endless confusion. Lawyers are unable to consult freely the works of the Dutch and Roman Jurists. Many law books are still untranslated; vital errors have been discovered in some of those which have been translated.

Middleton, J., said "I feel that I have not had access to, nor have I even knowledge of, all the possible Dutch or other authorities."

Mr. Justice Moncrieff said refering to Dutch authorities "to most of those authorities I have no means of referring." Owing to the difficulty of discovering the law, lawyers and judges have applied general rules found in elementary text-books in total ignorance of the fact that there are special rules to meet particular cases. Let me give one example; it is the general rule that where the beneficiary dies before the trustee (or fiduciary) the trustee gets absolute title; the property does not go to the heirs of the reversioner on the death of the trustee. This rule was always followed in Ceylon. Some years ago at the Cape McGregor translated Voet's chapter on Fidei Commissum and it was there stated that the rule did not apply to trusts created by deed, but applied only to trusts created by last will. *Mohammed Bai* v. *Silva* was decided in the District Court of Colombo and was argued in appeal before two judges of the Supreme Court, in ignorance of this exception. The case was reserved for argument before three judges on some other point (the question, whether the word "children" included "grand children") and it was only at the rehearing before the Court that Counsel casually discovered this exception.

There is divergence of opinion among the Roman-Dutch Jurists. It is at times difficult to reconcile their opinions, or to decide between conflicting opinions. Voet is regarded as the highest authority among these jurists and yet Voet is not always followed. Let me give one example. On the question of *Jus accrescendi* (the right of accrual or survivorship among co-trustees) Voet holds one view and most of the other jurists hold another view. Bertram, C. J., points out: "It is satisfactory to know that Voet's view is repudiated by Van Leeuwen, Sande, Huber, Vennius, Perez and Bynkershoek. It is combated with extraordinary vigour by Dekker."

On the question whether a donor can revoke a fidei commissary donation in favour of persons not *in esse* different views are held among Dutch Jurists and our Courts adopted the views of Perez and Vennius.

It is difficult to say whether the Roman-Dutch law on some points was introduced into Ceylon. Mr. Justice Ennis said: "The Roman-Dutch Law which prevails in Ceylon is not the entire bulk of that law but only so much of the Dutch Common Law as can be shown to be applicable, or of the Dutch Statutory Law as can be shown to have been specially applied." Lascelles, C. J., said: "The whole body of Dutch Law as it prevailed in Holland at the end of the eighteenth century was of course never introduced into the Colony."

On the simple question as to whether a person can marry a woman with whom he was living in adultery during the life time of his deceased wife, the Supreme Court had to decide the question whether a Placaat of 1674 was ever introduced into Ceylon. Mr. Justice Moncrieff said:—"The suggestion of non-introduction seems to be made because our Archives do not show a formal adoption of the Placaat of 1674. Unfortunately nobody seems to know what has become of our records and the materials left are of the vaguest." Mr. Justice Moncrieff came to the conclusion that the Placaat of 1674 was introduced into Ceylon. In the same case Mr. Justice de Sampayo reviewed all the authorities and concluded as follows:—"So far as I am able to ascertain...there is no indication that the Placaat of 1674 or anything similar to its provision was in force in the Dutch East Indies." Mr. Justice Middleton said: "There is *prima facie* no evidence to show that the law in Voet or the Placaat of 1674 was ever recognised or acted upon in Ceylon."

For a long time there was a controversy as to whether the North Holland law or the South Holland law was introduced into Ceylon. That there should be differences of opinion as to the interpretation of a section or as to the effect which one part of the law has on another is understandable. But that there should be any doubt or difference of opinion as to whether any law is or is not in force in Ceylon is shocking.

Even if the Roman-Dutch Law on a point was introduced, it is difficult to say to what extent the law is still in force. It is consequently difficult for lawyers to advise on many questions referred to them. The Judges of the Supreme Court have introduced many changes in the Roman-Dutch Law. What Mr. A. St. V. Jayewardene says in his essay on Roman-Dutch Law, of Burnside, C. J., Dias, J., and Clarence, J., may be said of many

lawyers and judges. He said:—"Either through an aversion to search for the law which was not ready to hand like the English Law, but buried in the Dutch and Latin works of eminent commentators and institutional writers or through an unwise *penchant* for the English Law, these three judges eagerly seized every opportunity, and urged every excuse, however trivial, to declare the Roman-Dutch Law obsolete, contradictory, unrefined and undiscoverable."

Burnside, C. J., spoke with undisguised contempt of the "minds of the ponderous Dutch Commentators, who no doubt would have regarded with primitive curiosity the present deed."

It is indisputable that chiefly owing to the difficulty of discovering the Roman-Dutch Law on several points the English Law was applied for a long time in a series of cases. Later, when the Roman-Dutch Law on the point was discovered the Supreme Court got over the difficulty by holding that the law on these points was either not introduced, or if introduced had become obsolete by disuse.

Let me quote the words of Lascelles, C. J. In deciding a question of this kind he said: "It is a fair inference that the Dutch Law on this matter has either never been introduced into the Colony or if introduced, that it has been abrogated by disuse." To give an illustration: Under the Roman-Dutch Law an action for damages lies against a witness for a false and defamatory statement made in the witness box. The translated portions of Dutch writers till recently did not refer to this principle. Under the English Law no such action lies, and our Courts in ignorance of the Roman-Dutch law followed the English Law in several cases. Some years ago De Villiers at the Cape translated the Chapter of Voet dealing with this subject. Relying on this high authority an action was brought against a witness. But the Supreme Court held that the law was abrogated by disuse.

It is not easy to say how many wrong decisions are necessary to declare that the Roman-Dutch Law on any point is obsolete by disuse; there are instances where the older decisions were overruled on the discovery of a clear Roman-Dutch authority.

Reference has also to be made to Batavian Statutes to ascertain the law on some points. In 1830 Chief Justice Otley was asked by the Inquiry Commissioners: "Are the Batavian Statutes referred to in the Courts and are they enforced in cases where they deviate from the provisions of the Roman-Dutch Law as expounded by the Dutch Commentators ?" He replied: "They must necessarily be admitted as paramount to all authorities when applicable to the present state of the Island." Even so late as 1904 Mr. Justice de Sampayo had occasion to examine these Statutes to find out what the law of Ceylon is as to the marriage of adulterous persons.

The Roman-Dutch Law ceased to be a living law in Holland in 1811. The Roman-Dutch Law in force in Ceylon is the law as it existed before 1795. It is consequently out of date. The Courts have occasionally arrogated to themselves the powers of the Legislature and introduced English Law principles. But this policy has neither been consistent nor always satisfactory.

The most important of modern codes is the Code Napoleon which was introduced into almost every European country conquered by Napoleon. It has been the model for numerous codes—for the Codes of Spain, Portugal, Italy, Egypt, Japan and all the Latin American Republics of Central and South America. Within the British Empire it has been the model for the Code of St. Lucia, Quebec and Malta. In Mauritius it was actually in force until it was modified by local legislation.

The most familiar objection urged against codification from the time of Savigny downwards was that it checks the growth of law and hinders its free development. But the experience of countries which have adopted codes does not support this view. On the other hand the codification of existing laws has had the effect of bringing into prominence their defects and has thus facilitated legislative amendments. The Code Napoleon for instance has undergone various alterations during 100 years, and in 1904, the centenary year, a Commission was nominated to make a thorough revision of it. The warnings of Savigny and his disciples did not deter Germany from codifying her laws. After enacting several partial codes she is now in possession of a code which is "the most carefully considered statement of a nation's law that the world has ever seen." The great advantage of codification is clearly seen from the fact that no country into which Napoleon introduced his code, ever reverted to its old common law although Napoleon's power crumbled within a few years. In Germany itself, the home of Savigny the Code Napoleon which was introduced by Napoleon into the Rhine Provinces, remained in force till it was displaced in 1900 by the German Civil Code. "The general drift of legislation and of public sentiment in the United States is towards the extension of the principle of codification."

Objections to change often proceed from sentiment. Whatever reasons there may be for a sentimental attachment to the Kandyan Law, Mohammedan Law, or Tesawalamai, there can be none to the Roman-Dutch Law. The Roman-Dutch Law was not the common law of the Island during the Dutch rule. Under the Dutch all the native races were governed by their own laws. The Tamils of Jaffna were governed by the Tesawalamai, the Tamils of Batticaloa by the Mukkuva Law, the Moors by the Mohammedan Law. There does not appear to be any reason for supposing that the Low-country Sinhalese alone had such unworkable laws that the Dutch abrogated them and forced their own laws on them. Nor can we suppose that the Low-country Sinhalese alone willingly surrendered their laws. The weight of authority is decidedly in favour of the view that it was judges and lawyers during the British period who made the Dutch Law the common law of Ceylon—the Charter of 1801 notwithstanding. During the Dutch rule only the Burghers and probably a few urban Sinhalese who gained the status of Burghers, were governed by the Dutch Laws.

Only 3 countries in the world were governed by the Roman-Dutch Law in the 19th century—Ceylon, British Guiana and South Africa. There may be some sentimental reasons for the South African Dutch retaining their laws. British Guiana has already repealed practically the whole of the Roman-Dutch Law and introduced the English Law.

Where we should have one clear and definite law with a unity of plan we are governed by five or rather six confused, undefined and contradictory systems of law. There is the Roman-Dutch Law, the English Law, the Mohammedan Law, the Kandyan Law and the Tesawalamai. The Ceylon Ordinances may be called a sixth system. Some of these Ordinances have been drafted without due regard to other existing laws and the result is a serious conflict of laws. The confusion resulting from so many systems of law may be illustrated by a simple example.

X, a Mohammedan, and Y, a Tamil subject to the Tesawalamai, both of 17 years of age living out of their paternal roofs and trading in partnership at Puttalam give to Z, who resides at Colombo a promissory note and as further security for the same transaction a mortgage bond. Z goes to a lawyer with a view to filing an action. The following puzzles have to be solved:—

Had X and Y capacity to enter into the contracts ? Under Ordinance 7 of 1865 the age of majority is 21 for all persons in Ceylon. X attains majority under the Mohammedan Law at or before 17; Y does not attain majority either under the Tesawalamai or the Roman-Dutch Law at 17. But Y has attained majority by trading and he is therefore liable on the note and bond. On the other hand X, though he has attained majority under the Mohammedan Law, is still a minor under Ordinance the local Ordinance—(7 of 1865).

The question of X's capacity to contract must be decided by the Local Ordinance—(7 of 1865).

The question of Y's capacity to contract must be decided by the Roman-Dutch Law as expounded by the Dutch Jurists.

The question of consideration for the note must be settled by English Law, *Letchime* v. *Jamison* 16 N.L.R. 286.

The question of consideration for the bond must be decided by the Roman-Dutch Law. When the test of jurisdiction is the place where the cause of action arises, the action on the note must be brought in Colombo (place of payment, according to English Law): the action on the bond cannot be brought in Colombo but must be brought at Puttalam (as the Roman-Dutch Law must be applied). If *Letchmie* v. *Jamison* was correctly decided then it may further be argued that the question as to capacity to contract on the note must be decided according to the English Law; and the question as to capacity to contract on the bond according to the Roman-Dutch Law. Similarly two different laws will have to be consulted on the question whether the two contracts are void or only voidable.

Our laws are in a more chaotic condition than the laws of most other countries were before codification. Text-books cannot help us out of this mess. They cannot decide between conflicting authorities and they do not therefore state the law authoritatively. Judges and lawyers do not want to know what jurists think, but what courts have decided. Ignorance of law is no excuse in law; but as the law stands now even learned Judges of the Supreme Court confess that they do not have access to the authorities for stating the law with confidence.

LAWS OF CEYLON.

VOLUME 1.

LAW OF PERSONS.

CHAPTER I.

DIVISION OF LAW.

The Roman institutional writers divided law into three branches: Persons, Things and Actions. *Omne ius quo utimur vel ad personas pertinet vel ad res vel ad actiones* (*a*).

In this division, the Law of Persons deals with Persons as the subject of legal rights, and may be called the Law of Status or legal capacity.

Law of Things.

The Law of Things (*jus rerum*) deals with things and obligations as objects of legal rights. It treats of tangible external objects of property with their titles; real rights over them of less orbit than dominium; inheritance comprising the subject of legacies; two less considerable forms of universal succession; and finally obligations under the two heads of contracts and delicts or torts (*b*).

(*a*) J. 1, 2, 12; G. 1, 8. (*b*) Moyle, p. 190.

The Law of Actions deals with the means of enforcing legal rights *i.e.*, with adjective as opposed to substantive law.

Some modern writers on Roman Law abandon the Roman classification and make inheritance one of their main divisions.

2. The division of the Roman jurists does not stand the test which modern analytical jurisprudence applies. But it is none the less a convenient arrangement of the subject, for there are some rights in which the status of persons concerned has to be specially taken into consideration, while in others this is not the case, and it is this distinction, which has led to a division of law into the Law of Persons and the Law of Things.

Normal and abnormal status.

3. This division has been followed by the Dutch jurists whose treatises are regarded in our courts as the source of our Common Law.

Holland's classification of rights upon the "normal" and "abnormal" status of the persons concerned corresponds to this division; the former deals with rights as unaffected by any special characteristics of the persons with whom they are connected; the latter deals with rights as so affected.

Standard type.

4. In all statements with reference to rights, the standard type of personality is assumed unless the contrary is expressed. It is only when there is a deviation from that type that the character of the persons needs any investigation; or in other words when the persons concerned are abnormal *i.e.*, are artificial persons, or infants, or under coverture, or

lunatics, and so forth, that the special effect upon the right in question of this abnormal personality has to be considered.

5. A deviation from the standard type of persons is also sometimes caused by nationality, race, community, religion, or residence and it is necessary to take notice of the forms of status they give rise to, under the Law of Persons. By abstracting the Law of Persons from the rest of the law called the Law of Things, the description of a right is much simplified, for the effect of abnormal conditions need not be repeated under each head of the general law.

Order of study.

6. As the inquiry into the Law of Persons is supplementary and secondary to that into the residue of Law, commonly called Law of Things, the order of exposition should therefore be, first the law generally without regard to peculiarity of personality, and secondly the Law of Persons; we should first treat of the various classes of substantive rights, and then proceed to treat of the effect produced upon them by the abnormality of personality.

7. The *Jus quod ad personas pertinet* expresses the law as to those variations in rights which arise from varieties in the persons who are connected with them. But it is unfortunately also used by the Roman jurists to express what the Germans call Familienrecht *i.e.*, to express not only the variations in rights which are caused by certain special variations in personality but also the special rights which

belong to certain personal relationships; not merely, for instance the legal exemptions and disabilities of infants and *femes covert*, but also the rights of a father over his son, a husband over his wife, and a guardian over his ward. (*c*).

8. It would be more convenient to follow the order adopted by the Roman and Roman-Dutch jurists and deal first with the Law of Persons, including family rights also, under that head, and then deal with the Law of Things. The Law of Obligations is a branch of the Law of Things in this classification, but it is treated in this book as if it were a main division of the law.

The Law of Inheritance, including the law relating to Wills is usually dealt with under the Law of Things by the Roman-Dutch jurists. But in view of the modern development of the law relating to wills and administration of estates of deceased persons, the subject will be dealt with separately.

All deviations from the normal type are not considered under the Law of Persons for when the deviation is not of a far-reaching character it will not be treated as founding a special status.

(*c*) Hol.

CHAPTER II.

PERSONS.

9. The term person is applied to any individual entity capable of rights, that is to say, capable of being the owner of, or of exercising rights over property, and of having and enforcing claims against others. Entities capable of rights are as already observed either normal or abnormal persons. It thus becomes necessary in considering the applicability of the law on any subject to ascertain the status of the person concerned. The most important type of abnormal persons are juristic or artificial persons, who are aggregates of human beings or of property which are treated by law for certain purposes as if they were individual human beings. Among natural persons abnormal status may be referred to many causes. The most important of these causes are:—Nationality, Residence or Domicil, Race or Community, Minority, Coverture, and Sex. An alien has an abnormal status by reason of his nationality, a Sinhalese residing permanently in England acquires a status differing from his original status by reason of his residence or domicil. A Muslim has a status differing from the normal type in Ceylon by reason of his religion and a Kandyan Sinhalese by reason of his race or community. A Jaffna Tamil residing in the Northern Province has a status by

reason of his community and may acquire a different status by ceasing to be an inhabitant of that Province. The rights of a person may further be affected by the person being a married woman or minor. We shall first deal with Natural Persons—(when personality begins and when it ends)—and then deal with the causes which give rise to abnormal status.

CHAPTER III.

NATURAL PERSONS.

BEGINNING OF PERSONALITY.

10. According to modern ideas every human being is capable of rights. The capacity for rights begins with the completion of birth (*a*).

The question as to what constitutes birth is of some importance.

11. It has been carefully considered by English lawyers in reference to the charge of child murder; if the child has not been born the charge of murder cannot be sustained.

It is of importance in cases of testate and intestate succession:—A leaves property to B's children if he have any and their next-of-kin after them; if B leaves no children the property is to go to C a stranger. A child is born to B and dies immediately thereafter. The property goes not to C but to the persons who would have been next-of-kin, to B's child had it lived (*b*).

Birth.

12. The main circumstance which constitutes birth is complete separation from the mother; but the division of the navel string is not necessary (*c*). It is immaterial by what means the separation is effected; consequently a child cut out of the mother's womb after her death, if it live but for a second is held to have been born for all legal purposes, although as far as regards the mother she cannot be said to have brought it forth (*d*).

(*a*) Sch. 18.
(*b*) 1 Nath. 94.
(*c*) Mby 82.
(*d*) 1 Nath. 94.

13. The foetus must have assumed human shape (*e*).

At the time of Grotius, those only were considered to be born who had a body capable of containing "a reasonable soul." Hence monstrosities were not regarded as persons, and it used to be the custom to smother them immediately at birth (*f*)

A *lusus naturae*, says Voet, if it has in the main the human form, is to be reckoned among lawful offspring, but monsters in which the human form is not easily distinguishable are not to be so reckoned. The destruction of these would appear to have been approved and permitted (*g*).

The child must also be born alive (*h*); A child still-born is not considered to have been born at all (*i*).

Still-Born Children.

14. Still-born children are registered in the register of deaths only, and the non-registration of the birth of a child whose death is registered is *prima facie* evidence of the fact that the child's birth was not completed (*j*).

Continuance of life after birth.

15. It is not necessary that the child should continue to exist for any period (*k*).

The question whether there should be any requirement of vitality beyond the bare survival after the child has left the body of its mother and the acquisition of the external human shape has been much discussed by

(*e*) Mby 82.
(*f*) Gr. 1 3 5.
(*g*) Voet 1. 6. 18.
(*h*) Mby 82.
(*i*) 1 Nath. 94.
(*j*) Sch. 18.
(*k*) I. Nath. 94.

German jurists, but their opinions are based to a large extent upon the authority of the Roman Law (*l*). There has been some disposition to make it essential for the attainment of personality that the child should have cried, but the Code of Justinian expressly declares that this is not requisite, and modern jurists generally take the same view (*m*).

16. There has always been great difficulty in getting an exact account of the condition of a child dying immediately after its birth, and not very carefully examined by any skilled person. An attempt has been made to meet this difficulty by a rule that every child born prior to the 182nd day after conception, should be presumed incapable of living, and therefore of becoming a person. The Roman Law does not (as has been supposed) countenance any such presumption; and it is open to the very strong objection that it necessitates for its application a determination of the date of conception with an accuracy which is very rarely attainable (*n*).

Unborn children.

17. The unborn are regarded as persons in so far as it may tend to their benefit, but not to their disadvantage (*o*).

Vander Keessel says:—Children yet unborn are considered as already born, whenever their interests are in question, and they may therefore succeed *ab intestato*, though they may not have been conceived at the time the person whose succession is in question died (*p*).

(*l*) Mby 83. (*m*) Code 6. 29. 3. Mby 83. (*n*) Mby. 82.
(*o*) Gr. 1. 3. 4. (*p*) v.d.k. 45.

18. Although those still in the womb cannot, since they are unborn, be regarded as born, yet by a fiction of law they are regarded as already born when there is a matter which is of advantage to them. Inheritance as of right may be transferred to those yet to be born, and still in the womb, as well as to those already born (*q*).

Their portions by inheritance are reserved for them until they are born (*r*).

If the question be the benefit not of those in the womb, but of third parties, the fiction that unborn are considered as already born ceases. But if the unborn child cannot receive a benefit without a benefit accruing at the same time to another, the fiction of law holds good. (*s*).

(*r*) See Mby 81; I. Nath, 93. (*q*) I. Nath, 93.

(*s*) I. Nath, 93, 94.

CHAPTER IV.

NATURAL PERSONS

TERMINATION OF PERSONALITY.

Death.

19. The capacity for rights ceases with death. Some of the rights acquired and some of the duties undertaken by a person during his lifetime are transferred to the person or persons who are said to represent his estate, but a right to which the deceased was not entitled at his death cannot accrue to his estate. It is therefore frequently important to ascertain whether a person to whom a right would have accrued if he had been living at a particular moment, did actually live at that moment, and for such a purpose it is necessary to know at what precise moment his life came to an end. (*a*)

Proof of death. Registration.

20. An entry in the register of death is *prima facie* evidence as to the date of death. In the case of a death in a country where no register is kept other evidence must be produced. (*b*)

Persons not heard of.

21. A difficulty arises in the case of persons who have not been heard of for some time. Under the rules of Roman Law an untraceable person was not deemed to be dead before the lapse of a specified period from the time of birth which the glossators fixed at one hundred years. Under our law, the question

(*a*) Sch. 29. (*b*) Ord. 1 of 1895, S. 42.

Several persons dying at the same time.

whether the Court may authorise a presumption of death, does not depend upon the age of the party concerned, but upon the length of the period during which no news has been received. The Roman Law had certain rules as to the order in which several persons becoming victims to the same fatal accident were presumed to have died. If a father died in the same shipwreck with his infant child, the father was presumed to have survived such child, whereas, on the other hand, an adult child dying with his father in a similar way was presumed to have survived the father. The German Code establishes a presumption to the effect that persons who have succumbed to a common danger have died at the same moment. The effect of this is that neither person can become entitled to any right in the estate of the other as his survivor. (*c*)

Presumptions.—Roman-Dutch Law.

22. Under the Roman-Dutch Law there exist certain presumptions of law as to death (*d*):—The presumptions are invoked when there is a question as to the death of two persons who are either entitled to succeed each other, or where one of them derives some right in the property of the other if he survives him, and when from the circumstances attending their death it cannot be proved which of them first died. (*e*) The presumption of survivorship is chiefly applied in the case of succession between parents and children, that construction being adopted which is most favourable to those who would succeed according to the course of nature.

(*c*) Sch. 31. (*d*) 3 Nath 1943, para 1927. (*e*) Voet 34. 5. 3.

Thus if father and son die in the same accident or same calamity, the son is presumed to have survived the father (*f*) but if the son or daughter has just attained puberty, the father, by reason of his greater strength and presence of mind, is presumed to have survived the child (*g*). Generally, the parent is presumed to have survived the child who has not attained puberty (*h*). Where father and son die in different places, the latter is presumed to have survived. If they were together in one shipwreck, the person who is shown to have been last seen is presumed to have lived longer (*i*).

If children, of either sex, die with their mother, the latter is presumed to have died first, if the children had attained puberty. But if the children were under puberty, the mother is presumed to have been the survivor (*j*). If a brother and sister both perish together, the weaker must be deemed to have died first (*k*). Whether the brother or the sister is the weaker will depend on the circumstances. In case of collaterals, there is no definite presumption; and the burden of proof will be on the person claiming under the collateral who he asserts was the survivor (*l*). In cases where there is a question whether ascendant or descendant was the more fitted to survive, the presumptions previously stated

(*f*) Dig. 34, 5, 9, 4, 5, 2, 15.
(*g*) Dig. 34, 5, 9, 13, 23; 23, 4, 26.
(*h*) Dig. 34, 5, 9, 1, 22, 23.
(*i*) Dig. 34, 5, Sec. 3.
(*j*) Stryk., Dis. 10, C. 2, No. 19.
(*k*) Stryk., Diss. 10, C. 3, 1, 2.
(*l*) Stryk., Diss. 10, C. 3, No. 7.

are rebuttable by evidence to show that in fact one or the other, from his or her physical condition, was the less likely to survive.

The foregoing principles are applicable in the case of succession *ab intestato*. In testate succession a different principle prevails, the rule being that the claimant must prove his title to that which he claims (*m*).

Evidence Ordinance.

23. The following rules are laid down in Sections 107 and 108 of our Evidence Ordinance:—

When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Provided that, when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

24. The two presumptions are conflicting, and the circumstances might be such that both presumptions were raised. Which is to prevail ? In such a case, the presumption of death would prevail. For example, if A, the plaintiff, says that X is alive, and upon this assertion claims the judgment of the court, A must prove the truth of this assertion. In order to do so, A gives evidence that X was alive 29 years ago. If the judge believes this evidence and nothing more appears, he will, be bound to find that X is alive. But B may

(*m*) 3 Nath. 1943. Sec. 42.

give evidence that X has been absent for seven years and so get the benefit of the presumption described in S. 108. Of course, it would do just as well if B were to prove that X was born 120 years ago, so that, according to the common course of natural events, he could not be alive now (S. 114); or, he may prove that two years ago X went to sea in a ship, which has not since been heard of. But, in all this, there is no shifting of onus whilst the evidence is being taken.

Section 108 makes provision for the question whether a man is alive or dead, that is, whether he is alive or dead when the question is raised, not whether he was alive or dead at some antecedent date; the law raises no presumption as to the time of his death, and the presumption that may, in certain circumstances, be raised, is a presumption that the man is dead when the question is raised, and not a presumption that he was dead at some antecedent date (*a*).

Section 108, according to its terms, does not require that the courts should hold the person dead at the expiration of the seven years therein indicated but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it (*b*).

Declaration of death.

25. Where an application was made by a woman for a declaration that her husband who had not been heard of for ten years was

(*a*) Mark Ev. p. 84, Sanjiva Row. 1402. 35 Cal. 25; Sanjiva Row. 1403.

(*b*) 8 Bom. L. R. 226. (229) San, 1403.

dead, it was held that our courts had no jurisdiction to grant such a declaration (*c*).

De Sampayo J. said: This application is entirely misconcieved. It is supposed to have been in pursuance of Section 108 of the Evidence Ordinance, which is merely laying down a rule of evidence that, if a husband is absent for a certain period without any information as to his whereabouts, for certain purposes his death may be presumed. But nowhere is there any provision laying down the procedure for obtaining a declaration of Court. The only way that the Section of the Evidence Ordinance can be availed of is by repelling any charge of bigamy that may be made against her if she marries again.

Though a separate action for a judicial declaration of death may not be provided for in our forms of procedure, as it is in some other systems of law, our courts are often called upon to make a judicial declaration of death when the question arises as an issue in another action or legal proceeding. Such adjudication is necessary not only to provide for the administration of the absent person's property and the devolution of his succession, but in regard to all rights and juridical relations the regulation of which depends on proof of death.

Presumption as to time of death.

26. There is a presumption of death after a certain interval (seven years); but none as to the time of death. If, therefore, anyone has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that, because a person was alive in 1877, therefore he was alive in 1878 (*d*).

(*c*) In *re* Ratnayake, 23 N. L. R. 191.

(*d*) 23 Bom, 296 (306), 8 All, 614 (620).

27. "In the Civil Law, the presumption of life ceases at the expiration of 100 years from the date of birth; and the same rule appears to have been adopted in Scotland. In England, however, no definite period has been fixed, at the end of which the presumption of a continuance of life ceases." Tay, Ev. 10th Ed., S. 198. P. 192.

A plaintiff, suing in ejectment, tendered, in proof of his title, a settlement 130 years old, by which it appeared that the party, through whom he claimed, had four elder brothers. The jury were directed to presume, not only that these persons were dead, but, in the absence of all evidence to the contrary, that they had died unmarried and without issue. *Doe* v. *Deakin*. 8 B & C. 22. *Doe* v. *Wolley*, 3 C & P. 402. see also *Greaves* v. *Greenwood* 2 Ex. D. 289 (C.A.); Tay. Ev., 10th Ed., S. 198. P. 193.

A deposition taken 60 years before, was held to be inadmissible in evidence, in the absence of any evidence of search having been made for the deponent, or any account of him, on the ground that there was no presumption of his death. Tay. Ev., 10th Ed., S. 199 P. 193.

Death is presumed, not as a matter of law, but of probability, before the seven years, in the Probate Court.

Presumptions —English Law.

28. **Presumptions under English Law.**—With regard to human life, there is no presumption of law by which the fact that a particular person was alive on a given date can be established, it being in every case a question of fact for the jury or judge sitting as such†.

As to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive (*a*) and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption

† See 13 Hals. page 500, sec. 692.

(*a*) *Prudential Assurance Co.* v. *Edmunds*, (1877). 2 App., Cas. 487.

that he is dead (*b*). There is no legal presumption, however, either that he was alive up to the end of that period (*c*), or that he died at any particular point of time during the seven years (*d*). And if it be necessary to establish that a person, who, after the lapse of seven years, is presumed to be dead, died at any particular date during that period, this must be proved as a fact by evidence raising that inference, *e.g.*, that when last heard of he was in bad health, or exposed to unusual perils, or had failed to apply for a periodical payment upon which he was dependent for support (*e*). While, where a party's case depends on establishing that a given person, who is presumed to be dead, was alive or dead at a particular time within the seven years' period, and there is no evidence at all on the subject, success or failure depends on the incidence of the burden of proof (*f*).

Presumptions under English Law.

A Legatee, for example, now presumed to be dead, may have disappeared less than seven years before the death of the testator, and no evidence may be forthcoming as to the date of his death. The party, then, on whom lies the burden of proving either that the legatee died before, or that he survived, the testator will fail to make out his case. See *Thomas* v. *Thomas*, (1864) 2 Drew. & Sm. 298. *Re Phene's* Trusts (1870) 5 Ch. App. 139.

It seems, however, that where a settlement contains a trust for a person named, that person must, in proceedings based on the

(*b*) *Will* v. *Palmer*, (1904) 53 W.R. 169; *Re* Bowden (1904) 21. T. L. R. 13.

(*c*) *Nepean v. Doe.* 1837 2 M. & W. 894.

(*d*) 13. Hal. 500.

(*e*) *Webster* v. *Birchmore* (1807) 18 Ves 362. *Hickman* v. *Upsall* (1875) L. R. 20 Eq. 136.

(*f*) *Re* Walker, (1871) 7 Ch. App. 120. *Re* Benjamin (1902) I ch.723.

trust, be taken, until the contrary is shown, to have been in existence at the date of the settlement. (*g*).

The presumption of death, it is to be observed, will *not arise in the mere absence of evidence with regard to the person whose life is in question*, for, when it has been shown that he was alive at some particular date, it is open to the jury to find that he continued alive, unless there is sufficient reason for the presumption of death coming into force. (*h*).

English Law. Presumptions

Once, however, this does come into force, then, although the presumption does not fix the date of death, yet it raises a legal inference that such person died at some date within that period and so displaces any presumption of fact that life continued for the whole of the seven years (*i*).

The presumption of death, however, even where it arises, is not always applied in a uniform manner. Thus, in an action by a lessor, or reversioner, to recover an estate dependent on a life, the presumption of the death of the *Cestui que vie* will arise on the mere proof of his absence for seven years while, where an application for the payment of funds out of Court is made upon presumption of death, advertisements for the missing person must have been issued, in addition to the making of proper inquiries. *Re* Allin's Lunacy, (1867). 17 L. T. 60. On the other hand, as against the Commissioners for the reduction of the National Debt, death will not be presumed at all, but must be proved by evidence. 13 Hals, 502.

The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion; and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends. (*k*)

Watson v. England (1844) 14 Sim. 28 (A girl of seventeen ran away from home, four years later, she wrote to her sister that she was going abroad. Nothing more was heard of her. No ground for the presumption of death after seven years.)

(*g*) *Re* Corbishley's Trusts, (1880). 14 Ch. D. 846.

(*h*) See *R.* v. *Willshire*, (1881) 6 Q. B. D. 366.

(*i*) 13. Hals. 502.

More recent decisions, however, appear to throw doubt on this restriction.

Williams v. *Scottish Widows Fund Life Assurance Society.* (1888), 52. J. P. 471.

Wills v. *Palmer* (1904), 53, W. R. 169.
(in each of which cases the death was presumed after seven years' absence of a man, who, under the circumstances, was not likely to communicate with friends.) 13. Hals, 502.
Frances v. Andrews, (1850). 15 Q. B. 756.

Where several persons perish in the same disaster, there is, in the absence of evidence on the point no presumption as to the order in which they died, or that they died at the same time. The *onus probandi* lies on the party who asserts survival, or concurrent decease, or pre-decease (*j*). Where legal rights, dependent on the fact, or date, of the death of a person have to be adjudicated, and such fact or date cannot be determined on evidence or presumption, and the question cannot be solved by the incidence of the burden of proof, the Court will make the best order that it can in the circumstances (*k*). With regard to trustees, it has been held that they must guide themselves by the presumption of death, in the same manner as a court of law would do (*l*).

(*j*) *Wing v. Angrave*, (1860), 8 H. L. Cas 183, *Barnett v. Tugwell*, (1862), 31 Beav. 232.

(*k*) In *re* Walker, (1909), P. 115; 13 Hals. 503.

(*l*) *Dobson v. Pattinson*, (1857), 3 Jur. (N.S.) 1202.

CHAPTER V.

JURISTIC PERSONS.

29. Juristic persons are such groups of human beings or masses of property as are in the eye of the law capable of rights and liabilities, in other words, to which the law gives a status (*a*). The rights of a natural person die with him. But the public interest requires particular rights to be kept on foot and continued for the advancement of religion, learning, commerce, charity or other object of public utility (*b*). To secure this it has been found necessary to constitute certain abstract bodies or artificial persons who may maintain a perpetual succession and enjoy a kind of legal immortality. Such bodies being creatures of the law and being invested by it with legal capacity or personality are called juristic persons (*c*).

Juristic Persons.

30. A juristic person is generally an aggregate of natural persons, but there is no difficulty in creating an imaginary person which does not contain any real person. Thus under the Roman law there was an interval between the death of a person and the assumption of the inhertance by his successor. During this period the Roman lawyers found it very inconvenient that there should be no one to represent the estate; accordingly they made the estate itself into an imaginary person.

(*a*) Holl. 96. (*b*) Aru. 30. (*c*) Aru. 30.

This estate was treated in Roman law as capable of increase and diminution and even of contracting by means of a slave comprised in it, as if it were a person. So in order to have some person who could represent the claims of the public they created another imaginary person called the *fiscus* or treasury.

Corporation aggregate.

31. A corporation aggregate has been defined as a collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the designs of its institution, or the powers conferred upon it either at the time of its creation or at any subsequent period of its existence (*d*).

32. An essential element in the legal conception of a corporation is that its identity is continuous, that is, that the original member or members, and his or their successors, to infinity are one. Thus where a liability or obligation is once binding on a corporation whether sole or aggregate it will bind the successors even though they be not expressly named. The nature of a corporation may be shown by contrasting it, as a legal conception,

(*d*) 8. Hals. 301.

with the individuals or mass of individuals in which it resides. In law the individual corporators, or members of which it is composed are something wholly different from the corporations itself; for a corporation is a legal *persona* just as much as an individual. If a man trusts a corporation, he trusts that legal person and must look to its assets for payment; he can only call upon individual members to contribute in case the Act or Charter creating the corporation has so provided. After the dissolution of corporation, the members in their natural capacities can neither recover debts which are due to the late corporation nor be charged with debts contracted by it (*e*).

English Law.

33. The law to be administered in this Island on all questions or issues which may have to be decided in this Colony in respect of the law of joint stock companies, and corporations, is the same as would be administered in England at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case, other provision is made by any ordinance.

34. Accordingly in Ceylon the English Acts, apply so far as they are not inconsistent with local legislation, and it would seem so far also as local circumstances render the application of the English law possible. How far individual cases satisfy this condition will have to be decided by the courts in each case as the question arises (*f*).

(*e*) 8. Hals. 302, 303.

(*f*) 1 Aru. 91.

35. A corporation ought to have a place of foundation—that is, to belong to some definite locality (*g*).

36. **Creation of Corporations.**—Artificial persons are created by a charter granted by the executive authority in a state, or by a special statute passed by the Legislature, or by virtue of general statutes which prescribe the conditions under which voluntary associations may acquire a corporate character (*h*). Natural persons and bodies-politic may be incorporated. One corporation may be made out of another corporation. The same body of persons may constitute at the same time any number of different corporations having different objects. Two or more corporations may be united so as to form a new corporation, or so that one is absorbed into the other, in each of which cases the new or the continuing body, as the case may be, will succeed to the rights and obligations of the corporation so united or absorbed (*i*).

37. A corporation is not invalid merely because at the moment of its creation it does not in fact exist, so long as it is capable of coming into existence. Where the corporation consists of a head and members they may be appointed after the foundation (*j*). A charter of incorporation is of no effect until it is accepted by those to whom it is granted. In the absence of any authoritative method of acceptance being stated, acceptance is a question of fact to be determined by the evidence in

(*g*) 8. Hals. 311. (*h*) Hol. 336.
(*i*) 8 Hals. 313. (*j*) 8 Hals. 313.

each particular case. As a general rule the acceptance of a charter, whether original or otherwise, is proved by evidence of acts done under it (*k*).

Number of members.

38. No special limits are placed upon the number of members composing a corporation aggregate, provided that the number is definite or capable of being ascertained. There must, however, be at least two members and the minimum number of members is in some cases increased by statute, as in the case of joint stock companies, and co-operative societies. In the case of an association having for its object, the acquisition of gain, incorporation may be made by registration under the law in force regarding such associations.

39. No company, association, or partnership consisting of more than twenty persons can carry on any trade or business, having for its object the procurement of gain to the company, association or partnership, or to the individual members thereof, unless it is registered as a company (*l*).

40. Seven or more persons associated for any lawful purpose, may by subscribing their names to a memorandum of association and otherwise complying with the requirements of Ordinance No. 4 of 1861 in respect of registration and incorporation, procure themselves to be formed into an incorporated company with or without limited liability.

(*k*) *R.* v. *Hughes* 7 B & C 708, 8 Hals. 317.
(*l*) Ord. No. 4 of 1861.

Trusts Ord.

41. Under the Trusts Ordinance the Governor in Executive Council, may in his discretion, by Order-in-Council, on the application of the trustees of any charitable trust or of any public or private association (not being an association for the purposes of gain) authorise the incorporation of the said trustees and upon the publication of the said order of the said trustees of the charity or association and their successors for the time being, shall be constituted a corporation under such style and subject to such conditions as may be specified in the order (*m*).

42. Under the Societies Ordinance the following societies only may be registered as corporations:—

Societies Ord.

(*a*) Societies established for the object of promoting thrift, of giving relief to members in times of sickness or distress, of aiding them when in pecuniary difficulties and for making provision for their widows and orphans.

(*b*) Societies for any purpose which the Governor, with the advice of the Executive Council may by notification in the "Government Gazette" authorize as a purpose to which the powers and facilities of the Ordinance ought to be extended.

No society can be registered under the Ordinance which does not consist of seven persons at least, and has not a subscribed capital of at least ten thousand rupees.

(*m*) Ord. No. 9 of 1917 Sec., 114.

43. A society which has for its object the promotion of the economic interests of its members in accordance with co-operative principles or a society established for the purpose of facilitating the operations of such societies may be registered under the Co-operative Societies Ordinance (*n*). Societies registered under the Ordinance are bodies corporate (*o*). Their rights and liabilities are specially defined in the Ordinance. No society can be registered under this Ordinance unless there are at least ten members.

44. No company or partnership consisting of more than six persons can carry on the business of banking unless incorporated and registered as a banking company (*p*).

A Municipal Council under Ordinance No. 6 of 1910, Sec. 6 is a body corporate; but the Local Boards Ordinance 1898 does not expressly incorporate Local Boards. The powers given to the Local Boards are the same as those possessed by corporations by reason of their incorporations, and they can sue and be sued by the name of "Local Board of Health and Improvement." Local Boards are therefore corporations by implication of law. Under Ordinance No. 11 of 1920 District Councils are Corporations (*q*).

45. **Dissolution.**—A corporation may be dissolved (*a*) by a legislative enactment; (*b*) in case of a corporation created by charter or letters patent:—by revocation of the charter or

(*n*) Ord. 34 of 1921. (*o*) Sec. 17.

(*p*) Ord. 2 of 1897, Sec. 3. (*q*) Sec. 10.

letters patent; (*c*) by the unanimous resolution of a corporation, ratified by the State; (*d*) in the case of a chartered corporation, by the surrender duly enrolled of the charter; (*e*) by the natural death of all the members of the corporation; (*f*) by the loss of any integral part of it without power of renewal; or (*g*) in the case of a registered company, by an order of court or other statutory formality.

Dissolution of corporation.

46. A corporation may without the consent of its members be dissolved by legislative enactment or revocation of charter or letters patent; (*a*) when the corporation violates the conditions under which permission was granted for its creation; (*b*) when it abuses the powers vested in it; (*c*) when it carries on undertakings not within the scope of its object; or (*d*) when it does acts which imperil the public weal. Upon the dissolution of a corporation its property devolves on the persons designated by the instruments of its incorporation. Failing such designation, the lands and other real property devolve on the person, if any, who granted them to the corporation or on his heirs and the personal property on the Crown. Failing such grantor or heirs (*a*) the real property of a corporation which has not for its object the acquisition of gain may be assigned by the unanimous resolution of a general meeting and with the permission of the Crown to a public purpose as near as possible to the object of the corporation; (*b*) the real property of a corporation, which has for its object the acquisition of gain passes in

equal shares to those corporators who are alive at the time of the dissolution.

47. A corporation is not necessarily dissolved by parting with all its property (*r*).

Abuse of powers by corporations.

48. A corporation may be dissolved by forfeiture for either misuse or abuse of its powers and privileges and there is a tacit or implied condition annexed to all grants of incorporation to trading companies that the grant shall not be misused or abused, and that, if it is, the charter or franchise is forfeited (*s*). Where a corporation is unable by the reason of the reduction of the number of its members to do what is necessary for the continuance of its existence, or for carrying out the obejcts for which it was created, it will not be thereby extinguished or dissolved, but only suspended; so that on a grant of a new charter to the dormant body the revived corporation may sue in respect of rights which had accrued to it before the new grant. The existing members nevertheless continue to possess their former rights for their lives, but without power to perform the duties imposed upon them by the constitution. The corporation may, however, continue to exist for certain purposes such as the holding of property and the payment of creditors (*t*).

49. Where the charter of a corporation aggregate prescribes a time for the election or appointment of the head of the corporation and

(*r*) 8 Hal. 397.

(*s*) *Eastern Archipelago Co.* v. *R.* 2 E. & B. 856; 8 Hal. 397.

(*t*) 8 H. 399.

contains no provision for the old head continuing in office until a new head is chosen, the corporation will to that extent be dissolved if the head be not chosen by the prescribed time, and cannot afterwards proceed to an election. So, when an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no means of supplying that integral part, the corporation is dissolved, at least for certain purposes, and the Crown may revive all the rights which the corporation had and attach them to a new corporation. Where offices are vacant and a corporation cannot act for want of power to elect, the corporation is not dissolved, but is in abeyance or dormant and may be revived by grant of a new charter; and in such a case the revived corporation will succeed to all the rights of the dormant one.

50. Where a corporation has been dissolved, its members, in their natural capacities, can neither recover debts which were due to the corporation nor be charged with debts contracted by it. Personal privileges, however, granted to individual members of a corporation will not necessarily be destroyed by the dissolution of the corporation or the surrender of its liberties.

51. If a company carries on business with less than seven members for a period of six months after the number is so reduced, every person who is a member of a company during the time it carries on business after the six months shall be severally liable

for the payment of the whole debts of the company contracted during such time and may be sued for the same without the joinder in the suit of any other member (*u*).

Winding-up.

52. The winding-up of a company may be either by the court or voluntary. A company may be wound up by the court (1) if the company has by special resolution resolved that the company be wound up by the court, or (2) if the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; or (3) if the number of members is reduced to less than seven; or (4) if the company is unable to pay its debts; or (5) when three-fourths of the capital of the company have been lost or become unavailable (*v*).

53. In the event of a company being wound up, every present and past member is liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding-up, with the following qualifications, that is to say:— (1) A past member shall not be liable if he has ceased to be a member for three years and upwards or if it be a limited company, for one year and upwards, before the commencement of the winding-up; (2) a past member shall not be liable in respect of any debt or liability contracted after he ceased to be a member; (3) a

(*u*) Ord. No. 4 of 1861, Sec., 51.

(*v*) No. 4 of 1861 Sec., 75.

past member shall not be liable unless it appears to the court that the existing members are unable to satisfy the contributions required; (4) a member of a limited company shall be liable only up to the amount unpaid on his shares or on his guarantee; (5) a sum due to a member from the company may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves; (6) the representatives of a deceased contributory shall be liable in due course of administration to the same extent as he would be liable if alive (*x*).

Powers of.

54. A corporation has, subject to the instruments of its incorporation, all the powers and liabilities of a natural person so far as they are capable of being attributed to a juristic person, and is bound by the acts of its servants and agents according to the ordinary rules of agency. There are some acts of which an artificial person is obviously incapable, and there are others which the law will not recognise its capacity to perform.

55. When a corporation is duly created all incidents thereto attach as of course. Thus, as a general rule, though there is no express power conferred to purchase land or to sue or be sued, yet the corporation may so purchase, or sue or be sued, as fully as though all these necessary incidents had been expressly given. Similarly it may make leases and grants. The doctrine and ordinary rules relating to estoppel apply to corporations as

(*x*) Ord. No. 4 of 1861, Sec. 69-71, 73.

much as to individuals. A corporation is entitled to claim the benefit of, and is barred by the statues of limitation as much as a private individual (*y*).

56. There is a difference between a statutory corporation and a corporation which is not statutory. The former has such rights and can do such acts only as are authorised directly or indirectly by the statute creating it (*z*); the latter, speaking generally, can do everything that an ordinary individual can do, unless restricted directly or indirectly by statute (*a*). Acts indirectly authorised are such things as may fairly be regarded as incidental to, or consequential upon, those things which are expressly authorised (*b*).

How Contracts are entered into.

57. The form in which as a rule, an artificial person enters into a contract or otherwise performs a juristic act is according to English law, by the imposition of its seal, which has been described as the hand and mouth of a corporation; unless in the case of a trading corporation the act is incidental to carrying on the business for which it is incorporated, and in the case of a non-trading corporation when the act is of trivial importance, or of urgent necessity (*c*).

(*y*) 8 Hals. 356.

(*z*) *National Guaranteed Manure Co.* v. *Donald* (1859). 4 H. & N. 8.

(*a*) *A.-G.* v. *Manchester Corporation.* (1906). 1 Ch. 643. per Farwell, J. at p. 651.

(*b*) *Peel* v. *London and North-Western Rail Co.*, (1907). 1 Ch. 5, C. A.

(*c*) Holl. 343.

Religious corporations.

58. Section 21 of the English Companies Act 1862, which prohibits a religious corporation from holding more than 2 acres of land without the sanction of the Board of Trade, does not prevent a corporation registered under the Act from holding more than 2 acres in Ceylon (*d*).

Grants to corporation.

59. A grant made to a corporation by any other than its true name is void. An error in name will not however render a grant bad if the name given is sufficient to indicate the true intention of the grantor and to clearly distinguish the grantee from others (*e*).

60. A corporation aggregate with a head cannot make a grant, while the headship is vacant; for the functions of the corporation are suspended pending the appointment of a new head (*f*). Similarly a grant made to it whilst the headship is vacant is void (*g*).

61. **Legal Proceedings by or Against Corporations.**—Any corporation may institute legal proceedings. A corporation aggregate must sue in its corporate name unless it is specially authorised by statute to sue in some other name, as for instance the name of one of its officers (*h*). A corporation may as a general rule, be sued as though it were an individual. Thus it may be sued on implied contracts, as, for instance for money had and received, use and occupation of land or tenancy

(*d*) *The Baptist Missionary Society* v. *Jayewardene.* 20. N.L.R. 359.

(*e*) 8 Hals. 308.

(*f*) 8 Hals. 375. (*g*) 8 Hals. 372. (*h*) 8 Hals. 392.

from year to year and it may plead the Statutes of Limitations (*i*). A foreign corporation may sue in this country in its corporate name or by the name by which it is generally known in business in this country. But it must prove the fact of incorporation (*j*). Similarly, any foreign corporation may be sued in this country (*k*).

Torts.

62. A corporation aggregate is liable to be sued for any tort provided that the person by whom the tort is actually committed is acting within the scope of his authority and in the course of his employment on the corporation's behalf and the act complained of is not one which the corporation would not, in any circumstances, be authorised by its constitution to commit, thus an action will be against a corporation for conversion, for trespass, for wrongful distress, for assault (*l*). An action against a corporation for injury (tort) is recognized both under the English and Roman-Dutch law and is maintainable in Ceylon (*m*). In order to fix a corporation with liability, the relation of principal and agent, or of master and servant must be established between the corporation and the person who commits the tort in respect of the tort in question. It is not necessary to prove that the agent was appointed under seal or even that he was in any way formally appointed. Nor need express authority to commit the tort be proved. It is

(*i*) 8 Hals. 392. (*j*) 8 Hals. 393. (*k*) 8 Hals. 393.

(*l*) 8 Hals. 386.

(*m*) *Kandasamy* v. *The Municipal Council of Colombo.* 1. A. C. R. 90.

sufficient to show that there is an implied authority which is to be inferred from the nature of the agent's employment (*n*). A corporator can sue for any tort as for instance, the malicious presenting of a petition for its winding-up in the same way as an individual (*o*), except for torts of a purely personal nature (*p*). Thus it may sue for a libel affecting its property though not for a libel merely affecting personal reputation and it can maintain an action for a libel reflecting on the management of its trade or business, and this without alleging or proving special damage. The words complained of must attack the corporation in the method of conducting its affairs, must accuse it of fraud or mismanagement or must attack its financial position (*q*).

63. A corporation which is subject to the provisions of the Companies Acts, 1862-1900, loses its legal capacity by the commencement of proceedings for winding-up. But the liquidator of the corporation for the time being is entitled, subject to the provision of the Act, to administer the property and enforce the rights of the corporation.

64. A Joint Stock Company registered in England and carrying on business in Ceylon

(*n*) 8 Hals. 387.

(*o*) *Quartz Hill Gold Mining Co.*, v. *Eyre*, (1883). 11. Q. B. D. 674.

(*p*) *South Hetton Coal Co.*, v. *North-Eastern News Association.* (1894). 1 Q. B. 133. C. A. per Lopez, L. J. at p. 141.

(*q*) *South Hetton Coal Co.*. v. *North-Eastern News Association.*

under the management of a local manager is not a person absent beyond the seas within the meaning of the Prescription Ordinance (*r*).

A corporation which is not domiciled in England is, for the purpose of English Civil Law, a foreign corporation. *Carron Iron & Co.* v. *Maclaren*, (1855). 1. H. L. C. 436.

65. An attorney of a corporation appointed under a seal to sue for debts due to the corporation has the power to appoint a Proctor by a simple writing. *The Oriental Bank* v. *Corbet.* (1881) 4 S.C.C. 158. Is action by way of summary procedure under Chapter 53 of the Civil Procedure Code available to a corporation ? 9. S.C.C. 169.

The directors of a joint stock company registered in India under the Indian Companies Act, (1882) made a call in 1908 for the balance due on defendant's shares, but the defendant did not pay it. In 1911 an order was made for the compulsory winding-up of the company by the District Court of Tinnevelly (India). On October 9, 1912 the Court made order that the defendant should pay the balance due on his shares within four days of the service of the order. The defendant not having paid the amount, an action was instituted on October 7, 1915. It was held, that the claim was not barred by prescription. The ordinary liability of a shareholder to contribute his share of capital arises under the articles, but on a winding-up it is converted into a statutory liability under Section 61 of the Indian Companies Act, 1882.

The amount of contribution ordered by the Court can be recovered, though the claim on the basis of calls originally made by the directors may have been barred by limitation before the winding-up. *Sankara Ayar* v. *Becket.* (1906). 18 N.L.R. 494. According to the Articles of Association of a joint stock company, a shareholder had to pay Rs. 50-00 on application. The defendant sent a written application for one share (of Rs. 1,000), but he did not pay the sum to the company either on application or thereafter. It was held that the fact that the defendant did not pay the amount due on application for the share did not make the allotment to him invalid. The company was entitled to recover from the applicant the amount due on account of the share after allotment. *The Ceylonese Union Company* vs. *Vyramuttan.* (1916). 19. N. L. R. 250.

In the proceedings for the compulsory winding-up of a joint stock company incorporated under the Indian Companies Act, the District Court of Tinnevelly (India) settled the list of contributories, and ordered that the contributories (including defendant) should within four days after service of that order pay the amount of the contribution. Held, that the posting of the order to defendant, who was living in Ceylon, was not due service of the order. *Sankara Ayar* v. *VanderStraaten.* 19 N.L.R. 302.

(*r*) *Dodwell & Co. Ltd.* v. *John*, 20. N. L. R. 206.

66. **Corporation sole.**— *A corporation sole* is a body-politic having perpetual succession, constituted in a single person, who in right of some office or function, has a capacity to take, purchase, hold, and devise (and in some particular instances under qualifications and restrictions introduced by statute power to alien) lands, tenements, and hereditaments to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be, and mostly are periods in the duration of a corporation sole, occurring irregularly, in which there is a vacancy or no one in existence in whom the corporation resides and is visibly represented (*s*). A corporation sole is always some sort of officer, generally an ecclesiastical officer. Rights and duties are frequently attached to an officer for the purposes of his office only. When an officer vacates his office these rights and duties pass to his successors; and it being convenient to distinguish the rights and duties which attach to a man *jure propris* from those which attach to him *jure officii*, it is permissible to speak of the latter as attached, not to the man, but to his office (*t*).

67. The selection of persons who are styled corporations sole is a purely arbitrary one. The King is said to be a corporation sole, and so is a parson. But the Secretary of State for India is not so, nor is an executor; though there is at least as good reason why

(*s*) Grant, Law of Corporations, 1850. p. 626.

(*t*) Markby 89.

both these persons should be treated as corporations sole as a parson, and on an examination of the position of so-called corporations sole it will be seen that they are not really juristical persons, but only natural persons peculiarly situated as regards the acquisition and incurring of rights and duties. In the countries in which the ideas of Roman law have had a more direct influence, the distinction between a corporation sole and a corporation aggregate can have no meaning as Roman law looks upon a corporation as an entity independent of the individuals who contribute or manage its funds, or appropriate its income and profits. The name of a corporation is therefore always an impersonal name according to the continental conception; the parish, the city, the university owns property; the incumbent, the citizens, the members are merely managers or beneficiaries. The corporation is always one person, never an aggregate of persons.

68. In Ceylon it was held that the incumbent of a Vihare (*u*), the manager of the American Mission Schools (*v*), the Secretary of the District Court (*w*), were not "corporations sole." The creation and appointment by the Holy See of Rome, of an Archbishop in Ceylon, does not constitute him a corporation sole with perpetual succession (*x*). Certain persons have been created corporations sole by

(*u*) *Rattanapala* v. *Kewitiagala*, 2. S.C.C. 27.

(*v*) *Brown* v. *Venasitamby* 4. Tam. 147.

(*w*) *Moldrich* v. *Cornelis*, 14 N. L. R. 97.

(*x*) *Van Reeth* v. *De Silva*, 8. N. L. R. 97.

law, *e.g.*, the Roman Catholic Archbishop of Colombo (*y*), the Public Trustee (*z*). Whether an individual, who is also a corporation sole, is acting in his individual or in his corporate capacity, is a question of fact in each case (*a*). Unlike a corporation aggregate, a corporation sole, has a double capacity, namely its corporate capacity and its natural or individual capacity; so that a conveyance to a corporation sole may be in either capacity, according as he takes to him and his successors (corporate) or to him and his heirs (natural) (*b*).

(*y*) Ord. No. 19 of 1906.

(*z*) Ord. No. 1 of 1922.

(*a*) Dr. Bentley's Case (1726). 2 Str. 913.

(*b*) 8 Hals. 302.

CHAPTER VI.

ALIENS.

69. Nationality gives rise to an important variety of abnormal status. Every Sovereign State makes a distinction between its natural-born subjects and those who are aliens, by withholding from the latter certain rights and capacities enjoyed by the former. It is the exclusive right of every sovereign to determine to what extent those born out of its dominions shall participate in the privileges of its subjects (*a*). Every subject of our King, be he Sinhalese, Tamil, Chinese or Hottentot, though not of the same race, is of the same British nationality (*b*).

70. A British subject is a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted (*c*). An alien is a person who is not a British subject (*d*).

71. The following persons are natural-born British subjects, namely:— Natural-Born British subjects.

(a) Any person born within His Majesty's dominions and allegiance (*e*); and

(b) Any person born out of His Majesty's dominions whose father was, at the

(*a*) See 2. B, 86.

(*b*) *Mudyanse* v. *Appuhamy*. 16. N. L. R. 117.

(*c*) 4 & 5 Geo. Ch. 17 Sec. 27.

(*d*) 4 & 5 Geo. Ch. 17 Sec. 27.

(*e*) 4 & 5 Geo. Ch. 17. Sec. 1.

time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either:—

(i) his father was born within His Majesty's allegiance; or

(ii) his father was a person to whom a certificate of naturalization had been granted; or

(iii) his father had become a British subject by reason of any annexation of territory; or (iv) his father was at the time of that person's birth in the service of the Crown; or (v) his birth was registered at a British Consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August nineteen hundred and twenty-two (*f*);

(c) Any person born on board a British ship whether in foreign territorial waters or not (*g*);

Any person whose British nationality is conditional upon registration at a British Consulate ceases to be a British subject unless within one year after he attains the age of

(*f*) 11 & 12 Geo. Ch. 44. Sec. 1.
4 & 5 Geo. Ch. 17. Sec. 1.

(*g*) 4 & 5 Geo. Ch. 17. Sec. 1.

twenty-one, or within such extended period as may be authorised in special cases by regulations made under this Act (*h*):—

(i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act; and (ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.

72. Any person who, whatever the nationality of his parents, is born within the British dominions acquires British nationality at birth, and is a natural-born British subject. The son of French citizens, born in London or Calcutta, is from the moment of his birth a British subject. The only respect in which his position, in regard to nationality, differs from that of a son of English parents who is born in London is that he can, when he has attained full age, renounce British nationality, and by making a declaration of alienage, become thereupon in the eye of English law an alien, in other words, the son of aliens, if born in the British dominions, is as much a natural-born British subject as would be the son of British subjects born within the British dominions.

73. **Denization and Naturalization.**— The disabilities of aliens in the British dominions are removed, either partially by denization, or wholly by naturalization (*i*). Denization is conferred by the Letters Patent of the King,

(*h*) 11 & 12 Geo. Ch. 44. Sec. 1.
4 & 5 Geo. Ch. 17. Sec. 1.

(*i*) 2 B. 163.

and is a high and incommunicable branch of the royal prerogative. No previous residence or service with the Crown is required for it. It does not remove the alien's ineligibility to any office of trust, civil or military, or his incapability of taking any grant of land, etc., from the Crown (*j*).

Naturalization.

74. The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose and satisfies the Secretary of State—(*a*) that he has either resided in His Majesty's dominions for a period of not less than five years, or been in the service of the Crown for not less than five years within the last eight years before the application; and (*b*) that he is of good character and has an adequate knowledge of the English language; and (*c*) that he intends, if his application is granted, either to reside in His Majesty's dominions or to enter or continue in the service of the Crown. The residence required for this purpose is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application, except that, in the case of a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the requirements of this section as to residence are not to apply, and the Secretary of State

(*j*) 2 B. 163.

may in any other special case, if he thinks fit, grant a certificate of naturalization, although the four years' residence or five years' service has not been within the last eight years before the application. For the purposes of this section a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom (*k*).

Effect of Naturalization.

75. A person to whom a certificate of naturalization is granted is entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject.

76. The Secretary of State may in his absolute discretion, in such cases as he thinks fit, grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in the certificate that the grant thereof is made for the purpose of quieting doubts as to the right of the person to be a British subject, and the grant of such a special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject (*l*).

(*k*) British Nationality and Status of Aliens Act. 4 & 5 Geo. Ch. 17 Sec. 2 and (8 & 9 Geo. 5. C. 38), S. 2 (2). Hal. Sup. p. 76.

(*l*) Sec. 4.

77. Where an alien obtains a certificate of naturalization, the Secretary of State may, if he thinks fit, on the application of that alien, include in the certificate the name of any child of the alien born before the date of the certificate and being a minor, and that child thereupon, becomes a British subject; but any such child may, within one year after attaining his majority, make a declaration of alienage, and thereupon ceases to be a British subject (*m*).

78. **Colonial Certificates of Imperial Naturalization.**—The Government of any British Possession has the same powers as the Secretary of State to grant or revoke a certificate of naturalization, having the same effect as a certificate by the Secretary of State; in a Possession where any language is recognised as on an equality with the English language, the requirement of a knowledge of either the English language or that language is substituted for the requirement of a knowledge of the English language. In a British Possession other than one of the self-governing dominions, or India this power must be exercised by the Governor or a person acting under his authority, but is subject in each case to the approval of the Secretary of State, and any certificate proposed to be granted is to be submitted to him for approval (*n*).

Part II of the Act (relating to naturalization) does not, nor does any certificate of naturalization granted thereunder, have effect

(*m*) Sec. 5.

(*n*) 4 & 5 Geo. Ch. 17 Secs. 8 & 9.

within any of the Dominions, unless the Legislature of that Dominion adopts this Part of the Act.

79. Where the Legislature of any such Dominion has adopted this Part V of the Act, relating to Naturalization, the Government of the Dominion shall have the like powers to make regulations with respect to certificates of naturalization and to oaths of allegiance as are conferred by this Act on the Secretary of State.

80. Ord. No. 21 of 1890 as amended by Ord. No. 5 of 1922 makes provision for the naturalization of aliens in Ceylon. The certificate of naturalization issued under this Ordinance confers the privilege of naturalization within this Colony (*o*).

81. The Imperial Act, 1914, does not take away or abridge any power vested in, or exercisable by, the Legislature or Government of any British Possession, or affect the operation of any law at present in force which has been passed in exercise of such a power, or prevent any such Legislature or Government from treating differently different classes of British subjects.

82. The following are the main provisions of the Naturalization Ordinance (*p*):— **Naturalization Ordinance.**

(1) Any person whilst actually residing in Ceylon may apply to the Governor in Executive Council that the privileges of naturalization may be conferred on him.

(2) The application must state the applicant's age, place of birth, place of residence, profession, trade or occupation, the length of

(*o*) Sec. 5. See also Preamble.

(*p*) Ord. No. 21 of 1890.

time during which he has resided within the Island, that he is permanently settled in the Island or is residing within the same with intent to settle therein.

(3) The Governor in Executive Council may, with or without assigning any reason, grant or refuse such application, as he thinks most conducive to the public good, and no appeal shall lie from his decision.

(4) If such application is granted, the applicant, must within thirty days take the oath of allegiance.

(5) Letters Patent are then issued under the Seal of the Colony, granting to the applicant all the rights and privileges of a British subject, and thereupon the applicant is within the limits of the Colony, entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject. The applicant must supply stamps to the value of one hundred rupees for the Letters Patent. Where the Governor in Executive Council is satisfied that any such Letters Patent have been obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom such Letters Patent are granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Letters Patent will be cancelled.

83. **National Status of Married Women and Infant Children.**—The wife of a British subject is deemed to be a British subject and the wife of an alien is deemed to be an alien. Where a man ceases during the continuance of his marriage to be a British subject his wife may make a declaration that she desires to retain British nationality, and thereupon she is deemed to remain a British subject (*q*).

84. A woman who, having been a British subject, has by, or in consequence of, her marriage, become an alien, does not by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage become a British subject, does not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject (*r*).

85. Where a person being a British subject ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor ceases to be a British subject, unless such child, on that person ceasing to be a British subject, does not become by the law of any other country naturalized in that country (*s*). Where a widow who is a British subject marries an alien, any child of hers by her former husband does not by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not (*t*). Any child who has so ceased to be a British subject may, within one year after attaining his majority make a declaration that

(*q*) Sec. 10. (*r*) Sec. 11.
(*s*) Sec. 12. (*t*) Sec. 12.

he wishes to resume British nationality, and again become a British subject (*u*).

86. **Loss of British Nationality.**—A British subject who, when in any foreign state and not under disability by obtaining a certificate of naturalization, or by any other voluntary and formal act, becomes naturalized therein ceases to be a British subject (*v*). Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration ceases to be a British subject (*w*). Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration ceases to be a British subject (*x*).

87. **Status of Aliens.**—Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien in the same manner in all respects as

(*u*) Sec. 12. (*w*) Sec. 14.
(*v*) Sec. 13. (*x*) Sec. 14.

through, from, or in succession to, a natural-born British subject. Provided that this Section shall not operate so as to:—

(1) Confer any right on an alien to hold real property situate out of the United Kingdom; or

(2) Qualify an alien for any office or for any Municipal, Parliamentary, or other franchise; or

(3) Qualify an alien to be the owner of a British ship; or

(4) Entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; or

(5) Affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the twelfth day of May eighteen hundred and seventy, or in pursuance of any devolution by law on the death of any person dying before that day (*y*). No alien (not being a denizen) can acquire or hold a share in a British ship; nor can a natural-born British subject who has acquired a foreign nationality, and subsequently re-acquired British nationality, nor any naturalized foreigner, or denizen, unless he has, since his repatriation, naturalization, or denization, taken the oath of allegiance, and is either a resident within British dominions,

(*y*) Sec. 17.

or a partner in a firm actually carrying on business therein (*z*). An alien shall be triable in the same manner as if he were a natural-born British subject. Aliens may be admitted to the English Bar and to be notaries and to join other professions (*a*).

88. The test of enemy status is not nationality, but the place of carrying on business (*Porter* v. *Freudenburg*, *Kreglinger* v. *Samuel* and *Rosenfield*, *Re* Merton's Patents. (1925). 1 K. B. 857, C.A., followed in *Tingley* v. *Müller*, (1917). 2 Ch. 144. C.A. (arrival of alien enemy in enemy country after leaving England) see also *Re* Sutherland (Mary Duchess), *Bechoff David & Co.* v. *Bubna*, (1915), 31 T.L.R. 248 (subject of enemy State residing either in an allied State or in a neutral State and carrying on business in partnership with the subjects of an allied State in the capital of that State, held not an alien enemy). Halsbury's Supplement (1927). page 66.

The prohibition at common law of intercourse with an alien enemy is not limited to commercial intercourse or trading, but includes all intercourse which could tend to detriment to this country or to advantage to the enemy, and accordingly alien enemy shareholders have no right of voting in respect of shares in a British Company during wartime, and the employment of a British subject as proxy to exercise the voting power is a prohibited intercourse between him and the alien enemy (*Robson* v. *Premier Oil and Pipe Line Co., Ltd.* (1915), 2 Ch. 124, C.A.). Commercial intercourse is not confined to making contracts between an alien enemy and a British subject, and a transaction directed to obtain the control of a trading company is commercial. Halsbury's Supplement (1927). page 68.

89. Aliens can, in respect of occurrences happening outside British dominions and actionable by the *lex loci*, recover in English Courts against British subjects whether in contract or tort, unless the act complained of is an Act of State performed by an officer of the British Government, either by its orders or ratified by it, or unless the enforcement of the right would be against British public policy but for acts committed in time of peace in

(*z*) Merchant Shipping Act, 1894. Sec. 1.
(*a*) 2 B. 136.

British territory, this plea of "Act of State" is not available (*a*). An alien has no right enforceable by action to enter British territory (*b*). Foreign firms and partnerships are regarded for some purposes as quasi-corporations (*c*). Foreign corporations enjoy all the personal rights (not involving the question of authority to act here in their artificial character) which foreign individuals have; they may carry on business in their corporate name and they are liable to all the incidents of litigation in English Courts, *e.g.*, interrogatories (*d*).

90. The Civil Procedure Code makes the following provision as to actions by aliens and by or against Foreign Rulers (*e*):— Civil Procedure Code.

Alien enemies residing in Ceylon with the permission of the Governor, and alien friends, may sue in the Courts of this Island as if they were subjects of Her Majesty. No alien enemy residing in Ceylon without such permission, or residing in a foreign country, can sue in any of such Courts. *Explanation*:—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State, or of the Colonial Secretary of this Island, is for this purpose deemed to be an alien enemy residing in a foreign country. A Foreign State may sue in the Courts of this Colony, provided that:— Alien enemy.

(a) It has been recognised by Her Majesty; and Foreign State.
(b) The object of the action is to enforce the

(*a*) 2 B. 140.
(*b*) 2 B. 149.
(*c*) 2 B. 153.
(*d*) 2 B. 156.
(*e*) Sections 466-469.

private rights of the head, or of the subjects, of the Foreign State.

The Court must take judicial notice of the fact that a Foreign State has not been recognised by Her Majesty. Persons specially appointed by order of Government at the request of any sovereign, prince or ruling chief, whether in subordinate alliance with the British Government or otherwise and whether residing within or without the Island, or at the request of any person competent in the opinion of the Government to act on behalf of such prince or chief, to prosecute or defend any action on his behalf, are deemed to be the recognised agents by whom appearances and applications may be made or acts may be done on behalf of such prince or chief. A person so appointed may authorise or appoint persons to make and do appearances, applications and acts in any such action, as if he were himself a party to the action. Any such prince or chief, and any ambassador or envoy of a Foreign State may, with the consent of Government certified by the signature of the Colonial Secretary (but not without such consent) be sued in any competent Court. Such consent is not given, unless :—

(a) The prince, chief, ambassador, or envoy has instituted an action in such Court against the person desiring to sue him ; or

(b) The prince, chief, ambassador or envoy by himself or another trades within the local limits of the jurisdiction of such Court ; or

(c) The prince, chief, ambassador, or envoy is in possession of immovable property situate within such limits and is to be sued with reference to such possession or for money charged on that property. No such prince, chief, ambassador, or envoy can be arrested and no decree can be executed against the property of any such prince, chief, ambassador, or envoy, unless with consent of Government.

91. The position of aliens under the Roman law and the Roman-Dutch law may be briefly stated.

92. **Roman Law.**—The gradual extension of the rights of '*connubium*' and '*commercium*' with Roman citizens to the neighbouring Italian tribes is a well-known chapter of the history of Roman law. Gradually the State assumed jurisdiction over aliens by appointing, *circa.* 242 B.C. a second praetor specially charged with cases *inter cives et peregrinos* or *inter peregrinos.* Neither the native nor the foreign law being directly applicable, the *praetor peregrinus* recognised in his edict and enforced in the tribunals under his control such generally observed forms and customs as commended themselves by their simplicity and reasonableness. This supplementary body of law came to be known as the *jus gentium,* and was held to be applicable to all free men. It secured to the alien on Roman soil private rights so far as required by his residence and business relation there: a form of marriage valid for most purposes, though not producing all the effects of a Roman marriage; a special right of property protected by praetorian remedies; a system of contract embracing all except the old and specifically Roman forms. 2 Burge 87.

93. **Roman-Dutch Law.**—Persons were according to the place of their birth, divided into "Inheymen" natives or citizens and "Uitheymen" (Uitlanders), aliens or foreigners. "Inheymen" citizens were those who were born in the country where they lived. On the same footing with these "Inheymen" were placed all those who equally had to obey the same sovereign or provincial authority, that is to say those who were naturalized; those who though born outside the province, were children of a citizen who at that time of their birth was absent abroad on affairs of State, or in the service of either the East or the West India Company; and those who had been born of a mother who at the time of their birth was travelling beyond the limits of the country. "Uitheymen" aliens or foreigners were all those who were born outside the province, and who were not naturalized; persons who were subject to some other sovereign. Grot 1. 13. 1; V.D.K. 173; V.L. 1. 10. 2; 2 B. 89.

The disabilities of a foreigner in the province or town where he was residing were of a varied character. In early history they were numerous, but with commercial intercourse between towns and provinces most of the differences disappeared, were abolished or died out. 2 Burge. 90. Foreigners, not permanently residing in a town, could not always give evidence against "poorters" or burgers." The greatest difference, and one which has remained to the present day, was shown in the law of procedure. Foreigners without a residence within the limits of a town, province or country could, when dwelling in that town or province, be apprehended and imprisoned before action was brought or judgment obtained, for a debt due to a citizen, "burger," or "poorter." 2 Bur. 91.

The arrest was, however, confined to cases in which the creditor had a liquid claim against the foreigner. It could not be extended to other cases, as such extension would have led to the withdrawal of the foreigner from his natural judge without sufficient cause. 2 Bur. 91.

For the same reason it was a rule that an arrested foreigner could regain his liberty by giving security (*cautio*) that he would "enter appearance, defend and comply with the judgment." 2 Bur. 92.

Naturalizaton.—Letters of naturalization were granted by the sovereign power, that is to say in each province by the Provincial State, and in the countries belonging to the generality by the States-General. Grot 1. 13. 6; 2 Bur. 93. whoever was accepted by a town as "poorter" was no longer an alien in the province. In this way the Provincial States had not the sole distribution of naturalization 2 Burge. 93. Letters of naturalization simply granted to strangers did not confer on them the right of attaining to dignities. The advantages of letters of naturalization *ad honores* were greater, for thereby an opening was afforded to persons born out of Holland of acquiring most of the dignities of that country. V.D.K. 177.

CHAPTER VII.

DOMICIL.

94. A person who has otherwise the status of an ordinary normal citizen may nevertheless have an abnormal status by reason of his domicil, and what is law for the average citizen may not be law for him. For example, a woman who may inherit movable property if she had the normal status in Ceylon may not, if she had her domicil in India, be able to inherit the same. As in our country the question whether a stranger retains his domicil of origin or has acquired a Ceylon domicil has often to be answered, it is necessary to state here the principles and rules relating to domicil.

The law binds its own subjects only as long as they have their domicil in the place where they are subject to the law in question, for when they change their domicil and transfer it to another place, they are neither bound by the laws of their former domicil nor by its jurisdiction. 1. Nath. 36.

The law of the place of the domicil prevails to so great an extent in determining the status, capacities, and rights of persons, that it is necessary to ascertain what constitutes the domicil, how it is acquired and how it may be changed (*b*).

95. In modern civilisation, the element of residence has been largely substituted for that of nationality, and the law to which the individual is subject is now commonly regarded as the *lex domicilii*, or law of the country in Residence.

(*b*) 2 B. 43.

which he has fixed his home, rather than the *lex patriae*, or Law of the State to which he owes the allegiance of a subject (*c*).

Home.

96. The domicil of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country, which whether it be in fact his home or not is determined to be his home by a rule of law (*d*). A person's home is that place or country, either (i) in which he in fact resides with the intention of residence (*animus manendi*); or (ii) in which having so resided he continues actually to reside, though no longer retaining the intention of residence, or (iii) with regard to which, having so resided there, he retains the intention of residence though he in fact no longer resides there (*e*). The word "Home" denotes a merely natural and untechnical conception, based upon the relation between a person's residence and his intention as to residence (*f*). The term "domicil" is a name for a legal conception, based upon and connected with the idea of home but containing in it, elements of a purely legal or conventional character (*g*).

Whether a place or country is a man's home is a question of fact. Whether a place or country is a man's domicil is a question of mixed fact and law, or rather of the inference drawn by law from certain facts,

(*c*) See. 2 B. 25.

(*d*) 79, *Whicker* v. *Hume*, 1858, 28 L.J. (Ch.) 396, 400, *per* Lord Cramworth; 6 Hals. 182.

(*e*) Dic. 84. (*f*) Dic. 93. (*g*) Dic. 93.

though in general the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicil (*h*).

97. In England it is now established law that a clear distinction should be drawn between political rights, which are questions of nationality, and social rights, which are left to the circumstances of each person's private life to decide. In countries like the British Dominions and the United States where political systems comprise different countries subject to different systems of law, domicil seems to be an appropriate standard for determining capacity and status (*i*).

98. **Nature of Domicil.**—The relation created by domicil is one between a person and a locality and never arises from membership of a community as distinguished from the country in which the community resides. But the Municipal law of the country of domicil may itself distinguish between classes of its subjects, and apply different rules according to the caste or creed or other characteristic of a particular person, so that after the domicil has been ascertained, it may be further necessary to inquire into the caste or creed to which a person belongs before the particular rule which is applicable to his case can be known. But this rule is none the less an integral part of the territorial law of the country of domicil (*j*).

(*h*) Dic. 93. (*i*) 2 B. 29.

(*j*) See 6 H. 183 & 184. See also *Khan* v. *Maricar* (1913). 16 N.L.R. 425 at page 428.

98a. In a recent case where it was necessary for an English Court to decide what was the personal law of a British subject on the basis of the law of her nationality as the standard which was applicable to her by the law of the foreign state where she was domiciled, the two principles were combined, the Court holding that the national law of every British subject for international purposes is the law of England and that law applies the law of the particular person's domicil in the British dominions. In *re* Johnson, (1903). 1 Ch. 821. 2 B. 29.

99. The domicil of a person can always be ascertained by means of either:—

(1) a legal presumption or

(2) the known facts of the case (*k*).

Presumption.

A person's presence in a country is presumptive evidence of domicil (*l*). Residence in a country is *prima facie* evidence of the intention to reside there permanently and is in so far evidence of domicil (*m*). Residence in a country is not even *prima facie* evidence of domicil when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*n*). This principle of evidence must be carefully distinguished from the legal rules that every one retains his domicil of origin until another domicil is acquired, and resumes it whenever an acquired domicil is simply abandoned. These are simply conventional rules of law, resorted to in order to maintain the general principle that no person can be without a domicil (*o*).

(*k*) Dic. 136. (*l*) Dic. 137.

(*m*) *Munro* v. *Munro*, 1840. 7 Cl. and F. 842; The Harmony, 1800, 2. C. Rob. 322; Dic. 142.

(*n*) See *Jopp* v. *Wood*, (1865). 4. De G. J. & S. 616; *Urquhart* v. *Butterfield*, (1887), 37 Ch. D. (C.A.) 357; Dic. 144.

(*o*) Dic. 133.

100. *Every person has a domicil.*—For the purpose of determining a person's legal rights or liabilities, the courts will invariably hold that there is some country in which he has a home, and will not admit the possibility of his being in fact homeless or in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons, always be assigned to him by a presumption or fiction of law (*p*).

101. *Domicil of Origin is imposed on every person at birth* (*q*).—The domicil of origin is determined by the domicil at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in the life time of the father receives the domicil of the father at the time of the birth; a posthumous legitimate child or an illegitimate child receives that of the mother at that time (*r*). The domicil of origin of a foundling is the country where he is found (*s*). A legitimated child, though its domicil of origin may be that of its father or mother at the time of its birth, will take its father's domicil, at the time of its legitimation (*t*). The place of birth constitutes that which is termed the domicil *ratione originis*. This may not be the place in which the birth actually happened, as where the mother was delivered of the child on a journey (*u*); in which case his domicil will follow that of his father or mother as the case

(*p*) Dic. 94.

(*q*) 2 B. 46.

(*r*) 6 H. 184. 2 B. 48.

(*s*) 2 B. 49.

(*t*) 2 B. 49.

(*u*) 2 B. 48.

may be (*v*). The domicil of origin of a child born on the high seas is the domicil of his parents (*w*).

Domicil of Origin.

102. As to this domicil of origin, the following points require notice: First, the existence of a "domicil of origin" must be considered a fiction or assumption of law (*x*). The aim of the fiction which assigns to every one from the moment of his birth a domicil of origin is to insure that no man shall be at any moment without a legal home in some country, according to the laws of which country, his legal rights may be in many respects determined; but the rule that a child has from the moment of his birth, the domicil of his father, is clearly based upon fact, since an infant's home, is generally speaking, the home of his father (*y*). Secondly, the domicil of origin though received at birth need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance (*z*). The domicil of origin is that arising from "*a man's birth and connections*" *i.e.*, it is fixed by the domicil of the parent at the time of the child's birth (*a*).

Thus *D*, the son of an Englishman and a British subject is born in France, where his father is residing for the moment though domiciled without being naturalized in America. *D's* domicil of origin is neither English nor French, but American, Dic. 106.

(*v*) Dic. 106. (*w*) 2 B. 48.
(*x*) Dic. 105. (*y*) Dic. 106. (*z*) Dic. 106.
(*a*) *Somerville* v. *Somerville*, 1801, 5 Vesey. 749a, 786, 787. *per* Arden, M.R. Dic. 106.

103. *The domicil of origin continues until changed for a domicil by operation of law or domicil of choice, and reverts on their determination* (*b*). When a person is known to have had a domicil in a given country he is presumed, in absence of proof of a change to retain such domicil (*c*). The presumption of law is always against a change of domicil which must in every case be proved with perfect clearness by the person alleging it (*d*). A person's wish to retain a domicil in one country will not enable him to retain it, if in fact, he resides with the *animus manendi* in another (*e*). Any person not under disability may at any time change his existing domicil and acquire for himself a domicil of choice by residing in a country other than that of his domicil of origin with the intention of continuing to reside there for an indefinite time (*f*).

In a case where the domicil of origin was actually quitted, and a new domicil was acquired, but the latter was also abandoned with an intention of settling in another place, if the person found it suited his health, and if it did not, of returning to his domicil of origin and the person died before he had decided on that place, his domicil was held to be that of his origin. *Munroe* v. *Douglas*, (1820). 5 Madd at p. 384. Wharton S. 78. Savigny S. 354.

104. The domicil of origin may be retained owing to no domicil of choice being acquired *animo et facto* in spite of long residence abroad (*g*).

(*b*) 2 B. 46.
(*c*) Lauderdale Peerage Case, 10 A.C. 692; Dicey 39; Voet. 5. 1. 93, 99.
(*d*) See *Spencer* v. *Rajaratnam*, (1913). 16 N.L.R. at page 332. 6 H. 185.
(*e*) Dic 116. (*f*) 6 H. 185.
(*g*) *Douglas* v. *Douglas*, (1871). 41 L.J. Ch. 74. *Re* Patience, (1885). 29 Ch. D. 976. 2 B. 51.

105. Slighter evidence is required to establish an abandonment of a domicil of choice and reversion to domicil of origin, than to establish the acquisition of a new domicil, but for reversion to a domicil of origin it is necessary, as much as for acquisition of a new domicil, to show complete abandonment of the acquired domicil both *animo et facto* (*h*). The domicil of origin is never destroyed, but only remains in abeyance during the continuance of a domicil of choice; the domicil of choice, when it is once lost, is destroyed for every purpose (*i*).

106. A divorced woman retains the domicil which she had immediately before, or at the moment of divorce until she changes it (*j*).

107. The domicil of origin and the domicil of choice differ from each other in two respects: First, in their mode of acquisition; and secondly in the mode in which they are changed. Dic. 104. The precise difference in this matter between a domicil of origin and a domicil of choice may be seen from the following illustrations: (1). An Englishman whose domicil of origin is English, and a Scotchman whose domicil of origin is Scotch are both domiciled in England where the Scotchman has acquired a domicil of choice. They leave England together, with a view to settling in America and with the clearest intention of never returning to England. At the moment they set sail, their position is in matter of fact exactly the same; they are both persons who have left their English home, without acquiring another. In matter, however of the law, their position is different; the domicil of the Englishman remains English, the domicil of the Scotchman becomes Scotch. The Englishman retains his domicil of origin, the Scotchman abandons his domicil of choice and re-acquires his domicil of origin. If they perish intestate on the voyage, the succession to the movables of the Englishman will be determined by English law, the succession to the movables of the Scotchman, will be determined by Scotch law. The Englishman will be considered to have his legal home in England, whilst the Scotchman will be considered to have his legal home in Scotland. *Munro* v. *Douglas*, (1820). 5 Madd, 379.

(*h*) 2 B. 51. (*i*) 6 H. 184. (*j*) Dic. 136.

(2) *D's* domicil of origin was Scotch. He settled in England and acquired there a domicil of choice; he then abandoned England as his home and went to reside at Boulogne, without however intending to settle or becoming domiciled in France. It was held that under these circumstances *D* resumed his Scotch domicil of origin at the moment when he left England. *Udny* v. *Udny*, (1869). L.R. 1 Sc. app. 441. Dicey 123. *Bell* v. *Kennedy*, L.R. 1 Sc. App. 307.

108. *No person can have more than one domicil at the same time* (*k*). A person may have a residence in one place and a domicil in another, and that residence may often be sufficient to confer rights, or impose liabilities (*l*). It is from cases in which "residence" alone has been in question that the possibility of contemporaneous domicils in different countries for different purposes has suggested itself (*m*).

Thus *D*, though domiciled in France, can if present in England, be sued, in our courts. This fact has been expressed by the assertion that *D* has a forensic domicil in England,—an expression which certainly countenances the notion that *D* is for one purpose domiciled in England and for another in France. A forensic domicil however means nothing more than such residence in England as renders *D* liable to be sued; the co-existence therefore of a forensic domicil in one country, and of a *full domicil* in another, is simply the result of the admitted fact that a person who resides in England may be domiciled in France. and does not countenance the idea that *D* can in strictness be at one and the same moment domiciled both in France and in England. Dic. 100. A person within the operation of the Domicil Act 1861. (24 & 25 Vict. c. 121) may have one domicil for the purpose of testate or intestate succession and another domicil for all other purposes. See also 6 H. 194 & 193. (paras 296 & 297). A person can have more than one domicil (according to Savigny, viii. S. 354) if he uses the several places alike as centres of his connections and affairs and distributes his actual residence among the places according to need. 1 Dig. 11. See also Voet. (5. 1. 92).

109. *Domicil by operation of law is acquired by dependent persons* (*n*). The domicil of every dependent person is the same as and changes if at all with the domicil of

(*k*) 2 B. 46. (*l*) Dic. 100.
(*m*) Dic. 100. (*n*) 2 B. 46.

the person on whom he is, as regards his domicil, legally dependent (*o*).

The domicil of an infant cannot be changed by any act of his own, but it may in some cases, be changed by the act of the person on whom he is dependent (*p*). The domicil of a legitimate or legitimated infant follows any change in the domicil of the father if living (*q*). If the father is dead, the infant's domicil does not necessarily follow a change in the mother's, but whenever the mother changes her own domicil, she may change that of the infant (*r*). The exercise of this power is only effectual where it is for the benefit of the infant that his domicil should be changed, and the power cannot be exercised where the infant is a ward of court residing out of the jurisdiction by permission. It is not lost by the mother's re-marriage (*s*). The mother of an illegitimate infant has the same power of changing his domicil when she changes her own. If an illegitimate infant is legitimated he takes the domicil of his father (*t*). In the case of a child who has lost both parents it is doubtful if his guardian or tutor has the power of changing his domicil from what it was at the death of the surviving parent (*u*). Even if a guardian can in any case change the domicil of his ward, yet the domicil of a child living with his mother, whilst still a widow will be

(*o*) Dic. 124.
(*p*) 6 H. 191.
(*q*) 6 H. 191. Dic. 125.
(*r*) 6 H. 191.
(*s*) 6 H. 191.
(*t*) 6 H. 191.
(*u*) 2 B. 59. 6 H. 191. Dic. 125.

that of the mother and not of the guardian (*r*). The change of a minor's home by a mother or guardian does not if made with a fraudulent purpose, change the minor's domicil (*s*). It is only during the mother's widowhood that she can change the domicil of her infant. The domicil which she acquired on her second marriage would not become that of the infant but his domicil could continue to be that which the mother possessed previously to her second marriage (*t*). The domicil of a minor is not changed by the mere re-marriage of his mother (*u*). By the Indian Succession Act 1865, the domicil of a minor which follows the domicil of the parent from whom he derives his domicil of origin, does not change with that of his parent if the minor is married or holds any office or employment in the service of the Crown, or has set up with the consent of the parent in any distinct business; otherwise a minor cannot acquire a new domicil (*v*). A minor, cannot (it would seem) acquire a domicil for himself by marriage (*w*). Where there is no person capable of changing a minor's domicil, he retains, until the termination of his minority, the last domicil which he has received (*x*). The last domicil which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his

(*r*) Dic. 127.
(*s*) 2 B. 58 & 59. Dic. 131.
(*t*) 2 B. 57.
(*u*) Dic. 125.
(*v*) 2 B. 57.
(*w*) Dic. 134.
(*x*) Dic. 134.

own act (*y*). A person on attaining his majority retains the last domicil which he had during his minority until he changes it (*z*).

110. The woman acquires the domicil of her husband only when the marriage is lawful and has actually taken place for if there is no lawful marriage or if the woman be only betrothed, she retains her own domicil. 2 B. 53. If the marriage be voidable but not void, it creates a change of domicil. (*Turner* v. *Thomson*, (1888), 13 P.D. 37, 41.). The ordinary presumption, that a wife is legally domiciled where the husband is, fails when there has been a sentence of Divorce. W.P. 267. Lunatics placed in asylums retain their original domicil. The domicil of a person, who has become of unsound mind during minority and continues so after attaining majority, follows the changes of his father's domicil. 2 B. 55 & 56. A person who has become of unsound mind since majority, retains the same domicil, as he had at the beginning of his lunacy, and does not change it, by change of domicil of the person who has the legal custody of him. 2 B. 56.

111. *Domicil of choice is acquired by persons sui juris. Its elements are an intention to make a permanent home in a particular place and actual residence there* (*a*).

112. As regards *domicil of choice*, there are four points as to the character of the *animus manendi* which deserve notice:—

(1) The intention must amount to a purpose or choice;

(2) The intention must be an intention to reside permanently, or for an indefinite period;

(3) The intention must be an intention of abandoning, *i.e.*, of ceasing to reside permanently in the former domicil;

(4) The intention need not be an intention to change allegiance or nationality which

(*y*) Dic. 135.

(*z*) Dic. 135.

(*a*) 2 B. 46.

is independent of domicil in a change of civil status (*b*).

113. **Change of domicil.**—For this purpose, residence is a mere physical fact and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind neither its character, nor its duration is in any way material (*c*). Time or length of residence does not of itself constitute domicil (*d*). The effect of time must not be exaggerated. It is weighty as evidence but it is not more than evidence of domicil (*e*). If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil (*f*). The state of mind or *animus manendi*, is that a person should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or in effect a deliberate intention to settle there (*g*). As no man can have more than one domicil at a time, an intention to retain a permanent home in the old domicil is necessarily excluded; and as the new home must be regarded as the permanent

(*b*) Dic. 108-111. 2 B. 62.

(*c*) 6 H. 185. Dic. 110.

(*d*) 1. *In re* Patience, (1885). 29. Ch. D. 976.
2. *Bradford* v. *Young*, (1885). 29 Ch. D. (C.A.). p. 617. Dic. 142.

(*e*) See *Cockrell* v. *Cockrell* (1856), 25. L.J. (Ch.). 730, 732. Judgment of Kindersley, V.C; Dic. 144.

(*f*) *Bell* v. *Kennedy*, (1868), L.R. 1 Sc. App. 307, 319; Dic. 111.

(*g*) 6 H. 185.

future home there must not be in contemplation any event upon the occurrence of which residence in the new country will be brought to an end (*h*).

114. It is not necessary that a change of nationality should be intended, or that any steps should be taken to secure naturalisation in the new domicil, even if naturalization is possible. Nor is it necessary that a person should realise the legal result of his conduct or intend to change his civil status (*i*).

115. If residence and the intention that it shall be permanent are both present, a domicil is acquired even in the face of express declarations of a desire to retain the old domicil (*j*).

Evidence of change of Domicil.

116. Various circumstances afford evidence from which the intention to change domicil may be inferred, and their number and variety must necessarily be increased by the varying usages and habit of different ages and countries.

117. "It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country" (*k*).

118. It has been said that there is no act, nor circumstance in a man's life, however trivial it may be in itself, which ought to be

(*h*) 6 H. 185.
(*i*) 6 H. 186.
(*j*) 6 H. 186.
(*k*) Lord Stowell, 2 B. 66.

left out of consideration in trying the question whether there was an intention to change the domicil. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime (*l*).

119. Any act, event, or circumstance in the life of an individual may be evidence from which the state of his mind may be inferred with more or less precision; and it is impossible to formulate any general rule by which the weight due to any particular point of evidence may be determined. Not only does the strength of the evidence from which the intention may be inferred vary according to the interest, probability or improbability of an alleged change of domicil but the importance of similar facts may differ absolutely in different cases. The age, character, and general circumstances of the man himself and the climate, religion and customs of the country in which the domicil is alleged to have been acquired, are considerations which may cause the value of a particular fact to vary almost indefinitely. 6 Hals. 187.

120. If the party has sold the capital he possessed in the place of his former domicil, and has removed himself and his family from thence to another place, and has there invested it, and there sits himself down to improve or enjoy it, with the intention of fixing his residence permanently there, no difficulty would arise in concluding that he had abandoned the domicil of his origin, and established it in the place to which he has just removed. 2 B. 65. It is not, however, by purchasing and occupying a house, or furnishing it, or investing a part of his capital there, nor by residence alone, but it must be residence with the intention that it should be permanent. 2 B. 65. Retaining property in the domicil of origin is evidence of intention to retain that domicil. 2 B. 65. The possession of landed estate has never alone been held sufficient to constitute domicil, or fix the national character of the possessor. 2 B .66. The degree of weight which belongs to these, and other circumstances, which may be adduced as affording a presumption that a new domicil has been acquired, must also greatly depend on the quality and station of the person. Their weight consists in the proof they afford of preponderating intention to acquire domicil. 2 B. 66. If the country in which he resides be that of a foreign state, there is the less reason for presuming that he intends his residence to be permanent, and thus to detach himself from the country of which he is a subject. 2 B. 66.

(*l*) 2 B. 66.

The possession and exercise of political or municipal rights, the residence of a man's wife and family, or the place where his children are educated or married, or started in business, and his family burial place, or the joining of the King's enemies have all been treated as possible elements of domicil. 2 B. 67.

121. On the one hand, the intention must be clearly and unequivocally proved; but, on the other hand, it is unreasonable to require it to be proved by evidence which the person whose domicil is in question might not fairly be expected to have furnished, if he had, in fact, formed the intention (*u*). Direct evidence of intention is rarely accessible, but a person whose domicil is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness (*v*). Expressions of intentions, written or oral, may be given in evidence, but such evidence must be carefully weighed in connection with the context in which it occurred, and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference (*w*). Expressions of intention to reside permanently in a country are evidence of such an intention and in so far evidence of domicil (*x*). Direct expressions, however of intention may be worth little as evidence (*y*). The person

(*u*) 6 H. 187.
(*v*) 6 H. 187.
(*w*) 6 H. 187; 2 B. 67.
(*x*) 1. *Hamilton* v. *Dallas*, (1875). 1 Ch. D. 257; 2. *Udny* v. *Udny*, (1869). L.R. 1 S. C. App. 441; 3. *Bell* v. *Kennedy*, (1869). L.R. 1 S. C. App. 307; Dic. 141.
(*y*) *Doucet* v. *Geoghegan*, (1878). 9. Ch. D. (C.A.). 441; Dic. 141.

who uses them may not know what constitutes a domicil. He may call a place his home, simply because he often lives there. He may wish to be, or to appear, domiciled in one country, while in fact residing permanently and intending so to reside, i.e., being domiciled in another (*z*).

122. A person's purpose may be more certainly inferred from his acts than from his language (*a*). Residence itself raises a presumption of intention to reside in the same place, which is increased when the residence is continued for a long period, and may even be conclusive in the absence of explanatory circumstances. But though a long residence, except in certain special cases, is always material as evidence, it is never essential, and very rarely decisive, for slight circumstances may serve to show the absence of a settled intention (*b*).

123. The acquisition of a domicil of choice is not necessarily prevented by the fact that residence has been established owing to reasons of health; but the state of health may be evidence according to circumstances to show that the intention to settle either does or does not exist. The question in these cases is whether a person would prefer under different circumstances to live elsewhere, but what is his present intention with regard to his actual residence (*c*). If he has however reluctantly, formed a fixed determination to make his home

(*z*) Dic. 141.,
(*a*) Dic. 142.
(*b*) 6 H. 187.
(*c*) 6 H. 188.

in the place of residence, a domicil is acquired; but if he has not, then even though he may expect to die there, no domicil is acquired (*d*).

124. If purpose of residence is proved, intention to adopt a particular home is not necessary, though having no such particular home is evidence of non-intention to make a permanent home there (*e*).

125. The special circumstances of residence may render its duration entirely immaterial. Thus, an ambassador or consul acquires no domicil in the country in which he resides for the purpose of his office, that purpose being in its nature temporary; but if he already has a domicil in that country, he does not lose it by accepting the appointment. 6 H. 188. Persons employed in the service of the British Crown retain their previous domicil, *e.g.*, the Chief Justice of a British Colony does not acquire a domicil by virtue of his office there. 2 B. 76. If the office or employment be such as not to require permanent residence or although it may require permanent residence, yet if it be held only during pleasure and not for life and consequently the person may at any time be removed from it, a residence in the place in which the duties of the employment or office, are to be discharged does not, of itself alone afford a presumption that the former domicil is abandoned. 2 B. 77. If however, the office which has been accepted were granted for life and required residence in the place where its duties are to be performed, the removal to that place will be an abandonment of the former and the acquisition of a new domicil. 2 B. 81.

126. If the "official residence" is residence for a limited time, or for a special purpose as in the case of a Governor-General of India the nature of the office does away with the presumption in favour of the existence of the *animus manendi*. If on the contrary, the office is one, such as in modern times an ecclesiastical cure, which makes it a duty for the person holding the office to fix his home permanently in a particular place, then the nature of the office adds to the strength of the presumption that he intends to make his home in the place where for the discharge of his official functions, he resides. Dic. 160. A person entering the service of a foreign government probably thereby acquires a domicil in that country certainly, if he resides there. 2 B. 81.

127. A person not having a British domicil, by entering the service of the British Crown does not necessarily change his domicil, but may acquire a domicil in that part of the British dominions where he resides on account of his functions. 2 B. 82.

(*d*) 6 H. 188. (*e*) 2 B. 67.

128. The residence of a domicil in the service of another may afford a presumption that he has abandoned his former domicil. 2 B. 82. Thus if having quitted his domicil of origin, he has successively served many masters in the same place and acquired in it some real property it is a reasonable presumption, he has renounced all hopes of returning to his original domicil. 2 B. 82. On the other hand if he has been in the service of different persons, in different places, and has frequently returned to the place of his birth, it may reasonably be presumed he intends to retain his domicil there. 2 B. 82.

129. Residence of the parents abroad for the sake of children's education may change domicil (*f*).

130. *Residence in Foreign Country.*—It is difficult to lay down any rule which does not admit of some qualification. A resort to, and residence in, a foreign country, for the purpose of carrying on trade there, may, from the frequency with which the person visits and returns from thence, exclude the presumption of an intention to establish a permanent residence there (*g*). He may have left his wife and children in the place of his former domicil, or all his arrangements regarding his residence may be made exclusively with reference to, and as connected with, the prosecution of his commercial pursuit; he may have remitted all his money to the place of his former domicil. These, or any other circumstances, from which it might be inferred that his residence was only temporary, and that he contemplated a return to his former domicil, exclude the inference that he had taken up a new, and abandoned his former, domicil (*h*).

(*f*) 2 B. 75. (*g*) 2 B. 67.
(*h*) 2 B. 68.

131. **Family Residence.**—The place of residence is *prima facie*, the domicil, unless there be some motive for that residence, not inconsistent with a clearly established intention to retain a permanent residence in another place (*i*). Residence abroad for an indefinite time will constitute a change of domicil although the person declares that he intends to return when he had made money enough (*j*), and so will residence for a permanent pursuit though such person afterwards becomes an ambassador there (*k*). The permanent residence of a man's wife and family is a material, although not conclusive element to consider in determining his domicil, and in the absence of evidence to the contrary may be regarded as his residence, and it is immaterial that the house was chosen by the wife and taken and furnished at her expense (*l*). The maxim "*ubi uxor ibi domus*" has been followed in South Africa in a number of cases (*m*).

132. **Case of Several Residences.**—Cases sometimes occur in which a person is possessed of establishments in two places, in each of which he resides. It then becomes necessary, in order to determine which is his real domicil, to examine the circumstances, with the view of discovering to which of these places he had given the preference; or rather, which of them was regarded by himself as his more permanent establishment. 2 B. 72.

132A. In the case of Europeans residing in the ex-territorial settlements in the East, the presumption is that they keep their domicil of origin or domicil previously existing, as they cannot, it seems, acquire an ex-territorial domicil and they are presumed not to wish to obtain the domicil of the country. 6 H. 68; 2 B. 68.

(*i*) 2 B. 69.

(*j*) 2 B. 69. A vague expression of intention to settle abroad "till one's fortune is made" will not keep alive the original domicil. 2 B. 68.

(*k*) 2 B. 69. (*l*) 2 B. 69. (*m*) 2 B. 69.

Domicil "de jure" and "de facto."

133. Where the method of acquiring domicil in a State is specified by its legislation, it has been disputed whether a subject of another State, who, by its law acquires a domicil in the former state, though he does not comply with the necessary statutory formalities of the foreign law is to be regarded as domiciled there (*n*). English law allows the acquisition of domicil abroad *de facto*, though it is not *de jure* on the ground that a municipal statute should not be allowed to interfere with a principle of international law. But the legal effect of such a *de facto* domicil is determined by the law of the country where the person is domiciled on the ground that no one can acquire a personal law in the teeth of that law itself (*o*).

134. Correspondingly if a subject of a foreign country acquires a domicil in England according to English law, English Courts will give effect to it, although the foreign country may still claim to determine his personal law, according to the law of his continuing political nationality (*p*). The acquisition of a domicil cannot be affected by rules of foreign law (*q*).

135. By the law of some countries, *e.g.*, of France, a person is required to fulfil certain legal requirements before he is considered by the French Courts to be at any rate fully domiciled in France, but if a person in fact resides with the *animus manendi* in France, (*i.e.*, is really settled in France) he will be considered by our courts to be domiciled there, even though he has not complied with the requirements of French law. Dic. 117.

(*n*) 2 B. 64.

(*o*) *Bremer* v. *Freeman*, (1857). 10 Moo. P.C. 306; 2 B. 64.

(*p*) 2 B. 64.

(*q*) In *re* Martin, (1910). P. (C.A.), 211;
In *re* Bowes, (1906). 22 T.L.R. 711. Dic. 117.

Europeans residing in Oriental States.

136. Where the subject of a Christian power resides in a country which is not under Christian government, (it would seem that) he cannot acquire a domicil there merely by the determination to make it his permanent home; he must also intend to make himself a member of the civil society of the non-Christian country, and manifest this intention by adopting its manner of life. This exception to the general rule does not extend to countries which, though Oriental, are under Christian government (*r*).

137. In Ceylon the question whether an European residing in Kandy acquired a Kandyan domicil was raised in *Robertson Case* and it was held by the Full Bench that no such domicil was acquired (*inter alia*) on the ground that the Kandyan law was unsuited to Europeans (*s*).

Clarence, J. said:—"The incidents of the 'Kandyan' law so far as they are ascertainable, are entirely foreign to the habitudes and *modus vivendi* of Europeans or Eurasians. It recognised polygamy, including polyandry, and although this has now for many years been forbidden by legislation, so far as concerns unions founded on solemnised marriages, it is material to remember—when considering what kind of a body of law this Kandyan law is—that polyandry was a recognised incident of it as it existed among the 'Kandyan,' Sinhalese. Again the distinction between marriage and mere concubinage, which forms so important an incident in the English or the Roman-Dutch law, existed but very feebly in the old Kandyan law. Many too of its incidents and usages are concerned with distinctions of caste. The distinction between *binna* and *diga* marriage, the custom as to adopting children of the adopter's own caste, and many other incidents which suited the Kandyan Sinhalese would be utterly out of place if applied to Europeans or Eurasians. So the matter stood in 1815 and for years afterwards—until in fact the European coffee planting venture began the number of European residents in the central parts of Ceylon was exceedingly small. Then came the influx of European planters, who

(*r*) 6 H. 186.

(*s*) 8 S.C.C. 36.

with the labour of Malabar coolies from India, cleared and brought into cultivation large tracts of high mountain jungle, hitherto uninhabited, and seldom trodden save by hunters; and on the plantations so formed European planters dwelt and dwell, superintending their Malabar coolies and holding small intercourse with the Kandyan Sinhalese of the villages on the lower ground. These are the circumstances under which the Kandyan law exists to-day and in my judgment under such circumstances there cannot be any proper question of a European or Eurasian acquiring a Kandyan domicil as distinguished from a Ceylon domicil."

Sir Edward Creasy, C. J. said in *Kershaw's Case*:—Conquered or ceded country retains its former laws, until the sovereign orders a change. But there may be exceptions to this presumption and it is easy to imagine, or to point out in history instances of nations or tribes whose laws are so savage, so iniquitous and immoral as to make it impossible to presume that a Christian European Sovereign, who becomes sovereign of such a nation or tribe by conquest or cession, would intend the continuance of such laws, at least so far as regards the European Sovereign's European subjects, who might become settlers in the new territory. Without imputing to the Kandyan law generally a character as has been just stated by way of hypothesis, we must say that it contained much that unsuited it for European habits and feelings and that the whole Kandyan marriage law, with its allowance of polygamy (and that in the form of polyandry the form most offensive to European feelings) its allowance of arbitrary and capricious divorce and the easiness with which the rights of legitimacy are given to the issue of loose and casual connections, was utterly repugnant to the most cherished feelings, and the most fixed principles of Christian Englishmen and women; and it was hard to suppose that they, when they came to live in Kandy were intended to be under Kandyan law, in their capacities and obligations as husbands and wives."

138. In *Sellambram* v. *Kadiraie*, (1917). 20 N.L.R. 161. where the question was whether a native of India had acquired a domicil of choice in Ceylon, Wood Renton, C. J. held:—"I am of opinion that the learned District Judge's decision that Avada had acquired a doimcil of choice in Ceylon is correct. He had been resident in the Island for a period of from thirty to thirty-five years. During that period he had returned to India on only three occasions, and on the last of these occasions he went because he was compelled to defend an action brought against him by Sellambram himself. The children of his first marriage are in Ceylon. It is true that he left his second wife in India, but she had been his mistress before she became his wife, and he may very well have desired to legalize the relationship. Sellambram's evidence as to the purchase of lands by Avada in India is of the vaguest and most unsatisfactory character. Finally, there is the circumstance that he told Mr. Atkins, the Superintendent of his estate, that he looked upon Ceylon as his home."

139. Only one domicil can be acquired in Ceylon and that a Ceylon domicil (*t*).

140. A domicil of choice could not be obtained in a community which does not possess supreme or sovereign power; this being so a purely Kandyan domicil of choice could not be acquired (*u*).

141. *A domicil will be retained until a new domicil is acquired* (*v*).

142. The domicil of origin is retained until the acquisition of a domicil of choice and cannot be divested by mere abandonment. The domicil of choice is lost by abandonment (*w*).

143. *No involuntary domicil is imposed on persons by their compulsory residence for a time in a particular place unless that residence acquires a permanent or voluntary character* (*x*).

144. As it is the will or intention of the party which alone determines what is the real place of domicil which he has chosen, it follows that a former domicil is not abandoned by residence in another place, if that residence be not voluntarily chosen. Those who are in exile or prison, as they are never presumed to have abandoned all hope of return, whatever length of time may have elapsed since they were first deprived of their liberty, are said to retain their former domicil. 2 B. 73. Exiles for political reasons or refugees retain their original domicil, but may perhaps lose it by entering on a course of life in the foreign country which requires an *animus remanendi*, and they may acquire a new domicil by banishment. 2 B. 73. Convicts transported for life are said to lose their domicil but not if only for a term of years. 2 B. 74. The same principle seems to apply to refugees from justice. Residence in a prison goes for nothing. 2 B. 74.

(*t*) *Wijesinghe* v. *Wijesinghe*, (1891). 9 S.C.C. 199. *Spencer* v. *Rajaratnam*, (1913). 16 N.L.R. at pages 326 and 332. Robertson's Case, 8 S.C.C. 38.

(*u*) *Williams* v. *Robertson*, (1886). 8 S.C.C. 37.

(*v*) 2 B. 46. (*w*) 6 H. 184. (*x*) 2 B. 46.

145. **Domicil of Corporations.**— The domicil of a corporation is the place considered by law to be the centre of its affairs, which:—

(1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on;

(2) in the case of any other corporation, is the place where its functions are discharged (*y*).

146. A corporation can have two domicils. It has one principal domicil, at the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices correspond, as far as the analogy can be carried out at all, to the residence of an individual. Dic. 163.

147. The question of the choice of law to be made where a Memon—belonging to a class in India who follow the Hindu law of succession, though Mohammedan by religion migrated to Mombasa, was considered by the Privy Council in *Abdur Rahim* v. *Halimabai* (*z*), and the observations in the judgment would appear to show that if the Memons had kept together and formed political or social organizations for themselves they would have been governed by their Hindu law of succession.

(*y*) Dic. 160 and 161. (*z*) 43 I.A. 30; 30 Mad. 227.

CHAPTER VIII.

CONFLICT OF LAWS.

148. Our Courts have often to consider on the one hand the effect to be given to a Ceylon status as regards transactions taking place out of Ceylon and on the other hand, the effect to be given to a foreign status as regards transactions taking place in Ceylon. When therefore it is necessary to determine what is a person's status and how far his rights or acts are affected thereby, it is necessary further to determine what is the law with reference to which his status or condition must be fixed (*a*). For example, a Ceylonese domiciled in India is sued in our courts on a contract entered into by him in India when he was 19 years of age. The age of majority in Ceylon is 21 and in India, 18. By what law is his status with reference to his plea of minority to be decided. A and B who are within the prohibited degrees of marriage in Ceylon go to reside in India and contract a marriage which is valid according to the law of India. Our courts may be called upon to pronounce upon the validity of the marriage. Questions of this nature relating to the Choice of Law are dealt with in that branch of law called Conflict of Laws and this is a convenient place to refer to the subject.

(*a*) Dic. 459.

Laws of domicil which foreign States recognize.

149. Foreign States recognise and give effect almost universally, to those laws of the domicil or nationality which constitute status, quality, or capacity of the person and which are called personal (*b*). Every country which is not Ceylon is a foreign country or state as far as Ceylon courts are concerned for this purpose. Under the head of "Personal Laws" fall questions of Legitimacy, Majority, Marriage, Divorce, Adoption, Parental Power, etc.

150. The personal capacity which the judge or the legislator of the domicil decides to attach to the person in question, follows him everywhere, whether such personal statutes were laid down with reference to a class of men, or to an individual. So one who is a minor or a major according to the law of the domicil is to be considered so all over the world, even in places where greater or lesser age is needed to attain majority. So when one is declared illegitimate by the law of his domicil he is regarded as such everywhere, nor can he by change of residence abandon his capacity or incapacity, or assume another capacity. Voet, however, holds that, as there is no authority in Roman law for the foregoing principle, personal statutes cannot extend beyond the territory of the person making the statute any more than real statutes, whether directly or by inference. 1 Nath, 56.

151. In a conflict between the personal law of the domicil and the personal law of another place at variance with it, that of the domicil prevails. 2 B. 33. The above principle is not to be applied when it would enable a person to avoid a contract which he was competent to make by the personal law of the place in which he made it, although he was incompetent by the personal law of his domicil. Thus if a person, whose domicil of origin was in Spain, when he does not attain his majority until his twenty-fifth year, should at the age of twenty-three, enter into a contract in England,

(*b*) 2 B. 31.

or any other place where his minority ceases at 21, he would not be permitted to avoid his contract by alleging that he was a minor and incompetent to contract, according to the law of Spain. 2 B 33 and 34.

Real Laws.

152. Real laws which affect real or immovable property, are confined in their operation to the place in which that property is situated, but the judicial tribunals of another country, before which the title of that property is litigated, will consult and adjudicate according to the law of the country in which such property is situated (*c*).

153. Rights over, or in relation to, an immovable (land) are generally speaking governed by the law of the country where the immovable is situated (*d*).

Inheritance to immovables

154. Whatever a person's actual or matrimonial domicil may be, inheritance *ab intestato* to immovable property in Ceylon is governed by Ordinance No. 15 of 1876.

Inheritance *ab intestato* to the immovable property in Ceylon of a person deceased shall be governed and regulated by the provisions of this Ordinance wherever such person may have or have had his actual or matrimonial domicil. Ord. No. 15 of 1876. Sec. 25.

155. A person's capacity to alienate an immovable *inter vivos*, or to make a contract with regard to an immovable, or to devise an immovable, or to acquire or to succeed to an immovable, is governed by the *lex situs* (*f*).

156. If a person is incapable, from any circumstance, of transferring his immovable property by the law of the *situs*, his transfer will be held invalid, although by the

(*c*) 2 B. 31. (*d*) Dic. 500. (*f*) Dic. 501.

law of his domicil no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicil (*g*).

157. A party must have a capacity to take according to the law of the *situs*; otherwise he will be excluded from all ownership. Thus, if the laws of a country exclude aliens from holding lands, either by succession, or by purchase or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicil. On the other hand, if by the local law aliens may take and hold lands, it is wholly immaterial what may be the law of their own domicil, either of origin or of choice (*h*).

158. A French subject domiciled in France is 20 years of age, and owns freehold land in England. He is under English law a minor. He conveys the land to a purchaser. The effect of his minority on the validity of the conveyance is governed wholly by the law of England. Dic. 506; see Story 431.

X, a domiciled Scotchman born out of lawful wedlock, is legitimated, according to Scotch law, by the marriage of his parents after his birth. His father is possessed of freeholds in England and dies intestate. X's capacity to inherit real estate in England is governed by the law of England, and he cannot acquire the freeholds by inheritance. Dic. 506.

159. It does not follow from the fact that *lex loci* should be applied in respect to all immovable property situate in Ceylon that the general law should be applied even when the parties concerned are Muslims.

In *Khan* v. *Marikar*, 16 N.L.R. 425. De Sampayo, A. J. said:—It may be assumed that, the property donated being situated in Ceylon, the law of Ceylon governs. But why should this be the Roman-Dutch law not the special law applicable in

(*g*) Story 431. Dic. 502. (*h*) See Story 430. Dic. 502.

Ceylon to the parties concerned? The Mohammedan Law in this respect is as much part of the local law as any other of the various systems of law prevailing in Ceylon. When a question arises as to the right to any immovable property wherever situated in Ceylon, it may be necessary to look for the law to some special law which prevails among the particular persons concerned. The special law or custom to be so applied may be, to borrow an expression from the judgment of the Privy Council in *Kumari Debi* v. *Chunder Dhabal*, "A personal as distinguished from geographical custom," but it would nevertheless be a part of the local law of Ceylon.

Inheritance to movables.

160. The domicil of a person governs the inheritance *ab intestato* to his movable property. Ordinance No. 15 of 1876, (Section 25) enacts as follows:—

> Inheritance *ab intestato* to the movable property of a person deceased shall be governed and regulated by the law of the country in which he had his domicil‡ at the time of his death; provided that when any person shall have his domicil‡ in any part of this Island, such domicil shall, so far as relates to the inheritance to his movable property, be deemed to be in the maritime provinces. Provided also that if a person dies leaving movable property in Ceylon, in the absence of proof of his domicil elsewhere, the inheritance to such property shall be governed by the provisions of this Ordinance.

161.—The assignment of a movable, wherever situate, in accordance with the law of the owner's domicil, is valid. When the law of the country where a movable is situate prescribes a special form of transfer, an assignment according to the law of the owner's domicil is, if the special form is not followed, invalid. A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicil at the time

‡ For Comments on the use of the term domicil see *Spencer* v. *Rajaratnam*, 16 N.L.R. at page 332. See also Chapter, Provincial Domicil *infra*.

of the assignment. An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*) is valid. An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt,) is valid; the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor; the right to recover the debt is, as regards all matters of Procedure, governed by the *lex fori*.

162. Movables follow the person and are governed by the law of the domicil. The law however is not, on that account, a personal but a real law. 2. B. 35. This statement which embodies the rule of *mobilia sequentur personam*, is now generally accepted as applicable only to succession of movables as a whole or which affect the person's status (*e.g.*, death, bankruptcy and marriage) and for rights over individual movables, the *lex rei sitae* decides. 2 B. 35. Personal actions and debts considered with reference to those to whom they belong, are attached to the person and are of the nature and quality which the law of his domicil assigns to them. 2 B. 35. But considered in relation to the person against whom they are enforced, they are governed by the law of the debtor's domicil. 2 B. 35. Questions arising upon the sale of chattels, or movable effects, are decided by the law or usage of the place in which the sale was made* Real actions, and demands charged on and issuing out of lands are governed by the law of the place in which the property on which they are charged is situated, *e.g.*, prescription and mortgage; and the rule is equally applicable to movables. 2 B. 36. With respect to those laws, which are

* See Foote p 252 who distinguishes between the contract to transfer movables and the transfer itself, assigning the former to *lex loci contractus* and the latter to *lex rei sitae*.

called mixed laws, all dealings, contracts, wills, and other instruments, which are made in the manner prescribed by the law of the place in which they are entered into and made are in every other place deemed valid and effectual.

163. Dicey formulates the following rules as to conflict of laws in respect of contracts:—

Validity of Contracts—Capacity.— A person's capacity to enter into a contract is governed by the law of his domicil (*lex domicilii*) at the time of the making of the contract.

1. If he has such capacity by the law, the contract is, in so far, as its validity depends upon his capacity valid. If he has not such capacity by that law, the contract, is invalid.

Exception 1.—A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made.

2. A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs* (*k*).

Form.—The formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*). Any contract is formally valid which is made in accordance with any form recognised as valid by the law of the country where the contract is made.

2. No contract is valid which is not made in accordance with the local form.

(*k*) Dic. Rule 149.

Exception I.—The formal validity of a contract with regard to an immovable (land) depends upon the *lex situs*.

Exception II.—A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*) (*l*).

Essential Validity.—The essential validity of a contract is governed indirectly by the proper law of the contract.

1. A contract (whether lawful by its proper law or not) is invalid if it, or the enforcement thereof is opposed to English interests of State, or to the policy of English law or to the moral rules upheld by English law.

2. A contract (whether lawful by its proper law or not is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*). A contract (whether lawful by its proper law or not is, in general, invalid in so far as the performance of it is unlawful by the law of the country. Where the contract is to be performed (*lex loci solutionis*); or

2. The contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place.

(*l*) Dic. Rule 150.

This exception (semble) does not apply to any contract made in violation or with a view to the violation of the revenue laws of any foreign country not forming part of the British dominions (*m*).

Will of immovables.

164. **Validity of Wills.**— The validity of a will of immovables is determined in every respect, whether as regards capacity form, or material validity by the *lex loci rei sitae* (*n*). A will of immovables must not violate restrictions placed on the disposition of immovables by the *lex loci rei sitae*, such as in the case of English land, the perpetuity rule. The construction of a will of immovables is, as a general rule, governed by the *lex loci rei sitae* (*o*).

Will of movables.

165. Any will of movables which is valid according to the law of the testator's domicil at the time of his death is valid (*p*). The law of the domicil governs the material validity of a will of movables, and determines the restrictions to be placed on alienations *mortis causa* (*q*). A will of movables made out of the United Kingdom by a British subject is valid in point of form, if made in accordance with the forms required either by the law of the place where the testator was domiciled at the date of execution, or by the laws then in force in that part of the British dominions where he had his domicil of origin. Such a will is also valid in point of form where it is in the form required by the law of the place where it was

(*m*) Dic. Rule 151. (*o*) 6 H. 220.
(*n*) 6 H. 219. (*p*) Dic. 167. (*q*) 6 H. 226.

executed, or, if such law has no provisions relating to the form of wills, then if it is made in a reasonable form. In these cases the domicil of the testator is immaterial, and it is unnecessary for the court to inquire what it was (*r*). Any will of movables which is invalid according to the law of the testator's domicil at the time of his death on account of:—

(1) the testamentary incapacity of the testator; or

(2) the formal invalidity of the will (*i.e.*, the want of the formalities required by such law; or

(3) the material invalidity of the will (*i.e.*, on account of its provisions being contrary to such law) is invalid (*s*).

166. A testator is domiciled in a country where the age of majority is 25 and where a minor cannot make a will. He, when resident, but not domiciled in England, makes a will of movables at the age of 22 and dies. The will is invalid. Dic. 670.

167. An American citizen domiciled at New York but resident in England makes his will while in England according to the formalities required by the English Wills Act. The will is invalid according to the law of New York for want of publication. His will is invalid. Dic. 670.

168. An American citizen domiciled at New York executes when in France a holograph will, valid by the law of France, but not attested as required by the law of New York. He leaves movable property in England. His will is invalid. Dic. 670.

169. A Naturalized British subject is resident in England, but his domicil of origin is in one of the United States. He retains his American domicil, and whilst on a visit to the Continent makes a will, which is executed in accordance with the formalities required by the English Wills Act, but not in accordance with the formalities required either by the law of the testator's domicil or by the law of the country where the will is made. The will is invalid. Dic. 671.

(*s*) Dic. 669. (*r*) 6 H. 227.

170. T, domiciled in France makes a will while in England containing provisions in contravention of French law. It is here, as regards such provisions, inoperative and invalid. (Dic. 673).

171. **Validity of Marriage.**—A marriage is valid when each of the parties has, according to the law of his or her respective domicil, the capacity to marry the other; and

(2) any one of the following conditions as to the form of celebration is complied with (that is to say):—(i) If the marriage is celebrated in accordance with the local form; or (ii) if the parties enjoy the privilege of exterritoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State to which they belong; or (iii) if the marriage (being between British subjects) is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, Sec. 22, within the lines of a British army serving abroad; or (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, by or before a marriage officer (such for example, as a British Ambassador or British Consul) within the meaning of, and duly authorised to be a marriage officer under, the said Act. A marriage is, possibly, not valid if either of the parties is, according to the law of

the country where the marriage is celebrated, under an incapacity to marry the other. Subject to certain exceptions (*t*) no marriage is valid which does not comply, as to both (1) the capacity of the parties, and (2) the form of the marriage, with the above rule.

172. **Divorce.**—According to international law, which is authoritative in the absence of any municipal law to the contrary, the true domicil of the married pair, as distinguished from their so-called matrimonial domicile, affords the only test of jurisdiction to dissolve their marriage; and the Courts of England will not recognize as effectual the decree of a foreign court divorcing spouses who at its date had their domicil in England (*u*).

173. The Roman-Dutch Law does not give jurisdiction to the Courts of the country in which spouses domiciled elsewhere are for the time resident, to entertain a divorce suit. Neither does Section 597 of the Civil Procedure Code, nor did previous enactments to a similar effect empower a Disctrict Court to entertain any divorce suit which was not previously cognizable by the Courts of the Island. But though a District Court of the Island cannot decree a dissolution of marriage in the case of such residents, yet it may, under the rules of international law, administer other remedies for matrimonial misconduct, such as judicial separation on the ground of cruelty and alimony for desertion. *Le Mesurier* v. *Le Mesurier*. 1 N.L.R. 160.

174. If the question arise as to the law which should determine the rights of husband and wife, those rights not having been provided for by express contract at the time of their marriage, resort is to be had to the law of their domicil on the day of their marriage.

(*t*) See Dic. LXXXV for exceptions.

(*u*) *Le Mesurier* v. *Le Mesurier*, 1. N.L.R. 160.

If they had different domicils, that of the husband is to be adopted in preference to that of the wife (*w*).

175. **Matrimonial Domicil.**—A husband's actual domicil at the time of marriage is termed his "matrimonial domicil." Where a husband though domiciled in one country, intends to the knowledge of both parties to the marriage, to become immediately domiciled in another country, it would seem that the term "matrimonial domicil" would include the country in which they intend to become and do become domiciled immediately after their marriage.

176. Ordinance No. 21 of 1844 (Section 6) provides as follows:—"In all cases of marriages contracted either within any part of this Colony or abroad without a nuptial contract or settlement, the respective rights and powers of the parties during the subsistence of the marriage in and about the management, control, disposition, or alienation of any immovable property situated in any part of this Colony, which belonged to either party at the time of the marriage or has been acquired during the coverture, and also their respective rights in, or to such property, or any portion thereof or estate or interest therein, either during the subsistence of the marriage or upon the dissolution thereof, shall in all cases be determined according to the law of the matrimonial domicil . . . . . " This section has been repealed so far as it is inconsistent with the Matrimonial Rights and Inheritance

(*w*) *De Nicols* v. *Curlier*, (1900). A.C. 21; (1900). 2. Ch. 410, 2 B. 33.

Ordinance (No. 15 of 1876) and the Tesawalamai Ordinance (No. 1 of 1911).

Matrimonial domicil in a part of the Island.

177. The question whether the "matrimonial domicil" referred to in this section can be acquired "in any part of the Island" was under consideration in several cases and it was held that the section never intended to suggest that there might be several matrimonial domicils in Ceylon. Bertram, C. J. said in *Seelachchy* v. *Visuvanathan Chetty* (*a*):—

"That Ordinance was passed at a time when British Colonists were settling and acquiring property in various parts of the Colony, and finding themselves faced with diverse systems of law, which if applied to themselves, would affect the mutual proprietary rights of husband and wife in regard to the properties so acquired. Presumably, therefore, with a view to defining their position with regard to these systems of law, section 6 enacted a principle, which is in exact accordance with that which has since been confirmed by judicial decisions in England, and also with the principles of Roman-Dutch law expounded by Voet. It declares that the mutual proprietary rights of husband and wife with respect to any immovable property in any part of the Colony acquired during the subsistence of the marriage shall, in the absence of any marriage settlement, be determined in accordance with the law of the matrimonial domicil of the parties, or if a marriage settlement exists, in accordance with the terms of that marriage settlement. In other words, it declared that in the absence of a marriage settlement the mutual rights of husband and wife whose matrimonial domicil was England should be determined by the law of England, and those of a husband and wife whose matrimonial domicil was Ceylon by the law of Ceylon. The section never intended to suggest that there might be several matrimonial domicils in Ceylon, and to regulate the rights of parties within one of such matrimonial domicils with reference to immovable property acquired in another. Such a view would have been inconsistent with the principle of *Wijesinghe* v. *Wijesinghe* which was apparently overlooked by this Court in *Velupillai* v. *Sivakamipillai* but recalled and re-emphasized in *Spencer* v. *Rajaratnam*. The Tesawalamai is part of the law of Ceylon, and its personal or local limitations were entirely unaffected by the section. It is clear, therefore, that section 6 of Ordinance No. 21 of 1844 has no bearing upon the question of the local application of the Tesawalamai. It has, however, one effect of an incidental character. and that an important one.

(*a*) 23 N.L.R. 112.

There is no exception of the Tesawalamai in the Ordinance. It applies to persons subject to the Tesawalamai as much as to the other inhabitants of the Colony. On the one hand, it authorizes them freely to dispose of their property by will, notwithstanding any "law, usage, or custom now or at any time heretofore in force within the Colony." On the other hand, it authorizes them before marriage to conclude marriage settlements regulating their mutual proprietary rights, if they so desired, in a manner insonsistent with the Tesawalamai. This circumstance will be found to have an important bearing on the problem before us."

In *Velupillai* v. *Sivakamipillai*, 13 N.L.R. 74 referred to by Bertram, C. J., in the above case the status of a Jaffna Tamil who married in Jaffna but who resided at Batticaloa had to be considered. The court held that "the rights of the parties have to be determined by the law of domicil of the husband at the time of the marriage. According to Section 6 of Ordinance No. 21 of 1844 the law of the matrimonial domicil (and not the *lex loci rei sitae*) is the criterion by which the rights and powers of the spouses in regard to common property situated in any part of the Colony are to be determined. The position of the widow would depend on her special legal rights under the customary law of Jaffna which was applicable to her husband at the date of her marriage; it would not be competent for the husband to deprive her of those rights, at least by acquiring without her consent a subsequent domicil of choice in the district of Batticaloa."

In *Kershaw's Case* (*c*) the matrimonial domicil of Kershaw who had acquired several estates in Ceylon and who went home and married at Guernsey was under consideration. At the time of marriage both spouses contemplated coming to Ceylon and permanently residing on one of the estates. Creasy, C. J. said:—

"It was in the expectation of this point arising in the case that we considered it material to ascertain the matrimonial domicil of the parties. If it had been proved elsewhere than in Kandy, though the actual domicil at the time of these transactions was in Kandy, we must notwithstanding the Ordinance No. 21 of 1844, Section 6, have addressed ourselves to consider, and to adjudicate on the very difficult question, whether in such cases the law of the matrimonial, or the law of the actual, domicil must prevail as to the *status* of the parties, a question on which so many of the greatest Jurists have differed. But it has been clearly proved in this case that both the actual and the matrimonial domicils were in Kandy: and we must treat

(*c*) (1862) Ram. 157.

Mrs. Kershaw as having the rights of a Kandyan wife as to her property not being the property of her husband, and as to her capacity to contract in her own right, unless we were to hold that the Kandyan Law applies to native Kandyans only, and not to Europeans who have become resident in the Kandyan Provinces."

In Robertson's Case (*d*) and in Wijesinghe's Case (*e*) it was held that no Kandyan matrimonial domicil could be acquired by Europeans residing in Ceylon.

178. There is a marked tendency says Dicey towards the establishment of the general principle that, in the absence of a marriage contract or settlement, the mutual rights of husband and wife, not only over movables, but also over immovables ought to be governed by the law of the matrimonial domicil (*f*).

Matrimonial rights.

179. Matrimonial Rights Ordinance (No. 15 of 1876) provided that the respective matrimonial rights of every husband and wife domiciled or resident in this Island in, to, or in respect of, movable property shall, during the subsistence of such marriage and of such domicil or residence be governed by its provisions, and that the respective matrimonial rights of every husband and wife, in, to, or in respect of any immovable property situate in this Island shall, during such marriage be governed by its provisions. These provisions were repealed by Married Women's Property Ordinance (which gives the married woman the status of a *feme sole*) in so far as they relate to persons married on or after the 29th of June 1877.

(*d*) 8 S.C.C. 36.
(*e*) 9 S C.C. 196.
(*f*) Dicey 641.

CHAPTER IX.

STATUS OF PERSONS GOVERNED BY SPECIAL LAWS.

180. We shall now attempt to define the classes of persons whose status differs from the normal standard by reason of their religion, race or community. It often becomes necessary in this country to ascertain the status of the person whose rights are under consideration in order to determine the special law applicable to him. In considering for instance, the question whether a person is entitled to a share of a piece of land by inheritance it is necessary to ascertain the status of the intestate; for if the intestate was a Jaffna Tamil his widow is not entitled to any share of the land; if he was a low-country Sinhalese the widow is an heir to one half the land; if the intestate was Mohammedan, the widow is an heir to a smaller share.

Persons governed by special laws.

181. The chief classes of persons who are governed by special laws are the Muslims, and the Hindus of India by reason of their religion, and the Malabar inhabitants of the Province of Jaffna commonly called Jaffna Tamils, and the Kandyan Sinhalese, by reason chiefly of their race or community. Mention should also be made of the Mukkuvas.

182. We must also ascertain the nature of our special laws. Are these laws applicable to all persons belonging to the race, community or religion wherever they may reside, or are the laws applicable to all persons living within certain geographical limits in Ceylon, or again are the laws applicable only to persons belonging to a certain race, community or religion, provided they continue to live within certain geographical limits ?

CHAPTER X.

THE MUSLIMS.

183. The Mohammedan Law is based on religion and is applicable to all Muslims, including Malays and immigrants from India known as the Coast Moormen, and Afghans (*a*). It is applicable not only in respect of movables and personal relations, such as marriage, but also with regard to immovable property situated in Ceylon (*b*).

Who are Muslims ?

184. "Any person who professes the religion of Islam, in other words, accepts the Unity of God and the prophetic character of Mohammed, is a Moslem and is subject to the Mussulman Law." (*c*). The law is applied to all Muslims whether they are so by birth or by conversion.

185. "When either of the parents is a Muslim, the Mohammedan Law presumes the child to be a Muslim until it is able to make a choice, (in other words, attains majority) and the right to its succession is regulated by the laws of Islam, and of the school or sect to which the parents conform" (*d*).

(*a*) *Khan* v. *Maricar*, 16 N.L.R. 425.

(*b*) See *Khan* v. *Maricar*, (1913), 16 N.L.R. 425; In *re Mohammadu Canny*, Ram. (1863-68) page 159. See also Ram. 1877 page 87.

(*c*) Amir Ali, xxi.

(*d*) Amir Ali, xxiii.

186. Sometimes rather difficult questions arise as to whether or not a particular person is to be classed as a Mchammedan for the purposes of the law to be applied to him.

187. Tyabji says (page 55):—"Where the question is, whether or not a person is a Mussulman, it will be decided in accordance with the tenets of the particular sect to which he professes, or is alleged, to belong. Where a person claims or is alleged to be a Mussulman, and his avowed belief and conduct in the past do not conform to those of any recognised sect of the Mussulmans, the Court will apply that law to him which will be in accordance with justice, equity, and good conscience, *Raj Bahadur* v. *Bishen Dayal*, (1882), 4 All. 343, and that may not be Mohammedan Law; and the Court will not permit anyone to commit a fraud upon the law by pretending to be a convert to Islam in order to elude the personal law by which he is bound."

Muslims by birth.

Where a person is born a Mussulman there is little difficulty in his being recognised as such. The burden of proof would be on those who allege that such a person does not follow Islam.

Is belief in Islam required ?

188. In a case decided by the Allahabad High Court, the suit being for partition, the chief issue was whether the family to which the parties belonged, consisted of Hindus or Mohammedans. The Court held that they were neither the one nor the other; and stated that to be recognised as one or the other under Sec. 24 of Act vi of 1871, not only must one call oneself a Hindu or Mohammedan, but must be an orthodox believer in, and must follow and observe that religion. *Raj Bahadur* v. *Bishen Daya*, 4 All. 343, 347. That is to say, their status before the law depends absolutely on their religious belief, and this in the strict sense of the term. It is submitted, says Tyabji, that this proposition must be interpreted as referring not to the state of the mind itself, but in so far as that state is externally manifested. For, as Brian, C. J. said in 1478, "It is trite law that the thought of man is not triable, for even the devil himself does not know what the thought of man is," (quoted by Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (1877) 2 App. Cas. 666, 692,) and another old authority has said: "The intent of man is uncertain, and a man should plead such matter as is or may be known to the jury." (1465) Y. B. Ed. iv. 89, quoted in Holland's Jurisprudence," (7th Ed.) 105, note. It is difficult therefore to give any force to the epithet "or orthodox" as applied by the Allahabad High Court to a "believer." It need hardly be stated that the Courts will decline to pronounce any particular version of a religion the true or orthodox one. *Mokoond Lal Singh* v. *Nabodi Chunder Singh* 25 Cal. 881; see also 33 Bom. 122, 205-211; Where the Privy Council had to consider the question of conversion, in order to decide whether or not the marriage of the alleged convert with a Mussulman was valid they substituted for an enquiry into the state of mind of the alleged convert, an enquiry into the conformity of

Profession of Islam enough.

her acts to an external standard, viz., to the conduct which may reasonably be expected from a person of her alleged religion; and they remarked, that it was a well-founded criticism on the part of the appellants, to say that the lower Court's ruling was based on a proposition to which exception could be taken, in as much as no Court could test or gauge the sincerity of religious belief, and that if the alien in belief embraces the Mohammedan faith, profession, with or without conversion, is necessary, and sufficient, to remove the bar to marriage arising from unbelief or difference of creed. *Abdul Razack* v. *Aga Mahomed* 21 I. A. 55. In another case the judges said that it was difficult to conceive how the plaintiff (who claimed his inheritance) could come into Court styling himself a Mohammedan when neither he nor his brother had been circumcised. 12 W. R. 512. Circumcision can, however, be only one of the tests for deciding whether or not a person considers himself, and desires to be recognised as a Mussulman—but the question of his religion cannot be decided without reference to the tenets, beliefs and customs of the praticular sect to which he professes to belong; and applying them to all the circumstances of the case. [On circumcision, see Hughes's "Dictionary of Islam," *sub verb* P. 57. As an external test it may be of use, but it can hardly be conclusive one way or the other.]

Pretended Conversion.

189. Where, on the other hand, it is shown that the parties to the suit are pretending to be converts to Islam, in order to elude the personal law applicable to them, the courts will not allow the pretended conversion to affect the rights and liabilities of the pretended converts.

Honest Conversion.

As to the effect of honest conversion, on rights, which had their inception previous to the change of religion, "Whenever a change of religion, made honestly, after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage is a question of importance, and, it may be of some nicety. *Skinner* v. *Skinner*, (1897). 25 Cal. 537, 546. The cases of "*Gobind Dayal* v. *Inayatulla*" (1885). 7 All. 775, and "*Ali Sahib* v. *Sabhji*, (1895) Bom. 85, enunciate principles which appear to give a reply to the question; but the difficulty to which the Privy Council refer, consists in applying the principles to the facts of any particular case, especially with reference to a transaction like marriage with its far-reaching consequences.

Converts and choice of law.

In a Bombay case *Bai Baiji* v. *Bai Suntok*, 20 Bom. 53, 57; see also 23 Bom. 539, the following propositions were laid down as governing converts—1. Mohammedan Law generally governs converts to that faith from the Hindu religion. 2. A well-established custom of such converts, following the Hindu Law of inheritance, would override the general presumption. 3. This custom should, however, be confined strictly to cases of succession and inheritance. 4. And, if any particular custom of succession be alleged, which is at variance with the general Hindu Law applicable to these communities, the burden of proof lies on the party alleging such special custom.

190. "If each sect has its own rule according to Mohammedan Law, that rule should be followed with respect to that sect (*i*)."

Sects of Mohammedans.

191. The Muslims are divided into two main sects:—the Sunnis and the Shiahs. The question of the *Imamate*, of the title to the spiritual and temporal headship of Islam, form the chief point of difference between them. The Sunnis are the advocates of the principle of election; the Shiahs, of apostolical descent by appointment and succession. This difference has given birth to two distinct systems or schools of law, both founded on the Koranic regulations but diverging upon the supplementary principles derived from the oral precepts of The Prophet and of his immediate descendants and disciples (*j*).

192. One great outward distinction between the Shiahs and the Sunnis is, that whilst the former pray with their hands held straight down by their side, the latter offer their prayers with hands folded in front. Between the Hanafis and the Shafeis, the difference consists in the former pronouncing the word *âmîn* (amen) in their prayers in a low voice, whilst the latter pronounce it loudly. Ameer Ali p. 4.

Schools of Sunni law.

193. There are four schools of Sunni Law, taking their rise from the four great doctors, 1. Abu Hanifa, 2. Malik Ibn Anas, 3. Shafi'i, and 4. Ibn Hanbal, each of whom produced his own exposition of the law without allegiance, but, at the same time, without any antagonism, to the other and respecting the ability and knowledge of his predecessors or contemporaries. There is, therefore, a

(*i*) *Deedar* v. *Nissa*, (1841). 2 M. I. A. 441; 447. (Privy Council).

(*j*) Amir Ali 1; Tyabji, 31.

kind of comity, so to say, amongst the followers of the Sunni schools. A person belonging to the Sunni Sect may adopt any one of the four great doctors as his guide: only he must follow the teachings of that doctor consistently.

Ceylon Muslims.

194. It has been held in India that where it is not shown, nor alleged, that the parties are Shiahs, there is a presumption that they are Sunnis, to which sect the great majority of the Mohammedans in India belong. The majority of the Sunnis in India are followers of the Hanafi school, named after Hanifa. Of the three other schools of Sunni Law, Shafi'i alone has any considerable number in India. Ceylon Muslims belong to the Shafi'i school.*

195. Shafei's doctrines are generally followed in "Northern Africa, in Egypt, in Southern Arabia, and the Malayan Peninsula, and among the Mohammedans of Ceylon." Amir Ali, "Personal Law of the Mohammedans" at page 20 (1880 Ed.). De Vos 2. See Amir Ali Students' Ed. (1912) page 3. Lord Hobart in his Minute (*Wellesley Manuscripts*, II *Ceylon Literary Register* page 134) says:—In Ceylon and Egypt the Moors follow the the Sheik Shafei's "interpretation of the Koran."

Going over from one sect to another.

196. There are different schools of Shiah Law, but they do not observe the same comity towards each other as the Sunni schools. When a person belonging to one communion or sect or sub-sect goes over to another, his status and the dispositions made by him, as well as the succession to his inheritance, are thence forward governed by the rules of the school to which he belongs. For example, a Shiah, on adopting the Sunni persuasion would subject himself to the Sunni

* *Rabi Umma* v. *Saibu*, (1914). 17 N.L.R. 338; see also 10 N.L.R. 3.

Law—So a Hanafi becoming a Shafeite would be governed by the Shafei principles (*l*). The Sunnis can become adherents of any one of the four schools of Sunni Law at their choice, and an adherent of one school may transfer his allegiance to another by a mere declaration to that effect (*m*). The same does not apply, however, to the different schools of the Shiah Sect (*n*).

197. A *sui juris* Muslim male or female, can, at any time go over from one sect to another. No formality is required for that purpose. A slight variation in the performance of prayers, the addition of a sentence in the "Confession of Faith" effectuates the change. The Kalma-i-Shahadat is in these words, "I testify that there is no god but God and I testify that Mohammed is the Prophet of God." To which the Shiah adds, "and I testify that Ali is the Commander of the Faithful, Imam of the Pious and Successor of the Prophet." Amir Ali xxii. Sunnis and Shiahs may validly intermarry without any change of sect or communion. And a woman of the Sunni sect, married to a Shiah husband, is entitled to the privileges secured to her married position by the law of her sect. The performance by her of ceremonies usually observed in Shiah families on the anniversary of the martyrdom of Hussain would be no evidence of a change of sect. That can be effectuated only by her offering her prayers (*namaz*) according to the Shiah ritual or by pronouncing the Shiah "Confession of Faith" Amir Ali. xxii.

198. The Code of Mohammedan Laws entitled "Special Laws concerning Maurs or Mohammedans" promulgated on the 5th day of August 1806, was "ordered to be observed throughout the whole of the Province of Colombo." It was by Ordinance 5 of 1852 extended to Mohammedans residing within Kandyan Provinces and in other parts of the Colony.

(*k*) Amir Ali, p. 4. (*l*) Amir Ali, 4.

(*m*) *Muhammad Ibrahim* v. *Gulam Ahmed*, (1864) 1 Bom. H. C. R. 236; Cf. *Fazil Karim* v. *Maula Buksh*, (1891) 18 Cal. 448, 459, 461. (P.C.).

(*n*) Tyabji, 56.

Code of 1806.

199. The Special Laws concerning Maurs or Mohammedans extracted from the Minutes of Council held at Colombo on the 15th August 1806, are no other than a translation from the Dutch into English, of the *Byzondere Wetten aangaande Mooren of Mohammedanen en andere inlandsche natien* (Special Laws relating to Moors or Mohammedans and other native races) which obtained in Ceylon during the Dutch period. They form a part of the *Nieuwe Statuten van Batavia* (New Statutes of Batavia) and have been recently published by Mr. J. A. Van Der Chys of Batavia in the *Ned. Ind. Placaat Boek* (Ao. 1602-1811) Deel ix bl. 410, an introduction to which contains a history of these *Nieuwe Statuten*. The original *Statuten van Batavia* were compiled during the administration of Governor-General Antonio van Dieman (1636-45). They were proclaimed on the 1st July 1642. These *Statuten* were afterwards revised and proclaimed under the title of *Nieuwe Statuten van Batavia* when Petrus Albertus van Der Parra was Governor-General (1761-'75). (D. C. Kandy 6563, 1. *Ceylon Standard* Law Reports, 13). Translated, the Introduction to the *Byzondere Wetten*, runs as follows:—

"The following civil laws and customs by which the " "Mohammedans are guided in the decision of the differences" "among them, as regards succession, inheritance, marriage," "divorce, etc., collected from the Mohammedan books of law" "and approved by the Council of India, shall be duly observed," "that is to say, etc." It will be seen that under the Dutch these *Byzondere Wetten* were of universal application throughout the Dutch Possessions of Ceylon: so that there was no warrant for the assertion in the Minutes of Council (5th August 1806) that these *Wetten* were observed, presumably only, in the Province of Colombo and no reason to limit their scope accordingly. De Vos, 3.

Are Muslims governed by the Code of 1806 only ?

200. The Charter of 1801 provided that in the case of Mussulman natives their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined by the laws and usages of the defendant (*p*). This Charter was repealed by the Charter of 1833, and it was argued that the result was that the only Mohammedan Law in force in Ceylon was the Code of 1806 (*q*). After

(*p*) Sec. 32.

(*q*) VanderStraaten's Reports Appendix B page xxxi.

the repeal of the Charter of 1801, only the Proclamation of 1799 was in force by which it was enacted that the administration of justice should be exercised according to the laws and institutions that subsisted under the ancient Government of the United Provinces; this Proclamation was repealed by the Ordinance No. 5 of 1835, which however re-enacted in the same terms the provisions of that Proclamation with respect to the administration of justice in the Maritime Provinces. It was urged that the law introducing the Mohammedan Law had thus been repealed and the Dutch Law was introduced as the sole law of the Maritime Provinces except where altered by statute. The Court held that the Mohammedan Laws and usages were of force before the acquisition of this Colony by the British; that they formed part of the laws and institutions subsisting under the Government of the United Provinces, and that they continued as part of the law of the conquered country to have force after the conquest and that as they do not owe their validity to the Charter of 1801 they were not cancelled by the repeal of the Charter. The law proclaimed to be of force by the Ordinance No. 5 of 1835, is not the law of Holland but the laws and institutions that subsisted in Ceylon under the ancient Government of the United Provinces which included the Moorish customs and the customary laws of the Northern Province as well as the Roman-Dutch Law. If a different interpretation should be given to this Ordinance and it should

be taken to refer only to the Roman-Dutch Law, then the Tamil laws would be abrogated by it, as well as the Mohammedan, and the Code of 1806 as well as the unwritten law of the Mohammedans: for the Minute of Council by which that Code is introduced does not purport to enact any new law, but to give an authoritative exposition of certain of the usages of the Mohammedans then in force amongst them. If therefore, the whole of these usages were swept away by the Ordinance of 1835 this partial codification of them would pass away also (*u*).

201. It is indeed matter of history and of notoriety that Moors under the Dutch Government were allowed to be governed by their own laws and usages and if any further proof were wanting, it would be supplied by the preamble to the Code of 1806, where the laws then promulgated are spoken of as being observed by the Moors and acknowledged by them to be "adapted to the present usages of the caste." This was written ten years after the occupation of Ceylon by the British, and we may reasonably conclude that the usages there spoken of relate to a much longer period, and that the law of inheritance therein set out had taken a much longer time to mature.—Lawson, D. J.

202. De Sampayo, A.J. held in *Khan* v. *Maricar*, 16 N.L.R. 426.—"It is true that the Mohammedan Code of 1806, entitled 'Special Laws concerning Maurs or Mohammedans,' was to be observed' by the Moors in the Province of Colombo.' But it is clear that the words 'Maurs' and 'Mohammedans' were used as synonymous terms. When the Ordinance No. 5 of 1852 extended the Code to the whole Island, the only word used was 'Mohammedans' and the Ordinance No. 8 of 1886, which provided a system of marriage registration for Mohammedans, is still plainer, and Section 17 speaks of persons professing the Mohammedan faith. The Mohammedan Law has certainly been applied without any question to Malays and to immigrants from India known as the Coast Moormen. The fact is that the Mohammedan Law is based on religion, and is applicable to all followers of Islam. Even before the Ordinance No. 5 of 1852 the Supremt Court applied it to Moors in Kandy, observing that they were governed by their own laws and customs of inheritance and marriage which are founded on their religion." (*Saibo Tamby* v. *Ahamat*, (1851). Ram. 163.)

(*u*) See VanderStraaten Appendix B.

Where Code is silent.

203. The Code of 1806 deals with matters of succession, right of inheritance, and other incidents occasioned by death, and matrimonial affairs. In matters for which the Code does not specially provide, it has been usual for the Courts to ascertain what Moorish Law or usage applies to the particular case (*v*).

204. Bertram, C. J., observed in *The King* v. *Miskin Umma* (*w*) "the Code is a very rough codification of certain portions of a very great system of jurisprudence. It is not exhaustive and has to be read in the light of the general principles of that jurisprudence."

Where Code is in conflict with text-books.

205. In this Code there are many provisions which are difficult to reconcile with the principles laid down in the standard text-books on Mohammedan Law, but there can be no question with regard to the duty of the Courts in Ceylon to give effect to those provisions even if they appear to clash with well-established principles of Mohammedan Law (*x*). Where any rule in the Code is plain and unambiguous, it is unnecessary to have recourse to the text-books on Mohammedan Law (*y*). Mohammedan Law applies among Mohammedans in Ceylon so far only as it is consistent with the ancient usages of the Mohammedans of Ceylon, and is not at

(*v*) *Cassim* v. *Peria Tamby*, (1896). 2 N. L. R. 200.

(*w*) 26 N. L. R. 330.

(*x*) *Bandirala* v. *Mairuma Natchia*, 16 N.L.R. 235.

(*y*) VanderStraaten's Reports, 1873-4. App. B., XXX.

variance with express enactment (*z*). Once such a usage has been found to exist, Mohammedan Law may be looked to elucidate it and supplement it in detail.*

Reference to text-books.

206. On a question of pure law, as distinguished from questions of usage or practice, where our Code of 1806 is silent the proper course is to refer to the standard text-books on the subject, and not to resort to the opinions of experts (*a*). Lascelles, C. J., said in *Lebbe* v. *Tameen* (*a*):—Now, I think I am right in saying that it has been the practice of this Court for many years past to refer to text-books of authority on questions of Mohammedan Law where our own Code is defective as it very often is. It would be easy to cite a large number of instances where this has been done and personally I do not see how our own so-called Code can be understood or administered without reference to the text-books on the subject. It is suggested that the proper course when a difficult question of Mohammedan Law arises, is to resort to the opinion of experts on Mohammedan Law. It may be that there are cases in which that may be a reasonable course to adopt. But on a question of pure law as distinguished from questions of usage or practice, it seems to me that the proper course is to refer to the standard authorities on the subject.

(*z*) VanderStraaten's Reports, 1873-4. App. B., xxxi. 19 N.L.R. 178; Grenier's Reports, 1873, Pt. iii. p. 18; 3 N.L.R. 116; (1900) 4 N.L.R. 65; 14 N.L.R. 295.

(*a*) *Lebbe* v. *Thameen*, (1912). 16 N.L.R. 71.

(*b*) 16 N.L.R. 71.

* Ennis, J., in *Abdul Rahiman* v. *Ussan Umma*, 19 N.L.R. 178; see also 4 N.L.R. 65; 14 N.L.R. 295; 16 N.L.R. 71; 17 N.L.R. 338; 18 N.L.R. 481.

207. De Sampayo, J. observed as follows in *Narayanen* v. *Saree Umma* (*c*):—It is urged that the special laws governing Mohammedans in Ceylon are only concerned with such matters as inheritance and matrimonial affairs, and that where there is a *casus omissus* the Roman-Dutch Law should be applied even to Mohammedans. I cannot assent to this proposition. The local Mohammedan Code of 1806, it is true, provides only for such matters as those mentioned, but the Mohammedan Law as such is applicable to the Mohammedans of Ceylon. By a long course of judicial practice, which cannot be questioned, the original sources of Mohammedan Law and the recognised commentaries thereon have always been referred to as authorities on any points not provided for in the Mohammedan Code of 1806, which though called a Code, is not, and does not profess to be a complete embodiment of the laws applicable to Mohammedans. Even as regards inheritance the principles of the Mohammedan Law may be invoked in any case not specially dealt with in the Code. *Sarifa Umma* v. *Mohammado Lebbe* (*a*), *Pereira* v. *Khan* (*b*). That being so, there is no *casus omissus* such as contended for.

When general law applies.

208. In *Abdul Rahiman* v. *Ussan Umma* (*d*), in which the question of the validity in Ceylon of an ante-nuptial contract regulating succession to property after death (which is invalid under the Mohammedan Law) was

(*a*) 1 S.C.C. 80.

(*b*) 2 Bal. 188.

(*c*) 21 N.L.R. 439.

(*d*) 19 N.L.R. 178.

raised, Ennis, J. and Schneider, A.J. held that such contracts were valid in Ceylon.

209. Ennis, J. held that the Mohammedan Law in Ceylon is based on usage, and where the Code is silent and no ancient custom has been proved, the general law of the Island is the law applicable (*e*). "It is a document foreign to the principles of Mohammedan Law, but good and valid by the general law of Ceylon. There is nothing to prevent Mohammedans in Ceylon from adopting the general law of Ceylon where there is no ancient custom, any more than there is anything to prevent them from disposing of their property as they choose by will under the provisions of the Ordinance No. 21 of 1844" (*f*).

210. Schneider, A. J. held in the same case:—Now, if the law as stated in the text-books is applicable, the appellants are entitled to succeed, but, in my opinion, this law is not proved to prevail in Ceylon. The onus is on the appellant to prove that under the Mohammedan Law as it obtains in Ceylon the antenuptial contract is invalid. What is the Mohammedan Law which prevails in Ceylon. It cannot for one moment be pretended that the whole body of Mohammedan jurisprudence obtains currency here, for the obvious reason that all law must derive its sanction by virtue of legislation or custom or judicial decisions. Mohammedan Law stands devoid of any sanction here, because Mohammed had no right to impose his law on the inhabitants of any British territory. It is matter of history that the Mohammedans or Moors under the Dutch Government here were allowed to be governed by their own peculiar usages. It is no secret that what is called the Code of Mohammedan Laws of 1806 is mainly a translation of a Dutch compilation. Mohammedan Law in Ceylon derives its sanction from the graciousness of the British Sovereign in recognising it as the customary law of a portion of the population of this Island. Part of this customary law now derives sanction as statute law, as, for instance, the Code of Mohammedan Laws, 1806, which by a resolution of Council became statute law. It has been frequently pointed out that this Code is not exhaustive. Where the Code is silent, and there is no special custom or any point, it has

(*e*) *Abdul Rahiman* v. *Ussan Umma*, 19 N.L.R. 178.

(*f*) *Abdul Rahiman* v. *Ussan Umma*, 19 N.L.R. 179.

been held that the Roman-Dutch Law should be resorted to, as being the law generally applicable in the absence of any special law, which takes the matter out of the operation of that general law. The reported cases show that since 1862 A.D. our Courts have consistently followed the principle that the Mohammedan Law which prevails in Ceylon is so much and no more of it as has received the sanction of custom in Ceylon. It is true that treatises on the Mohammedan Law generally are frequently referred to in our Courts. But this is done only to elucidate some obscure text in our written Mohammedan Law, or in corroboration of evidence of local custom. I cannot find a single decision that has gone to the length of holding that, apart from the prevalence of a local custom, Mohammedan Law has any application in Ceylon. On the contrary, there is authority to the effect that where there is a conflict between the Mohammedan Law as found in the treatises and local custom, the latter should be followed. (*Sule Amma* v. *Mohammado Lebbe Padily*, 10 N.L.R. 109. *Bandirala* v. *Mairuma Natchia*, 16 N.L.R. 235. The principles of the Mohammedan Law as found in treatises have been adopted as governing Mohammedans here in the matter of pure donations, because since 1862 there has been evidence that the customs of the Ceylon Mohammedans recognised those general principles. But in the construction of wills, deeds, *fidei commissa*, and in ordinary matters of contract the principles of the ordinary general law, and not of the Mohammedan Law, are always applied. *Kadiga Umma* v. *Meera Lebbe*, 7 N.L.R. 23; Gren. Reports, (1873) Part iii page 28. Finally, I would add that where Mussulmans or Moors in Ceylon go to a notary and enter into a contract which is valid according to the general law prevailing in the Island, there should be unequivocal evidence of an inveterate custom before such a transaction could be pronounced by a Court of Law to be invalid or inoperative because of such custom. A strong presumption arises in such a case that the parties intended to be bound by their contract solemnly entered into, and that from long residence in the country they had learned to adopt the general law on the subject, unless there was some definite and well-reputed custom to the contrary.

211. A Mohammedan widow was held to have the right to sell the property of her deceased husband for payment of his debts under the common law, as the Mohammedan Code of 1806 was silent on the point. *Ibrahim* v. *Muhamadu*, 3 N.L.R. 116.

212. It was held by Wendt, J., in *Pereira* v. *Khan* (*g*) and Phear, C. J., in *Sharifa Umma* v. *Mohammado* (*h*) that the Code of 1806 applies only to a series of special cases therein set out in succession, and does not

(*g*) 2 Bal. 188. (*h*) 1, S.C.C. 88.

profess to furnish any principle of inheritance capable of being applied generally. The series of cases so given are by no means exhaustive.

When Code is silent, what school of law applies

213. The Code is based on the Shafi Law. As it is statutory law and no mention is made of any particular sect it will apply to Mohammedans of all sects in Ceylon. In respect of cases not provided for resort must be had to the Mohammedan Law—not to the Shafi Law only, but to the law which governs the sect to which the person whose rights are in question belongs (*i*).

214. Berwick, D. J., observed (Gren. for (73-74), p. 28.) "While it is true, in a sense that Mohammedan Law is part of the Common Law of this country, it is not to be supposed that the whole immense body of Mohammedan jurisprudence is law here, or that the dealings of Moormen in Ceylon are solely or even principally regulated by it. Only such parts of that system are law here as have been specially introduced into the Island either by express legislation or by ancient, continuous or inveterate custom or usage, which is all the Charter of 1801, meant. It is in nearly the same position in this respect as the Common and Statute Law of England here, and equally with purely English Law must give place to the ordinary law of the country, which in the last resort is the Roman-Dutch, whenever there is no inveterate and established practice to the contrary applicable to the particular case."

215. *Per* Lawson, D. J.—The Court therefore is of opinion that it went far enough in its former decision in rejecting the authority of any treatise on Mohammedan Law as binding and conclusive in any action between Mohammedans in this country, without evidence of some special custom existing here to prove the applicability of the law as cited, and that it is bound to administer the law according to such special custom when satisfactorily proved. And it may further be remarked that although the laws observed by Mohammedans in different countries prevent us from regarding the doctrines of any general treatise on the subject as conclusive when standing alone, yet there is such a resemblance between the usages of the Mohammedans of Ceylon and those of the great body of Mohammedans in India, that any treatise of authority relating to the latter, may fairly be cited as corroborating independent evidence of the usages of the former. All Mohammedan Codes owe their origin to the same source as the laws of different countries in Europe

(*i*) See *Mohammedan Law of Intestate Succession*, by M. T. Akbar, Vol. I. Ceylon Law Recorder, p. 4.

owe their origin to the Roman Law, and as we frequently in these Courts cite the Digest or Commentaries on it by writers not Dutch in corroboration or explanation of an unsupported or obscure passage in a Dutch author we may fairly quote an Indian treatise on Mohammedan Law in support of evidence of a Mohammedan custom in Ceylon though such treatise by itself is of no binding authority. VanderStraaten Appendix B.

CHAPTER XI.

THE HINDUS.

Hindu Law.

216. It would be useful to state here something about the nature of Hindu Law, especially as the principles governing the applicability of Hindu Law to various persons may be invoked with advantage in deciding similar questions in connection with our personal laws. Besides, according to the rules of private international law dealt with in the chapter on Conflict of Laws (viii) reference to the law of a person's domicil often becomes necessary. For example, inheritance *ab intestato* to the movable property of persons who have not acquired a domicil of choice in this country is governed and regulated by the law of their origin. The number of Indian Hindus residing in this country, who have their domicil in India is large and reference to Hindu Law therefore becomes often necessary.

217. Hindu Law is regarded as a personal law. As pointed out by the Privy Council (*a*): "the law applicable to the succession of any individual depends on his personal status which again mainly depends on his religion. . . . . ."

Who are Hindus ?

218. Hindu Law is applicable to *Hindus*. But it is difficult to state with precision, who are *Hindus*. The term Hindu is of comparatively recent origin. It is impossible to say

(*a*) 13 M.I.A. 277 at p. 307.

more than that Hindus are those who profess Hinduism—a definition obviously far from satisfactory. "The true test of Hinduism" says Dr. Gour, (189), "now implies the observance of caste, the worship of a Hindu deity and the paying of homage to Brahmins who are the hierophants of that religion. The ceremonial observance of the Hindu fasts and feasts is another index." "Considered as religion Hinduism is rather a system than a creed. It has no dogma or articles of faith. A man may be a deist or atheist, he will continue to be a Hindu if he was born one." In *Bhagavan Koer* v. *Bose*, 31 Cal. 11 (Privy Council) it was stated:—"The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclectism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections, exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the *Chamars* who profess Hinduism, but who eat beef and the meat of dead animals are, however low in the scale, included within its pale."

219. The Census Report (*b*) of India, (N-W.P.) sums up the elements of Hinduism thus:—"A belief in the superiority of Brahmins, veneration for the cow, and respect for the distribution of castes are the elements of Hinduism, which are generally recognized as fundamental. But each one of these has

(*b*) Part I Sec. 173 p. 192; Gour, 189.

been rejected, or is rejected by tribes, castes or sects whose title to be included amongst Hindus is not denied."

Schools of Hindu Law.

220. It may be noted here that the term "*Hindu Law*" embraces within it schools of law no less divergent than the antagonistic creeds which are labelled Hinduism. The differences between the various schools relate to even such important matters as rules of succession, and rights to property.

For instance under the Mitakshara law prevailing in Madras a woman has no right of inheritance [she has a right to life interest] either to her father's or husband's estate; but under the Mayukha Law prevailing in Bombay females may inherit under certain circumstances. Under the Dayabaga Law prevailing in Bengal the son is not co-owner with his father of the family estate, but is only an heir on the death of his father and the father has full rights of alienation; but under the Mitakshara Law the son is a co-owner with his father from the date of his birth and the father has no right of alienation over the property of his children except for necessity or for the benefit of the family.

Change of Residence.

221. A person migrating from one part of India to another may by acquiring a "domicil" in the place of his new residence acquire a new law in spite of the fact that he is governed by a personal law. A person residing in a particular province of India is held to be subject to the particular school of Hindu Law recognized in that province. He is *prima facie* governed by the law of inheritance prevailing in that part of the country in which the property is situate. If the members of a particular sect of Hindus claim to be governed by some other law, it is for such sect to prove clearly as a matter of fact by what other rules their rights of inheritance are regulated. This *prima facie* presumption is

rebutted by shewing that the Hindu or his ancestors have come from a place where a different school of law prevails (*e*). In such a case the law of the place whence they migrated and not of the place where they settled themselves and where the property with reference to which the dispute should arise was situate would govern. The presumption is that the family has retained its old laws and customs and continues to be governed by them.

Adopting law of new domicil.

222. The presumption being rebuttable it is rebutted by showing that the parties have changed their old law and have adopted the law of their new domicil or place of settlement. The party alleging that the family has ceased to be governed by the law of the place of their origin has to prove it. Evidence that the parties have brought their own priests from the place of their origin and that the ceremonies, etc., are being performed by those priests according to the law of their origin only confirms the presumption. Notwithstanding retention of these religious rites and usages, the family may have adopted rules of succession according to the systems of Hindu Law prevalent in the place of their new settlement (*f*). The Privy Council held where a family migrates from one territory to another if they preserve their ancient religious ceremonies, they also preserve the law of succession (*g*). It should be noted that this

(*e*) Gour, 145., (*f*) Gour, 149.

(*g*) *Rutcheputty* v. *Rajender*, 2 M.I.A. 132: Gour, 214. See also 12 M.I.A. 81. (92). 29 Cal. 433, (541).

presumption only applies to persons as to whose nationality or race there is no dispute and there may be cases where the same degree of presumption cannot be made as for instance in the case of persons of mixed descent or of those whose assimilation to the Hindu Society is yet incomplete (*h*). Persons who have long lived rooted to the soil of any porvince and speak the language and follow the customs there prevalent, are governed by the *lex loci*. In the case of migrating families the presumption in favour of the law of origin may be rebutted by proof of their adoption of the customs and usages of their domicil (*i*). But the mere adoption of local customs, festivals, etc., is not sufficient to displace this presumption (*j*).

Test of change.

223. The real test is whether the family has continued to adhere to the essential ceremonies of its place of origin, such as those performed at the time of birth, marriage and death (*k*), especially the last which Hindu Law regards as the most important (*l*).

224. Where a family originally subject to the Mithila school of Hindu Law migrated to Bengal and had for several generations inter-married with Bengal women, though the rights and ceremonies connected with funerals and marriages had been sometimes performed according to the Bengal Shastras, the Court held the fact of inter-marriages to justify the application of the law of domicil. But the converse proposition does not necessarily hold good, since a family may have for generations become merged in the local population, and yet it may not be permitted to inter-marry with the people of that locality, Gour, 217.

(*h*) Gour, 214.

(*i*) 40 Cal. 407; 24 W.R. 95.

(*j*) 13 W.R. 47.

(*k*) 4 M.I.A. 259.

(*l*) 8 C.W.R. 295 (296); Gour, 216.

Application of Hindu Law.

225. "In the early days of British rule," says Dr. Gour the term "Hindu" was used in its largest sense, but it was soon discovered that the term "Hindu" was not exact concept as defining any determinate body of people to whom that term was accurately applicable. For even within the class of people who were by religion Hindus, there were those who differed from each other in their tenets and conduct as far widely as polytheists and atheists,—those who revered cows and those who ate them, those who worshipped a god and those who reviled it, those who reverenced Brahmins and those who denounced them as unscrupulous charlatans. Dr. Gour, p. 172, Sec. 228.

226. Straight, J., held that the Hindu Law must be applied only to those who were orthodox believers of the Hindu religion. *Raj Bahadur* v. *Bishen Dayal*, 4 All. 343 at p. 347. "Lapses from orthodox practice, could not have the effect of excluding from the category of Hindu in the Act, one who was born within it and who never became otherwise separated from the religious communion in which he was born." *Bhagwan* v. *Bose*, 31 Cal. 11. Gan, 69.

227. Holloway, J., observed "the term Hindu means persons within the purview of the Shastras." 9 Mad. Jur. 21 (22). Gan, 72. "This statement" says Ganapathy Ayer, (Hindu Law p. 72.) "Can hardly be regarded as correct. Outcastes and degraded persons are certainly out of the pale of the Shastras and yet they are governed by the Hindu law."

228. The difficulty in defining Hinduism has in some measure resulted in the application of a religious law to religionists who can be called Hindu only in a territorial sense.

229. Hindu Law is applied to Jains, but, it would seem, not to Buddhists in India, though both profess similar creeds. Sikhs and Lingayats are also governed by it in spite of the numerous differences between them and "orthodox Hindus." Though Hindu Law is a personal law based on religion, Mohammedan converts from Hinduism are allowed to retain their old law, and so were Christians before the Indian Succession Act, in spite of the fact that neither of them profess a religion of Indian origin or growth.

Buddhists.

230. The system founded by Buddha like that founded by Maha Vira, in its original form was not a religion in the ordinary sense of the term. It was only a monastic organization and at its early stage was not directly antagonistic to the cardinal principles of Brahminism. Eventually when the Brahminic sacrificial cultus was discarded, and the authority of the Vedas questioned, the stage was reached when exclusion from the place of Brahminism became inevitable, and Buddhism was transformed into a religion. Dr. Gour says:—The question whether Buddhists are Hindus can only admit of one answer. Whatever may be its association and affinity with Hinduism, it is a creed apart, and Buddhists cannot be classed as Hindus, both because they do not regard themselves as such, nor are they so regarded by other Hindus (*n*).

231. **Buddhists and Jains**—Both Gautama, the founder of Buddhism and Mahavir, the founder of Jainism were contemporaries [See "*Gazeteer of India*" *Vol.* II, *page* 258; *Gour's Hindu Code page* 203; *Ganpathi Ayer's Hindu Law page* 89; *Professor Jacobi's Jain Sutras* 225 *B.E.*] and although both preached doctrines which were similar and in certain respects even identical, Buddhists are not regarded as a sect of the Hindus, but Jains are, and are governed by the Hindu Law. Like the Buddhists, the Jains deny the existence or at least the activity and providence of God, and the divine authority of the Vedas, and consider a state of impassive abstraction as supreme felicity. They do not perform any obsequies for the dead. They have no *thithi* or days appointed for celebrating the memory of the dead. The chief objects of their worship are a limited number of saints who have raised themselves by austerities to a superiority over the gods. The Jains admit the whole of the Hindu gods, and worship some of them though they consider them as entirely subordinate to their own saints who are therefore the proper objects of adoration. "Some changes are made by the Jains in the rank and circumstances of the Hindu gods, and they have increased the number of gods. They have no veneration for relics.". *See Ganapathi Ayer's Hindu Law page* 83; *see also Elphinstone's History 9th*

(*n*) Gour, 213.

Ed. pages 115-117; *Dr. Gour's Hindu Code page* 202. It was held by the High Courts of India and by the Privy Council that the Jains were governed by the ordinary Hindu Law.

232. **The Lingayats.**—The chief characteristics of this sect in its early days were adoration of the Lingam and of Nandi, Siva's bull, and disbelief in the transmigration of the soul. They rejected infant marriage and permitted widows to remarry. According to the theory of the original founder, caste distinctions were unworthy of acceptance and hence caste and other Brahminical observances were abolished by him.

233. **The Sikhs.**—The Sikh creed involves belief in one god; it condemns the worship of other deities; prohibits idolatry, and pilgrimage to great shrines and abolishes caste distinctions. As a necessary consequence it abolishes Brahminical supremacy. It recognizes no ceremonial impurity either at births or at deaths. It was held that Sikhs and Lingayats, being sects of Hindus were governed by Hindu Law, see 2. Morley's Digest pages 22 and 43; 31 Cal. 11 at page 30; 30 I.A. 249. (252). Gour, 78 and 93.

234. **Christians.**—"Upon the conversion of a Hindu to Christianity the Hindu Law ceases to have any continuing obligatory force upon the convert. He might renounce the old law, by which he was bound, as he had renounced his old religion or if he thought fit, he might abide by the old law, notwithstanding he had renounced the old religion" (*o*) but, since the passing of the Indian Succession Act they have no option but to conform to its provisions on the subject of succession.

Indian Succession Act.

235. The Indian Succession Act X of 1865 is the general law in British India as regards intestate and testmentary succession. Hindus, Mohammedans and Buddhists are exempted therefrom and the Governor-General in Council may exempt others. Europeans, Indian Christians, Jews, Armenians, etc., are consequently governed by the Act.

(*o*) Gour, 97.

236. In this connection two questions arise:—"Are Hindu converts to Christianity 'Hindus' within the meaning of Sec. 331 of the Succession Act and do the provisions of the Act necessarily preclude the application of Hindu Law upon matters not directly dealt with in that Act ?" The Succession Act does not define that term, but there can be no question that after their conversion they cannot be called Hindus even in common parlance. They are, therefore, bound by the Act, and as it saves no usage or custom to the contrary they are inevitably so bound. In this view there is no room for survival of the essentially Hindu doctrines of coparcenership and survivorship. *Kamavati* v. *Digbijaising*, 43 All. 525 Privy Council; *Tellis* v. *Saldhana*, 10 Mad. 69; Gour, 210. [But contra see *Francis Ghosal* v. *Gobri Ghosal*, (1906) 31 Bom. 25, where it was held that notwithstanding the conversion of a family to Christianity it may still continue or become an undivided joint family holding and enjoying property in coparcenership with the right of survivorship which is unaffected by the Succession Act which merely deals with the *devolution* of rights on intestacy and does not purport to enlarge the category of heritable property.], Gour para 329. In *Abraham's Case* 9 M.I.A. 195, which was decided before the Indian Succession Act the Privy Council held as follows:—"The profession of Christianity releases the convert from the trammels of Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu Law, or by any other positive law, may by his course of conduct, after his conversion, have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which, as to these matters, has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it should be governed by the law which he has adopted, or the rules which he has observed." Then referring to the native Christians, they went on to add: "Some adhere to the Hindu customs and usages as to property; others again retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules, and laws as to their property."

237. **Mohammedans.**—The same principles which governed the case of Hindu converts to Christianity before the passing of the Indian Succession Act, have been applied to the case of Hindu converts to Mohammedanism (*p*).

(*p*) Gour, 109.

The Kutchi Memons and the Khojas, though converted to Mohammedanism have retained many Hindu usages, amongst others an order of succession opposed to that prescribed by the Koran (*q*).

238. It was held in *Bai Baji* v. *Bai Santok*. (1) "That though the Mohammedan Law generally governs converts to that Faith from the Hindu religion yet (2) a well-established custom of such converts following the Hindu Law of inheritance would override the general presumption. (3) that this custom should however be confined strictly to cases of succession and inheritance, (4) and that if any particular usage at variance with the general Hindu Law applicable to these communities in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such special custom."

239. **Outcaste Hindus.**—Caste is an integral part of the Hindu religion and the Shastras enjoin the forfeiture of all civil rights with the deprivation of caste. But the Caste Disabilities Removal Act passed in 1850 has repealed all such texts and usages as have that effect—the result being that the forfeiture of one's caste now no longer entails any of its prescribed civil disabilities and an outcaste Hindu is in the eye of the law as good a Hindu as one who has never lost his caste (*qq*).

240. **Conversion to Hinduism.**—Though it is stated that Hinduism does not admit converts, nevertheless the process by which non-Hindus are admitted into its fold is in its effect, little, if at all, distinguishable from conversion. This result is achieved by acknowledgment and recognition of non-Hindus as Hindus. It is thus that the creedless barbarians of a bygone age have been brought into its fold. Whole provinces have thus become Hinduised (*r*).

(*qq*) Gour, 195.

(*r*) Gour, 211.

241. **Illegitimate Children of Hindus.**— Hindu Law makes no distinction between the legitimate and illegitimate children of Hindu parents (*rr*) or even where one of them is a Hindu and the other non-Hindu provided they are brought up and received as Hindus (*s*). The same rule applies equally to children of mixed parentage.

242. A long series of legislative provisions have been enacted for the purpose of securing to the people of India the maintenance of their ancient law. The framers of the earlier Acts, Regulations and Charters had a less detailed acquaintance than the modern legislators with the diversities of creed and of religious law existing in India. They were familiar with two great classes, Mohammedans and Hindus, each with its own law bound up with its own religion. They thought no doubt that they were sufficiently providing for the case by securing to Mohammedans the Mohammedan Law, and to Hindus (or Gentus, as they were sometimes called) the Hindu Law. There were the Armenians, the Parsis, the Jews. These were not referred to in the Charters. The startling consequence was that English Law was sought to be applied to them. Even with respect to Hindus and Mohammedans there were and are different sects and in process of time it became more and more clearly understood that there were more forms than one of the

(*rr*) Ram Kumari (In *re*) 18. C. 264.

(*s*) *Myna Bayee* v. *Ootaram*, 8 M.I.A. 400; *Lingappa* v. *Jesudasan*, 27 M. 13.

Mohammedan Law and more forms than one of the Hindu Law. The Courts acting in the spirit which prompted the legislation have applied the law of each school to the people whose ancestral law it was. So also it came to be known that there were religious bodies in India which had, at various periods and under various circumstances, developed out of, or split off from, the Hindu system, but whose members have nevertheless continued to live under Hindu Law. Thus the Courts applied the Hindu Law to the Jains and Sikhs as they applied the Shiah Law to the Shiah Sect of Mohammedans (*u*).

(*u*) Gour, 160.

CHAPTER XII.

MALABAR INHABITANTS OF THE PROVINCE OF JAFFNA

THE TESAWALAMAI.

243. The status of the Tamils of the Northern Province differs from the ordinary standard in certain respects in as much as these Tamils are governed by special customs.

244. So far as the customs relate to status, including therein the rules for the distribution of estates on intestacy, they have been held to apply only to Tamils who are inhabitants of the Northern Province. Ennis, J. held in *Spencer* v. *Rajaratnam* (*a*). "The Tesawalamai are not the customs of a race or religion common to all persons of that race or religion in the Island; they are the customs of a locality and apply only to Tamils of Ceylon who are inhabitants of a particular Province" (*b*). Wood Renton, C.J., held in the same case:—The Tesawalamai is not a personal law in Ceylon as the Hindu or the Mohammedan Law is in British India. It is not a personal law attaching itself by reason of descent and religion to the whole Tamil population of Ceylon, but an exceptional custom in force in the Province of Jaffna—now the Northern Province—and in force there, primarily, and mainly at any rate, only among

Not a personal law.

(*a*) 16 N.L.R. 332.

(*b*) *Spencer* v. *Rajaratnam*, (1913). 16 N.L.R. 321.

Tamils who can be said to be 'inhabitants' of that Province; as the Tesawalamai is a custom in derogation of the common law, any person who alleges that it is applicable to him must affirmatively establish the fact. The mere fact that a man is a Jaffna Tamil by birth or by descent, while it is a circumstance of which account must be taken in considering his real position, will not bring him within the scope of the statutory definition of the class of persons to whom the Tesawalamai applies.

245. Tesawalamai is according to Regulation No. 18 of 1806 "the customs of the Malabar inhabitants of the Province of Jaffna." The exact significance of the terms (1) *Malabar*, (2) *Inhabitants* and (3) *Province of Jaffna* in this Regulation must now be determined.

Malabar inhabitants of the Province of Jaffna.

Malabar.— Strictly speaking the term Malabar is now applied to persons inhabiting the Malabar Coast of India—Cochin, and Travancore. The term is believed to have been first used by the Arab or Arabo-Persian mariners of the Gulf to the seaboard country corresponding roughly to the *Kerala* of ancient times and modern Travancore. "Malai" is a Dravidian word for mountain. The termination "bar" may be connected either with the Arab *barr* "(a continent) or with Sanscrit "*vara*" (a region)." It was applied by the navigators of the Gulf to other regions which they visited besides Western India, *e.g.*, Zangibar (modern Zanzibar)—country of the blacks. Whatever might have been the

original significance of the term Malabar, it appears to have been used to include the South-East Coast of India at an early date.

According to some the term *Ma'bar* (Arabic for passage) was applied to the South-East Coast and confused by Europeans in later years with Malabar.

Marco Polo, the Venetian traveller, who visited India and Ceylon about the end of the thirteenth century refers to the Gulf of Mannar as "the bay that lies between *Ma'bar* and the Island of Zeilan (*a*). He calls the Province that he first touched after leaving Ceylon Ma'bar, which was at that time the usual Musulman designation of the coast extending from Kulam (Quilon) to Nilawar (Nellore) (*b*). † Marco Polo sailed westward from his port of embarkation for a distance of about sixty miles till he came to the Province of Ma'bar, which he says was styled "India the Greater." According to him it is the best of the Indies and is on the mainland. He refers to the coast wherein he landed as among the possessions of the Pandyas. The Port he visited on this coast has much exercised the ingenuity of scholars, and from various considerations, both Yule and Cordiner would refer the port to Kaveripatnam. Among other ports suggested are Kayal Pattanam and

† It may be noted that during the first millenium of the Chrisitan era the people inhabiting both the south-east and south-west coast spoke the same language and had the same characteristics.

(*a*) Marco. Vol. ii p. 313.

(*b*) See Krishnaswami Ayangar's South India and her Mohammedan Invaders, page 62.

Periya Pattanam near Rameswaram‡ All these ports are in the east coast where one would expect a boat sailing from Ceylon to land, having regard in particular to the fact that the port of embarkation at the time seems to have been Puttalam (Bathelar) in Ceylon the Bhattala of Ibn Batuta; and the distance would be about sixty miles (*c*).

‡ Mr. Krishnaswami Ayangar writes:—The lead is taken by all these authorities from the statement of the Mohammedan writer Wassaf that Fittan, Mali Fittan and Kabil constituted the famous ports of which Takhiud-din Abdur-Rahman was the Marzaban (Margrave). These three names are obviously Pattanam, Melai Pattanam, and Kayal or Kayal Pattanam in the langauge of the locality. Kayal, according to Marco Polo, was the premier port, whereto came all merchants from the east as well as the west, and from all over India, for purposes of trade. The other two stand in some geographical relation with this one. The words would stand, the port and the upper port, the term pattinam meaning port. I believe the port on what is the Island now is called Ramesvara Pattinam, sometimes also Pattinam merely, but at the time of Marco Polo there was another great port on the inner side of the Gulf of Mannar, the ruins of which are now known as Periya Pattanam. In the wars of Parakrama Bahu in favour of one of the Pandyan Princes, and against his brother, he is supposed to have taken on the mainland and in the peninsula, a village called Kundukala and having fortified it with three circuits of walls and twelve gates, called it Parakrama-pattanam, equidistant from either sea. A little way to the south and on the coast lie the vast ruins of a city called Periya Patttanam (large port or city) in the Ramnad Zamindari already referred to above, where till recently people picked up coins and antiquities of sorts, and I am informed, a considerable portion of the ground plan of the city could still be traced at low water.

(*c*) See Krishnaswamy page 64.

Malabar.

The Portuguese applied the term *Malabar* not only to the language of the people of the Western Ghats, but also to the Tamil language and the people speaking Tamil. Bishop Caldwell says:—"The Portuguese sailing from Malabar on voyages of exploration made their acquaintance with various places on the Eastern or Coromandel Coast and finding the language spoken by the fishing and seafaring classes on the eastern coast similar to that spoken on the western, they came to the conclusion that it was identical with it, and called it in consequence by the same name—viz., Malabar." Other Europeans have followed the Portuguese even in comparatively recent times in calling Tamils, "Malabars." Colebrook in his *Essay on the Sanscrit and Prakrit Languages* says:—"The language of the province is Tamil, to which Europeans have given the name of Malabar." In the very first book ever printed in Tamil characters at Ambalakaddu on the Malabar Coast in 1577 the language of the book is styled "Malabar" or "Tamil" (*c*). The British appear to have used the word in the same sense. In the Proclamation issued on the 11th of February 1815 on the occupation of Kandy by the British the term Malabar is used to signify Tamil, in the expression there used: "*The Malabars from the Coast of Coromandel.*" ‡

(*c*) Yule-Burnell.

‡ As to Malabar Settlements in Jaffna, *see para* 274b.

246. The editor of the 4th volume of the New Law Reports (Sir P. Ramanathan, K.C., C.M.G.,) says in a note at page 333:—

"Malabar" is a corruption of "Malai-Varam" (mountain-side), the country along the Western Ghauts of India. When the Dutch, who had visited Western India, arrived in Ceylon and found the Tamils here to be somewhat identical in religion with the Hindus of the Malabar Coast of India, they called them Malabar inhabitants, meaning settlers from the Malabar Coast. But the Tamils in Ceylon came from the eastern coast (called by the Dutch the Coromandel Coast), and are different from the people of Malaivaram or Malayalam in point of language and social institutions. Hence, it is an error to speak of the Tamils as Malabars.

Province of Jaffna.

247. **The Province of Jaffna**— may be taken to correspond with the Northern Province as it exists today. In 1919 the Tesawalamai Commission reported on the point as follows:—

The territorial area of "Jaffnapatam" or the "Province of Jaffna" is not very easy to determine. It is, however, certain that it did not include Trincomalee, and Batticaloa, though they were populated by Tamils (see *Wellapulle* v. *Sitambalam*, Ram. Rep. 1872-1876, p. 114.) We have some guidance, as to what Jaffnapatam in the Dutch times comprised, in the Memoir of Governor van Rhee, written, according to the Dutch colonial practice, for the information of his successor Governor Gerrit de Heer in 1697, a translation of which will be found in the Journal of the Ceylon Branch of the Royal Asiatic Society, 1871-1872. According to that Memoir (pages 2 and 4), Jaffnapatam comprehended the Island of Mannar, the Peninsula of Jaffna, the Vanny, and the Islands round Jaffna. In 1799 Mr. Cleghorn, Secretary and Registrar of Records, wrote a Minute, now generally known as Cleghorn's Minute, on the administration of justice and of the revenue under the Dutch Government. There he gives the divisions of the Company's possessions with respect to Presidencies, among which is "Jaffnapatam," whose dependent country under the

Chief Military Officer is stated to have extended along the northern parts of the Island, from the limits between Puttalam and Mannar to the river Kokoly, the limit of Trincomalee. It thus appears that Jaffnapatam in the Dutch times included the Districts of Mannar and Mullaittivu. At the date of the Regulation of 1806 the limits of the Province of Jaffna were probably the same as in the Dutch times. From a report embodied in the judgment in the above case *Wellapulle* v. *Sitambalam*, it appears that Lieut.-Col. Barbet, the first Agent of Government appointed to Jaffna in 1801, had jurisdiction extending to "Calpentya, Mannar, Vertelitivo, Puttalam, Mullaittivu, Kayts, and Point Pedro and the vicinities thereof." So that it is clear that both in the Dutch and in the British times the Districts of Mannar and Mullaittivu were comprehended in Jaffnapatam or the Province of Jaffna. The mention in the above report of Calpentya and Puttalam, which it is agreed were never parts of the Province of Jaffna, is explainable by the circumstance that Lieut.-Col. Barbet was not the mere Government Agent of that Province in the modern sense, but was "Commissioner Extraordinary of Revenue and Commerce for the Northern Districts" at a time when the administrative divisions of the Island were not so well defined as they became by later Proclamations. Reference may also be made to the map of Ceylon of December 1822, authenticated by Capt. G. Schneider, Surveyor-General, and dedicated by him to Sir R. Otley. This establishes two facts: (1) That the Province of Jaffna included the Districts of Mannar and Mullaittivu; and (2) that the extreme southern limit was the line separating Chettikulam from Nuwarakalawiya. It may then be concluded that the Province of Jaffna, for all practical purposes, corresponded with the present Northern Province.—(Signed). T. E. DE SAMPAYO, K. BALASINGHAM, A. KANAGASABAI, P. ARUNACHALAM.

Province of Jaffna.

Inhabitant.

248. The term inhabitant has been construed to mean a permanent inhabitant—a

person who had acquired a permanent residence in the nature of domicil in the Province of Jaffna.

249. Middleton, J., had to construe the term inhabitant in deciding as to the status of a Jaffna Tamil who went over to Batticaloa and resided there for about thirty-five years and acquired lands and other properties there (*d*).

Inhabitant.

He said:—"I would construe it as indicating a permanent inhabitant, one who has his permanent home in the Province of Jaffna. The question of domicil has been introduced here; and, of course, in a measure that question affects the inferences as to the meaning of the word 'inhabitant.' "I may add, however, as regards the law of domicil, the Lauderdale Peerage Case lays it down that a change of domicil, which, I think, is very much equivalent to what I call 'inhabitancy' here, must be *sine animo revertendi*, and I think that the Judge was right in holding in accordance with the ruling in that case that every presumption is to be made in favour of the original domicil, and that no new domicil can be taken to have been acquired without a clear intention of abandoning the old." In the same case Wood Renton, J., said:—"I think that the term 'inhabitant' must be interpreted in the sense of a person who, at the time in question, had acquired a permanent residence in the nature of domicil in that Province. I should be inclined to hold, if it were necessary, that, even if the rights of the parties depended upon the domicil of the testator at the date of the execution of the will, the appellant has failed to show that he had thrown off his admitted domicil of origin. But it is unnecessary to decide the point."

250. In *Spencer* v. *Rajaratnam* the Supreme Court had to consider the case of a person who was born in Jaffna, but lived and died in Colombo.

(*d*) *Velupillai* v. *Sivakamipillai*, (1930). 13 N.L.R. 74.

Ennis, J., said

(*cc*):—In questions relating to domicil there is a presumption of law that the domicil of origin is retained until a change is proved, but it seems to me that when the question is one of inhabitancy, for the purpose of the application of a local custom, the presumption is not in favour of the original inhabitancy, but of the actual residence at a particular time; that there is a presumption that a change of residence to a place outside the limits of local custom indicates an intention to depart from local custom.

Wood Renton, C. J., observed:—

Inhabitant.

The term "inhabitant" in Regulation No. 18 of 1806 must be interpreted in the sense of a person who at the critical period had acquired a permanent residence in the nature of domicil in that Province. It is not desirable or possible to lay down any general rules as to the circumstances which will suffice to establish the existence of such a residence. Each case must depend on its own facts. There may be, on the one hand a residence in Jaffna which will not suffice to make a Tamil an "inhabitant" of the Province within the meaning of the Regulation of 1806, and, on the other hand, a residence elsewhere, even for protracted periods, which will not deprive him of that character. An advocate practising before the Supreme Court in Colombo or a Government Servant permanently attached to the Kachcheri at Galle or Matara might well, if he were a Jaffna Tamil, retain such a connection with his native Province as to entitle him to the benefit of its customary law. But the mere fact that a man is a Jaffna Tamil by birth or by descent, while it is a circumstance of which account must be taken in considering his real position, will not bring him within the scope of the statutory definition of the class of persons to whom the Tesawalamai applies. These conclusions, I think, necessarily arise on a fair construction of the statutory provisions with which we have to deal in the present case. They are justified also by the well-known conditions of social and public life in this Colony. The evidence shows, and the fact is notorious apart from it, that there are Jaffna Tamils who, while retaining all their natural affection for the Province in which they were born, have severed their personal and family and professional or business

(*cc*) 16 N.L.R. 332.

connections with it to an extent which makes it impossible that they can fairly be described as being any longer "inhabitants" of that Province. To subject persons of this description to a customary law so complicated, confused, and uncertain in many of its provisions, as is the Tesawalamai, would be a grave step.

251. The question of "inhabitancy" like domicil is a mixed question of fact and law. Much depends on the circumstances of each case, and it is not easy to lay down precise rules for the decision of the point. It would therefore be instructive to note the circumstances in which persons have been held to be or not to be "inhabitants of Jaffna."

252. In *Spencer* v. *Rajaratnam* (*f*) above noted, the Court had to consider the facts adduced in support of the claim whether a person N was an inhabitant of Jaffna, and incidentally whether his parents were such inhabitants.

Mixed question of fact and law.

Wood Renton, C. J:—He left Jaffna when he was a few months old, and lived and died in Colombo. He married in Colombo a lady—whom the District Judge has found to have been a Colombo, and not a Jaffna Tamil. When the marriage was proposed Naganathan told him (father-in-law) "that he was a Colombo man and domiciled in Colombo." The only circumstances that can be said in any way to counterbalance this evidence are the alleged visits of Naganathan to Jaffna in 1888, again in 1895, and twice between 1895 and 1898. This evidence, most of which the learned District Judge describes as "extremely vague," is however, quite insufficient, even if accepted in its entirety, to show that Naganathan was an "inhabitant of the Province of Jaffna," or had any intention of becoming one. But the plaintiff's case does not rest exclusively on the evidence specially applicable to Naganathan. She depends also, as she is entitled to do, on the evidence as to Arumogan and his wife Sinnatangam, and Arumogan's parents before him. The fact that Naganathan's parents (Arumogan and Sinnatangam) and grand-parents were "Malabar inhabitants of the Province of Jaffna" would not, of course, necessarily

(*f*) 16 N.L.R. 328.

Inhabitant.

show that Naganathan was one. But it might create a presumption in favour of that conclusion. Arumogan's father Tilliyan Naganathar, and mother Kadiresu, lived and died in Jaffna, and were "inhabitants" of that Province. The evidence relied upon to prove that Arumogan preserved the local status which he thus acquired at birth may be summed up as follows: He preserved the family name and religion. He married a Jaffna lady. He visited Jaffna in 1874, 1875, and 1888 for business and ceremonial purposes. Although he sold one of his lands in Jaffna, he took care that the purchaser was a relation. He bought another land in the Province for over Rs. 800—a high price for a comparatively poor man, as he is then said to have been. When his sister Theyvanai died in 1870, he dealt with her property as sole heir—on the basis of the provisions of the Tesawalamai which, it is alleged, would exclude his other sister Manicam, who had been dowried, from the succession. The provisions of his joint will recognized Sinnatangam's separate rights under the Tesawalamai to her dowry property. Sinnatangam too evinced an intention to remain an "inhabitant" of the Province of Jaffna. Although she was married in the district of Chilaw, she returned to Jaffna for her first confinement. Her dowry property was not inventoried on the administration of the estate of either Arumogan or Naganathan. Whatever might be said as to the conduct of her husband in this respect, she at least appointed Tamil executors. She spoke in her will of "my house at Anacotta," directed that her personal property should be taken and kept there, and left a bequest to a local temple for the purpose of securing the perpetual observance of a religious ceremony in memory of her. But there are very serious considerations that have to be reckoned with on the other side. Although Arumogan might cease to be an "inhabitant" of the Province of Jaffna, he did not cease to be a Tamil and a Hindu. There is, therefore nothing surprising in the fact that he retained the family name and religion, and kept himself in occasional touch with his friends in Jaffna. Moreover, the evidence shows that it is not unusual even for members of the Colombo Tamil community to retain portions of their ancestral property in the Province of their birth. Although Arumogan married a Jaffna lady, the marriage itself was not celebrated in Jaffna, and the home was undoubtedly in the district of Colombo. It was in that district that most of his immovable and, with the exception of some shares in the Jaffna Trading Company, his movable estate was locally situated. His sister Theyvanai, in whose house he was brought up, had severed her connection with Jaffna. I am by no means certain that the case of *Anthony* v. *Nathalie*, (1843) Muttukishna, 167, on which the plaintiff's counsel relied as proving that a dowried sister in the position of Manicam would, under the *Tesawalamai*, take no interest in a deceased sister's estate, does in fact support that proposition. The general rule enacted by the *Tesawalamai* is that the property of males devolves on males and that of females on females, and the case of *Thambar* v. *Chinnatamby*, (1903). 4 Tamb. 60, seems

to me to indicate that Manicam's rights of succession would not, in a case like the present, be excluded. The appointment by Arumogan in his joint will of European executors—an appointment of a kind admittedly unusual among Tamils—is a circumstance to which considerable weight must be given, and which is by no means explained away by the fact that the executors in question were his own employers. The inventory of Arumogan's property was not adduced in evidence by the plaintiff, and there is, therefore, nothing to show that it did not include Sinnatangam's separate property. Sir Stanley Bois, one of Arumogan's joint executors, was asked no question—as he ought to have been if the plaintiff relied on the fact—as to whether or not Sinnatangam's separate property had been included in the inventory of Arumogan's estate, or as to why it was not included in that of Naganathan, of whom he saw a great deal after Arumogan's death. That Sinnatangam should have gone back to her parents' house for her first confinement is a consideration of almost no importance. It was the natural and usual course for a lady in her position to adopt. But she subsequently gave birth to two other children, and on neither of these occasions did she return to Jaffna. The removal of some of her personal property to her house at Anacotta and the foundation of a religious ceremony in a temple there in memory of her are circumstances open to the same observations that I have already made in dealing with Arumogan. She remained a Tamil, although her matrimonial home had been in the district of Colombo. It was quite natural that she should retain her house in Jaffna, although it is worthy of notice that she did not continue to live in it after Naganathan's death. Sinnatangam was a Hindu as well as a Tamil, and might reasonably desire that her memory should be preserved in a temple situated in the district where she had been born and brought up. Inhabitant.

Ennis, J:—The evidence as to whether Naganathan's father and mother could be considered inhabitants of the Northern Province is of little weight, if any, against the evidence relating directly to Naganathan, which leaves no doubt in my mind that Naganathan was an inhabitant of Colombo and not of the Northern Province. The distribution of his estate would, therefore, be governed by Roman-Dutch Law.

253. In *Fernando* v. *Proctor*, 12 N.L.R. 312 it was held:—The operation of the Tesawalamai is restricted to persons who can fairly be said to be "inhabitants" of the Province of Jaffna, now, the Northern Province. Susan Philips was not herself an "inhabitant" of that Province. Although she was of Jaffna Tamil descent, her family had long been settled in Puttalam and Chilaw. She was born in the former, and lived and died in the latter town, and the District Judge finds that there is no proof that she ever went to the Province of Jaffna. It may be said apart from Ordinance 15 of 1876, the matrimonial domicil of the spouses would in such a case, be that of the husband. But I express no opinion on that point now; for the evidence here does not show that Jolly Philips himself, any more than his

wife, was an "inhabitant" of the Northern Province. Although his father was a Jaffna Tamil, he himself was born in Trincomalee, where his family was settled for forty-five years or more. His father was Kachcheri Mudaliyar at Trincomalee and returned to Jaffna after he retired. It was suggested that his official absence from Jaffna did not deprive him of his legal position as an "inhabitant" of that Province. But there is nothing to prove that Jolly Philips ever acquired a right to be so described.

Tamils from outside Jaffna settling in Jaffna.

254. The question whether a Tamil coming over from outside the "Province of Jaffna" and settling in Jaffna could acquire the status of a Malabar inhabitant of the Province of Jaffna was considered in *Savundranayagam* v. *Savundranayagàm* (*h*) and the Supreme Court would appear to have held that it was not possible for him or his children to do so.

In this case the facts as stated by the District Judge, (Dr. P. E. Pieris), were as follows:—Savundranayagam's father was Tissera, who was a Tamil born in Colombo—a member of the Chetty class. Tissera married Wilhelmina Jurgan Ondatjee, who was a Tamil. The plaintiffs stated that she was also a Colombo Chetty; the defendants asserted that she was "a Malabar inhabitant of Jaffna" within the meaning of that term in the Regulation of 1806. Tissera and his wife lived at Jaffna. The husband predeceased, leaving behind G. P. Savundranayagam and another, Ariyanayagam. The land in dispute belonged to Wilhelmina. Savundranayagam became a lawyer and practised at Trichinopoly, where he died in 1882. He married twice, Jaffna Tamil ladies; both marriages were prior to 1876. Plaintiffs are the children of the first bed, the defendants children of the second bed. Plaintiffs say that Gabriel Tissera having been a Colombo Chetty was governed by the Roman-Dutch Law, and therefore his son was governed by the same. The defence say that Tissera by settling in Jaffna became subject to the *Tesawalamai*, and that Savundranayagam was a Malabar, to whom the *Tesawalamai* applied. It further relies, as an illustration, on the fact, which is well-known, *that Tamils from India settle in Jaffna, and their descendants are absorbed among the Jaffna Tamils, and are admittedly governed by the "Tesawalamai."* In other words, during the lifetime of Wilhelmina, and after her death, it was recognized that her rights were governed by the *Tesawalamai*. The baptismal register of Savundranayagam shows that Tissera and his wife were recognized as inhabitants of a Jaffna parish, that Savundranayagam was born in Jaffna. Savundranayagan was a lawyer, and

(*h*) 20 N.L.R. 275.

married before 1876. He very well knew the meaning of the Roman-Dutch Law community. By his will he disposed of all his property, including the jewels he had given to his wife in his lifetime. He certainly considered that his interests were in Jaffna, for he directed that on certain contingencies certain moneys were to be deposited with the Procurator of the Jaffna Roman Catholic Mission, with the cognizance of the Vicar Apostolic of North-Ceylon, and that the Procurator or Bishop should deal with the moneys in certain fashion. He left the entirety of the land in dispute to his second wife, and specially declared that the second plaintiff is not entitled to any share of the property he died possessed of. Savundranayagam clearly considered himself a Jaffna Tamil, and governed by the *Tesawalamai*. It is abundantly clear that for the last seventy-five years Tissera, his wife, her sister, and the latter's husband, with their descendants, have been recognized as governed by the *Tesawalamai*. No Court of Law would be entitled at this time of the day to open up the question of whether such recognition was correct, or whether the action of parties for three-quarters of a century was not based on an error. I must hold that Savundranayagam was governed by the *Tesawalamai*.

The Supreme Court came to a different conclusion. Wood Renton, C.J., held:—

The defendants have, in my opinion, failed to discharge this burden. Gabriel Tissera was a Colombo Chetty. The name of his first wife was Wilhelmina Ondatjee. There is no proof whatever that she was a Jaffna Tamil. The learned District Judge himself says that she was "a member of a large and well-known family, representatives of which are to be found in various parts of the Island, claiming to be Tamils, Sinhalese, or Burghers, according to their circumstances and environment. But he reaches the conclusion that she was subject to the Tesawalamai by a series of elaborate but unsubstantial inferences or conjectures from the conduct of another lady of the same name, Lavinda Ondatjee, from the baptism of Savundranayagam, from his will, from the name of his brother Ariyanayagam's wife, and from the fact, which the District Judge says that it is a "satisfaction to know," that "when Simon Jurgan Ondatjee, admittedly a Chetty of Colombo, sued his father-in-law, Don John Mark Pulle Mudaliyar, at Jaffna in 1803, the heads of the caste, Thamoderam Pulle Coomarakulasooriya Mudaliyar and Virasinghe Mudaliyar, took part in the trial, which was dealt with under the *Tesawalamai*." However interesting and ingenious such speculations may be, they are not a safe basis for a judicial decision, and I do not think that the learned District Judge would have acted upon them if his attention had been directed to the principle enunciated in *Spencer* v. *Rajaratnam*.

Jaffna Tamil marrying Tamils residing out of the Northern Province.

255. It was held in *Fernando* v. *Proctor* (*i*) that where a Tamil woman, not an inhabitant of Jaffna marries a Tamil inhabitant of Jaffna, she does not become by the marriage, an inhabitant of Jaffna by the operation of Section 2 of Ordinance 15 of 1876.

256. Ordinance No. 1 of 1911 makes the following provision on this point:—

(1) Whenever a woman to whom the *Tésawalamai* applies marries a man to whom the *Tésawalamai* does not apply, she shall not during the subsistence of the marriage be subjected to the *Tésawalamai.*

(2) Whenever a woman to whom the *Tésawalamai* does not apply marries a man to whom the *Tésawalamai* does apply, she shall during the subsistence of the marriage be subjected to the *Tésawalamai.*

Land situated outside Northern Province.

257. The question whether the Tesawalamai is applicable to immovable property owned by Malabar inhabitants but situate outside the Province of Jaffna, was raised in *Seelachchy* v. *Visuvanathan Chetty* (*j*), and in *Velupillai* v. *Sivakamipillai* (*k*).

In the first case Bertram, C. J., did not decide the question in so far as it related to rights of intestate succession to immovable property but held with regard to the mutual proprietary rights between husband and wife as to property acquired during marriage as follows:—

For certain purposes the Tesawalamai applies to all immovable property within the Province. Nothing is expressly said in the judgment with regard to its effect on immovable property situated outside that Province. This, in the present connection,

(*i*) 12 N.L.R. 309.
(*j*) (1922) 23 N.L.R. 97. (*k*) (1910) 13 N.L.R. 78.

is the problem that remains for us to determine. It was suggested in that case in the argument by Mr. Elliott that the true principle is this: "The Tesawalamai may be divided into two heads. One part deals with personal relations, etc., which Jaffna Tamils carry with them where they go. The other part deals with land tenure and other matters which are purely local." We are not called upon to give a decision on the whole of this interesting and broad proposition, which seems intended among other things, to comprise the law of succession. We are simply concerned with the mutual proprietary relations of husband and wife subject to the Tesawalamai with respect to immovable property acquired during the continuance of the marriage but situated outside its special realm. The problem then is simply this. In what manner does a special local Customary Law, to which a husband and wife are subject, affect their mutual proprietary rights with regard to immovable property acquired during the marriage but situated outside the locality within which the Customary Law is in force ? This happens to be the precise question which is discussed at great length by Voet in the chapter "De Ritu Nuptiarum" (23, 2), and which was obviously the subject of much controversy in this day. Voet is, of course, speaking of places each subject to its own municipal law, and each capable of constituting a separate matrimonial domicil, but, if bearing this difference in mind, we apply these principles, as in my opinion we may justly do, to the case of a region subject to a special customary law differing from the ordinary law of the country in which it is situated, the result would appear to be as follows: *Any property acquired in the course of trade by one of two spouses subject to the Tesawalami in a part of the Colony outside its special local sphere becomes ipso facto partnership property as part of the community. The legal title to that property does not, however, pass to the community, in as much as we, like the Frisians require special formalities for the passing of title, where under law it does not pass by operation of law. There passess, however, by the tacit agreement of the spouses, manifested by their not having made an inconsistent marriage settlement (as under Section 6 of Ordinance No. 21 of 1844 they might have done), an equitable right to have that property declared part of the community.* It might be said that this tacit agreement itself is obnoxious to Ordinance No. 7 of 1840, and that the law, therefore, cannot give effect to it. But I think that this is too strict a view. I prefer to regard the solution as coming within a principle definitely made part of our legal system by Section 96 of the Trusts Ordinance, No. 9 of 1917.

Land situate outside N.P.

In the second case *Velupillai* v. *Sivakamipillai*, Wood Renton, C.J., held as follows:— If it should be proved that under the Tesawalamai, a wife acquires at the date of her marriage a permanent proprietary interest in

the matrimonial property, of which her husband has no power to deprive her by will, the principle that was laid down in the first place as to movables, by the House of Lords in *De Nicols* v. *Curlier*, and in the subsequent proceedings in the same by the Chancery Division, as to immovables in regard to the property of French spouses who had been married without any marriage contract, but under the special law of community enacted by the Code Civil, would apply. The position of the widow in the present case would then depend on her special legal rights under the customary law of Jaffna which was applicable to her husband at the date of the marriage and it would not be competent for the husband to deprive her of those rights, at least by acquiring without her consent a subsequent domicil of choice in the District of Batticaloa. *The rule of law laid down in the case of De Nicols* v. *Curlier, would hold good in regard to the immovable property of the husband, even if it were not situated in the Province of Jaffna.*

"On the other hand, if it ultimately be shown that there is no special customary law of this character applicable to Malabar inhabitants of the Province of Jaffna, we should still have to consider the express provisions of Section 6 of Ordinance No. 21 of 1844, which has not, for the purpose of a case like the present, been repealed, in my opinion, by Ordinance No. 15 of 1876, and which provides that in all cases of marriages contracted without a nuptial contract or setlement, the respective rights and powers of the parties, not only during the subsistence of the marriage, but even upon its dissolution, in regard to immovable property situated in any part of this Colony, shall in all cases be determined according to the law of the matrimonial domicil. In my opinion, the clear effect of that enactment is to make the law of the matrimonial domicil the criterion by which the rights and powers of spouses in regard to immovable property situated in any part of the Colony are to be determined, and there is therefore no room for the application of the rule (see *Bank of*

Africa Ltd., v. *Cohen*) that the *lex loci rei sitae* should be applied. If it had been necessary to decide the point, it might well, I think, have been held that the effect of Section 15 of Regulation No. 18 of 1806 is to subject all questions between persons who, at the date that the point is in issue, are within the meaning of that Section "Malabar inhabitants of the Province of Jaffna" to the provisions of the customary law. But, apart from that, Section 6 of Ordinance No. 21 of 1844 is I think, decisive."

For comments on the foregoing observations, see para 177, *supra*; and chapter on Provincial Domicil, *infra*.

Law applicable where Malabar is defendant.

258. The provision in Regulation No. 18 of 1806 that all questions between Malabar inhabitants of the said province, *or wherein a Malabar inhabitant is defendant* should be decided according to the Tesawalamai, causes some difficulty. Does the law to be applied, say in a case where title to land is in dispute, vary with the race or status of the defendant ? Does this provision have the effect of enabling a "Malabar of the Province of Jaffna" when sued in ejectment to prove his title in a manner different from his Muslim vendor ? Is a Malabar who seeks as plaintiff to assert title to a property or to redeem an *otty* (usufructuary) mortgage not to be permitted to prove his right under the Tesawalamai if the defendant is a Muslim ? A similar provision was made in the Charter of 1801. By Section 32 of the Charter where one of the parties is a Mussulman or Sinhalese the matter should be determined by the laws and usages of the defendant. This Charter was repealed by the Charter of 1833 and the point is not of importance in the case of Sinhalese and Mussulmans.

In the Governments which the barbarians established on the ruins of the Roman Empire, the same rule was followed and the Courts decided each case that arose in pursuance of the personal law of the defendant. Holl. 407.

The Ceylon Courts have not explained the meaning of this provision. In India almost identical words have been used with reference to the Mohammedan Law and reference may be usefully made to the Indian cases.

259. In India it has been laid down that where both the parties to a transaction are Mussulmans whether from birth or by subsequent conversion of the same sect, the Mohammedan Law of the particular sect to which they belong will be administered. *Raja Deedar Hossein* v. *Ranee Zuhooroonnissa* (1841). 2 M.I.A. 441; *Ali Husain* v. *Fazal Husain* (1914). 36 All. 431. Tyabji 53. Where both parties are not Mussulmans (of the same sect), the High Courts and the Courts of Burma are required to determine the rights of the parties in accordance with the law of the defendant; and the other Courts to act according to justice, equity and good conscience. *Budamsa Rawther* v. *Fatima Bi* (1914). 26 Mad. L. J. 260. Tyabji 53. With reference to this statement that when only one party to a transaction is a Mohammedan the rights of parties are to be determined according to the law of the defendant, the Madras High Court expressed the opinion that the application of the rule is confined to cases where there have been dealings between parties to the suit and a suit is brought in respect of that transaction. In a case where the plaintiff's title depended on a gift of lands, which had taken place originally between Mohammedans only, and the donor afterwards dealt with persons not Mohammedans, and not subject to Mohammedan Law, and the plaintiff was no party to any such dealing it was held that the plaintiff could not by the donor's acts be rendered subject (as regards her property) to any other than the Mohammedan Law. In the result the plaintiff's law was applied and not the defendant's. *Azimunissa* v. *Clement Dale* (1868). 6 Mad. H.C.R. 454, 474-5. In *Sarkies* v. *Dosee*. 6 Cal. 794, 806, 808, it was held that "the concluding words of the Section, do not mean this, that when a Hindu purchases land from a European, in which the vendor has only a limited interest the Hindu purchaser is to be in any better position than a European purchaser would be. It was held in *Laksmandas* v. *Dasrat* 6 Bom. 168 that the view entertained, that the validity of a mortgage by a Mohammedan to a Hindu mortgagee, if the latter be the defendant, should be tested by Hindu Law, was open to doubt. In an Allahabad case it was held that the word parties as used in Section 24 of the Bengal Civil Courts Act, does not mean parties to an action but must be interpreted with reference to the inception of the right to be adjudicated upon. *Gobind Dayal* v. *Inayatullah* (1885). 7 All. 775, 793 (F.B.). On the other hand the Calcutta High Court, *Bussuntaram Marwary* v. *Kamaluddin Ahamed* (1885). 11 Cal. 421 expressed a doubt, whether on a Hindu creditor suing the heirs of a Mohammedan debtor, the Mohammedan Law applied;

and the Bombay High Court laid down the rule that the Hindu Law applied so long as the debtor was a Hindu and the Mohammedan Law when the debt was transferred to a Muslim. In the case last cited, the plaintiff sued for redemption; the original mortgagor was a Hindu who had transferred the equity of redemption to a Mohammedan (the plaintiff). The Court held (over-ruling the contention of both parties) :—

(1) That the Hindu Law of 'damdupat' should be given effect to, though both parties to the suit were Mussulmans;

(2) that that rule applied only so long as the debtor was a Hindu, and that as soon as the equity of redemption was assigned to the plaintiff, a Mohammedan, the applicability of Hindu Law ceased. *Ali Sahib* v. *Shabji* (1895), 21 Bom. 85. In a suit for inheritance, the claimants, or some of them, may be of a different religion from the deceased, but the law governing the case will be that of the sect to which the deceased belonged. *Hayatun Nissa* v. *Muhammad Ali Khan* (1890). 12 All. 290; 17, I.A. 73.

260. The Tesawalamai or Country Customs to which the Regulation of 1806 gave the force of law is the Code prepared by Claas Isaaksz by order of the Dutch Governor Simons.

Codification by the Dutch.

261. The reasons which led the Dutch Government to get the Country Customs of Jaffna reduced to writing, may be gathered from the Instructions left in 1697 for the benefit of the Political Council of Jaffnapatam, by Commandeur Hendrick Zwaar de Croon who subsequently became Governor-General of the Netherlands India:—

"I also found that no law books are kept at the Court, and it would be well, therefore, if Your Honours applied to His Excellency the Governor and Council to provide you with such books as they deem most useful, because only a minority of the members possess these books privately, and, as a rule, the Company's servants are poor lawyers. Justice may therefore be either too severely or too leniently administered. There are also many native customs according to which civil matters have to be settled; as the inhabitants would consider themselves wronged if the European laws be applied to

them, and it would be the cause of disturbances in the country. As, however, a knowledge of these matters cannot be obtained without careful study and experience, which not everyone will take the trouble to acquire, it would be well if a concise digest be compiled according to information supplied by the chiefs and most impartial natives. No one could have a better opportunity to do this than the Dessave, and such a work might serve for the instruction of the members of the Court of Justice, as well as for new rulers arriving here, for no one is born with this knowlege. I am surprised that no one has as yet undertaken this work."

261 (a). When Cornelis Joan Simons, Doctor of Laws, who was vice-President of the High Court at Batavia, became Governor, he directed Claas Isaaksz, the Dessave of Jaffna, to make a collection of the customs of the Tamil Country. The collection which took three years to complete was referred to twelve Tamil Mudaliyars for their revision and after their approval (except on certain matters relating to slavery) by order of the 4th of June 1707, was adopted as an authoritative statement of the Tesawalamai or Customary Laws of the Country.

Law altered by Portuguese.

262. The laws thus promulgated were not the customs of the Tamils as they existed in the country when the Portuguese conquered Jaffna. Referring to some of these customs this Dutch compilation itself says:—

"But in process of time, and in consequence of several changes of Government, particularly those in the times of the Portuguese (when the Government was placed by order of the King of Portugal in the hands of Dom Philip Mascarenhas), several alterations were gradually made in those customs and usages, according to the testimony of the oldest Mudaliyars."

Tesawalamai applied by Dutch only if clear and reasonable.

263. The Dutch too do not appear to have administered the Tesawalamai as they found it. Referring to the administration of justice in civil cases, Paviljoen who was Commandeur of Jaffnapatam in his Instructions to his successor wrote in 1665 over forty years before the codification of the Tesawalamai: "The natives are governed according to the Customs of the Country if these are clear and reasonable, otherwise according to our laws."

Origin of Tesawalamai

264. Dalton, J., observed in *Iya Mathayer* v. *Kanapathipillai* (*a*). Having regard, to the auspices under which this collection of laws and customs of Jaffna was composed and by whom it was composed, it is difficult to think that the provisions of Roman-Dutch Law did not exercise some influence, and that the idea of a partial community of goods as in the case of tediatetam may not have been strengthened by if not derived from the common law of the Dutch Government (*b*).

265. As regards the origin of Tesawalamai, Bertram, C.J., said:—

The institution of a community of goods in marriage, unknown to the Roman Law, was independently developed among races so distant and diverse as the Dravidian inhabitants of the Malabar Coast and the Germanic tribes, from whom, in all probability the Roman-Dutch Law derived it. (See Voet 23, 2, 66; Planiol, Droit Civil, III, S 891). I can find

(*a*) (1928) 29. N.L.R. Ap. p. 307.

(*b*) Dalton, J., in 29 N.L.R. 307.

nothing to correspond to it in the law of the Hindu Joint Family, which was suggested as the source of the Tesawalamai in the course of the argument.

Tesawalami not applicable to Pagans.

266. The text of the Tesawalamai Code as approved by the Modalyars seems to suggest that it was applicable to the Christians and not to "Pagans."

In the Section relating to sale of lands, it is provided that no sale can take place until notice of the intended sale has been published on three successive Sundays at the Church to which the parties* belong. See Section VII sub-Sec. 1. Special provision is made to regulate inheritance where a pagan dies. It is also worthy of note that the only pagans contemplated in this Dutch compilation are pagans coming from India. The Code assumes that the people governed by it are strictly monogamous; the only exception being pagans coming from India. The Sections of the Code are as follows:—

How where a pagan marries a Christian woman.—If a pagan comes from the Coast or elsewhere and settles himself here, and being afterwards inclined to marry a Christian woman procure himself to be instructed in the Christian doctrine, and being sufficiently instructed is at last baptized and married, and by his industry acquires property by means of what his wife has brought in marriage, his heirs (should he die afterwards without leaving a child or children) shall not be entitled to anything: for, not having brought anything in marriage they consequently shall not carry anything out, and being moreover pagans. But should the wife die first without leaving any child or children, the husband is lawfully entitled to the half of the acquired property, it having been gained by his industry.

How where two pagans intermarry.—If a pagan comes here as just stated and marries a pagan woman, and such pagan dies

* Wendt, J., would appear to hold that the notice should be in the Church to which the lands belong. See 7 N.L.R. 154.

without leaving a child or children, his relations inherit the half of the property acquired during marraige; because should he have left any child or children, and should they or his relations claim the inheritance, they certainly would get it without his having brought anything in marriage, they being pagans; but having once embraced the Christian religion the pagan's relations are not entitled to anything. Pagans consider as their lawful wife or wives those around whose neck they have bound the *tâli* with the usual pagan ceremonies; and should they have more women, they consider them as concubines. If the wives, although they should be three or four in number, should all and each of them have a child or children, such children inherit, share and share alike, the father's property; but the child or children by the concubines do not inherit anything.

Christianity during Portuguese Rule.

267. As to Christianity in Jaffna during the Portuguese Rule, Dr. Paul E. Pieris writes (Portuguese Era 149) :— In two years 52,000, including the highest born had been baptized. Among them were the three Mudaliyars who still remained, almost all the Arachchis, and the greater proportion of the Temple Brahmins and their families, numbering about 150 souls. Two Wannias and two Adigars of Panankaman with their households, twenty Kumaras or relations of the Royal Family, including four Princes, nephews of the King, were also enmeshed . . . The young wives of Para Raja Chegara Pandara were lodged with a Sister of the Order and every effort was made to convert them; these efforts were successful. In all three hundred, chiefly members of the Queens' households, were baptised on this day, to the great satisfaction of de Oliveira.

Tesawalamai not based on religion.

268. That during the Dutch period most if not all the inhabitants of Jaffna were at least nominally Christians and belonged to some church and were married or baptized there appears also from Zuwaar de Croon's Instructions (*c*). The Tesawalamai as codified by the Dutch, cannot therefore be said to be based on religion as the Hindu or Mohammedan Law is. The statement of Mayne that the Tesawalamai affords proof of the usages of the Tamils of South India some two centuries ago cannot be accepted without a great deal of qualification.

(*c*) See page 52.

Reasons for giving the Dutch Code the force of law.

269. Some years after the British occupied Jaffna they gave to the Tesawalamai as collected by Claas Isaaksz the force of statute law by the Regulation of 1806 referred to above. The Preamble of the Regulation gives the reasons for the enactment as follows:—

A Regulation for the security of property and the establishment of a due Police in the District of Jaffnapatam and its dependencies. The system anciently pursued with respect to the differnt description of property which exists in the province of Jaffna, was the result of much local experience and of a very attentive consideration of those customs and religious institutions which had prevailed in that province not only from the time of the Portuguese conquest, but also from the earliest period of the Malabar Government. It assimilated itself to the ancient habits of the country, to the feelings and prejudices of the people, and it was for these reasons on the whole wise in principle, and salutary in its effects. It appears however that of late years, measures have been adopted inapplicable to the situation of the country, shaking in a considerable degree the tenure on which various species of property rested, and destructive of the Police and the tranquility of the people. The most valuable property in that district consists partly in land and partly in a right of servitude possessed by persons of the higher castes over those of inferior (viz. of the Covia, Nalluwa, and Pallua), castes approximating nearly to a state of lenient slavery. The proprietors' titles to both these species of property have been rendered obscure and uncertain, their rights to land by the introduction of a new plan of registration and by the means which have been taken to enforce it; the right to servitude of persons of the lower castes, by the decisions of Provincial Courts.

These circumstances have not only tended to diminish the value of land but have materially checked the cultivation of the country and gradually destroyed the whole of its Policy. The property in land is shaken by its being exposed to constant and vexatious litigation, the property in service by the person bound in that service referring to the decisions of Provincial Courts. The servant from these decisions refuses to obey his master, the master consequently refuses to support his servant; the ancient system of subordination is done away; numbers of the lower castes without the means of subsistence are daily turned upon the public and uniformly commit those enormities which for the last few years have disgraced the Province of Jaffna and which demand the immediate and salutary interference of His Majesty's Government. With a view therefore to re-establish the security of property whether in land or in service, and to prevent those enormities that have recently occurred, the Governor in

Council is pleased to enact that . . . [The first five clauses of the regulation deal with the preparation of Thombu Registers, and the registration of slaves. The eighth to the fourteenth clauses deal with slavery. The sixth and seventh clauses give the force of statute law to the Tesawalami collection in these terms.]

270. The Thase Walema, or customs of the Malabar inhabitants of the Province of Jaffna, as collected by order of Governor Simons in 1706 shall be considered to be in full force. (Section 6.) All questions between *Malabar* inhabitants of the said Province or wherein a Malabar inhabitant is defendant shall be decided according to the said customs (Section 7).

271. These Sections are numbered 14 and 15 in the Revised Ordinances of 1923. This is probably a mistake. Volume I of Ordinances published in 1853 (see pages 106 and 107) gives the whole Regulation as promulgated in 1806 and it contains only fourteen Sections and the Sections quoted above are numbered 6 and 7.

Customs relating to land.

272. The collection of Customs, now generally known as the Tesawalamai includes customs relating to status and customs relating to land. So far as these customs relate to land as distinct from persons, they have been held not to apply outside the limits of the Northern Province (*cc*).

Land situate outside Northern Province.

273. The question whether lands owned by Jaffna Tamils, but situate outside the N.P. are governed by Tesawalamai rules relating to matrimonial rights and inheritance is difficult to answer in view of the following observations of Bertram, C. J. (*d*). "I observe that in the evidence and in the documents published in connection with the Tesawalamai Commission, it was assumed by more than one prominent witness that the Tesawalamai did not apply to

(*cc*) Ennis, J., in *Spencer* v. *Rajaratnam*, (1913). 16 N.L.R. 332.

(*d*) 23 N.L.R. 97 at page 112.

property 'outside Jaffna,' and that the late Mr. William Wadsworth in an interesting memorandum expressed the opinion that 'looked at from every point of view there cannot be any doubt that the Tesawalamai Code is both a personal and local law applicable to the Tamils of the Province of Jaffna and to property in Jaffna.' When we are dealing with Customary Law, such extra-judicial utterances by a person well acquainted with local customs are entited to consideration. Any property acquired in the course of trade by any one of two spouses subject to the Tesawalamai in a part of the Colony outside its special local sphere becomes *ipso facto* partnership property, as part of the community. The legal title to that property in so far as it is immovable property does not pass to the community, inasmuch as we require special formalities for the passing of title to immovables, where under our law it does not pass by operation of law. There passes, however, by the tacit agreement of the spouses, manifested by their not having made an inconsistent marriage settlement, an equitable right to have that property declared part of the community.''

Right of pre-emption in N.P. Is it personal or territorial law ?

274. **Pre-emption.**— It was held in *Suppiah* v. *Tambyah* that the Tesawalamai imposes a restriction on the sale of land in the Province of Jaffna which would affect the rights of any person who assumed to buy it whether he be English, Moor, or Jaffna Tamil, resident or not resident in that Province (*e*).

(*e*) Middleton, J., in *Suppiah* v. *Thambiah*, (1904). 7 N.L.R. 157.

Pre-emption in India.

In India, however, the Law of Pre-emption is not territorial, but personal to Mohammedans, and where the inhabitants of any locality have adopted it by custom, it will not necessarily be presumed that a person not being a native of, or domiciled in, the locality is governed by it, notwithstanding that he may be the owner of land within the locality (*a*).

Pre-emption may arise out of contract and the Hindus have often made stipulations for mutual rights of pre-emption.

"It seems reasonable to conclude that it was with a view to prevent the intrusion of a stranger into the estate of the family or community and to exclude any person whose want of thought or skill might augment the burdens of the other members of the coparcenary community, rather than from any desire to borrow an institution from their Mohammedan neighbours, that the Hindu communities caused stipulations for pre-emption to be inserted in the *Wajib-ool-urz*." Tyabji 654. These objects may be attained without declaring the law of pre-emption a territorial law in the Northern Province binding on Europeans, Burghers and others, as was done in *Subiah* v. *Tambiah*.

The right of pre-emption is recognised as prevailing by custom in Behar, [Gujarat] and Malabar, and is enforceable in these areas, irrespective of the religious persuasion of the parties concerned (*b*). In Punjab (c) and Oudh (*d*) the right of pre-emption is governed by statute.

The right of pre-emption under Mohammedan Law which is the same as under our law is described by Markby as the right of a third person under certain circumstances to step in, when a contract is made for the sale of immovable property, and claim to take the place of

(*a*) Tyabji 661.
(*b*) Tyabji 657.
(*c*) iv of 1872.
(*d*) 'xviii of 1876.

the buyer, that is, to take the property at the same price and on the same conditions as the buyer and seller have agreed upon (*e*).

The Privy Council remarked (*f*) that pre-emption in Village Communities in British India had its origin in the Mohammedan Law as to pre-emption, and was apparently unknown in India before the time of the Mogul Rulers. Similarly Mahmood, J. (*g*), said that pre-emption, as it prevails in India, owes its origin entirely to Mohammedan Law, and that there was no foundation for it in Hindu Law.

There is some difference of opinion as to the extent to which the custom prevails in India. In Bengal it has been confined to cases where all three of the parties concerned are Mohammedans. But in the North-West of India (where Mohammedan influence was great) the right exists whether the purchaser is a Mohammedan or not. In the Madras Presidency the custom is said to be unknown (*h*).

Origin of Pre-emption.

274 a. How the Mohammedan custom of pre-emption was introduced into Jaffna it is not easy to say. The custom does not, as already stated, exist in the Madras Presidency and it is not therefore likely to have been introduced by settlers from that Presidency. Materials are not altogether wanting to attribute the introduction of the Law of Pre-emption to the

(*e*) Markby's Hindu and Mohammedan Law, 152.
(*f*) Tyabji 651. 13 All. L.J. 236.
(*g*) Tyabji 667; 7 All. 775.
(*h*) Markby's Hindu and Mohammedan Law, 153.

occupation of North Ceylon for a time by Mohammedans.

Was it introduced by Mohammedans ?

There is no proper history of Jaffna prior to the Ariya Chakravartis †. Arabian and Chinese records indicate that there were large Arabian Settlements in South India and Ceylon from about the Christian era. The Arabs, who were subsequently called Mohammedans, became so numerous and powerful in these regions that some of them became *Wazirs* or Ministers in the Pandyan and Ceylon Courts.

Nevill writes:—"The whole North-West coast and Jaffna has from the most ancient times been peopled by the Tamils and the Moors, thus accounting for the districts being under the Maharajahs of Zabedj, who extended their empire and ruled the Malay Islands, Kalah and Travancore."

Kalah is said to be a port in North Ceylon; some think it was the ancient name for Galle.

Tennent says:—"The assertion of Abou Zeyd as to the sovereignty of the Maharajah of Zabedj at Kalah, is consistent with the statement of Soleyman that the Island of Ceylon was in subjection to two monarchs." This Maharaja of Zabedj was considered to be a Mohammedan.

In the fourteenth century Mohammedans occupied the Pandyan throne at Madura. A Mohammedan Prince named *Vathimi Kumaraya* is said to have reigned at Kurnegala. Cassie Chetty seems to think that Vathimi Kumaraya was the son of Wijaya Bahu V by his Moorish Queen Vathimi (*a*). According to Arabian records a Prince of

(*a*) Vansanden's Sonahar, page 20.

† The term Ariya Chakravarti appears to have been a title assumed by some Tamil Chieftains. The theory that the Ariya Chakravarti sent at the head of the Pandyan Army to Ceylon by the Pandyans was a Mohammedan is refuted by Krishna Swami Aiyangar; see South India and her Mohammedan Invaders page 57.

Ceylon named Abu-Nekbah-Lebabah who had dominion over the pearl fisheries sent about the end of the thirteenth century, Al-Adj-Abou Othman as Ambassador to Melek Mansour-Qalayoon, one of the Mameluke Sultans of Egypt with the object of establishing commercial relations with Egypt (*i*).

Some place names in North Ceylon also indicate considerable Mohammedan settlements in that region in ancient times. It is significant that in the Kandaswamy temple premises in the very heart of the ancient capital of Jaffna (Nallur) there is a place where Mohammedans worship. The suggestion that this was due to Buvenaka Bahu,‡ the founder of the temple, having a Mohammedan consort has the effect, if at all, of supporting rather than discrediting the Arabian account. The *Mahawansa* records that a Malay (Javaka) Prince named Candabhanu overran the whole of Ceylon in the thirteenth century, that he was defeated by Parakrama Bahu, but that he returned, having collected a large Tamil force from the Pandya and Chola Countries and a host of Malays. A Mohammedan, Jamul-uddin, was sent on an embassy from Ma'bar to the Mongol Court in the thirteenth century according to Chinese writers. The Moor

‡ The surmise that Abu-Nekbah referred to in the Arabian records was Buvaneka Bahu, is probably based only on some little similarity of sound. *See* Ancient Jaffna by C. Rasanayagam, page 352.

(*i*) "Ceylon" by an officer, late of the Ceylon Rifles, Vol. i pp. 247, 248."

geographer Edrisi writing in 1154 A.D. refers to Mohammedan ministers of the King of Ceylon. There is reason to believe that the Mohammedans had before the 13th century control of the countries on the trade route from Arabia to the Malay Archipelago; North Ceylon and South India were on the route and came under Mohammedan influence and probably even under Mohammedan domination.

Was it introduced by Malabars ?

274b. Another possible explanation for the Law of Pre-emption in North Ceylon is that it was brought by the "Malabar" emigrants. Mohammedans of South India, especially of the West Coast, have a history anterior to the Mohammedan invasion from the north. Mohammedan influence in Travancore seems to have been great as early as the ninth century A.D., for it is stated in Travancore history, that Cheraman Perumal divided his kingdom among his relations and went on a pilgrimage to Mecca.

Pre-emption in Holland.

274 c. The Law of Pre-emption was not unknown to the Dutch. Wessels refers to it (*naasting* or *jus retractus*) as a curious custom prevalent in a great many towns of Holland, though never actually forming part of its common law. Grotius defines *naasting* as the right of a person over immovable property, as also against the purchaser and seller thereof, to step into the place of the purchaser whenever the property is sold. The origin of this custom has been the subject of considerable dispute. Bynkershoek thought that its origin was to be

sought in the feudal customs, but van der Spiegel (p. 133) says: "If I mistake not the origin of this custom is to be found in the ancient customs of the Germans which were brought over by the Franks." A favourite form of *naasting* was that by which the blood relations of the seller had the right to claim the property from the purchaser for the same price the latter paid for it (*jus retractus familiae*). Van der Spiegel tells us that with the Germans the family ties were so closely knit that in any dealing with land the relatives had to be consulted. The principle pervaded the whole of the German Law. We see it in the Marriage Law and in the Law of Inheritance. The immovable property was always regarded as family property, which could not be alienated without the consent of the nearest relatives. It is not likely that the Dutch introduced the Law of Pre-emption into the Northern Province, for it was only a local custom in some parts of Holland and not part of the common law. Moreover if it was introduced by them it would be found in other parts of the Island where the Roman-Dutch Law was more readily adopted. Wessels points out that "inasmuch as this *jus retractus* did not form part of the common law of Holland, it was not taken over into the law of the Cape Colony."

275. The law relating to Matrimonial Rights and Inheritance has been codified in Ordinance No. 1 of 1911. This Ordinance does not define the class of persons to whom it was intended to apply. Section 3 provides

"this Ordinance shall apply only to those Tamils to whom the Tesawalamai applies." The Attorney-General (Mr. Walter Pereira, K.C.) in introducing the Bill in Council stated:—"It is very difficult to say when a Tamil, by reason of emigration from his home in the North, ceases to be governed by the Tesawalamai. That will still be a matter left for the Courts to decide on such evidence as may be available in each case." The Government appointed a Commission in 1917 in view of the decision in *Spencer* v. *Rajaratnam* to report on the desirability of introducing legislation for defining the persons or class of persons to whom the Tesawalami applies. The Commission reported as follows:—

Persons to whom Ord. No. 1 of 1911 applies.

> The reasons for any introduction of legislation may be stated to be (1) that it is not desirable to leave the question of a change of habitancy and of property and personal rights to such uncertain proof as oral evidence, and (2) that the consensus of opinion among the people of Jaffna and of Jaffna origin is that the Tesawalamai should have such extended application.
>
> On the first point, it may be stated that the difficutly of proof is not greater than in the case of change of domicil, and that the cases in which the question has arisen during the last hundred years or more are rare. At the same time there is now a large and increasing number of Jaffna Tamils who go out of Jaffna in pursuit of office or business and settle with their families in other parts of the Island, and to whom it is a matter of importance to define their legal status. As regards the second point, we have examined a large number of witnesses, both in Jaffna and in Colombo. and we have also received a written statement from certain residents in Batticaloa. We have also received

representations from proctors practising at Mannar and Mullaittivu, who are anxious that there should be no doubt that the Tesawalamai is applicable to the Tamils of those districts. There are also many Jaffna Tamils resident in India, the Federated Malay States, and other places out of Ceylon, and the written communication from the Selangor Ceylon Tamils' Association may be taken as representing the views of that class. There is no doubt that there is a general wish that the Tesawalamai should be made applicable to all persons of Jaffna origin wherever their residence may be. It should, however, be noted that several persons of position in Colombo have objected to such application, if as is the case under the Tesawalamai, any property acquired by them should fall into any community with their spouses and be incapable of being disposed of by them without the concurrence of the spouses.

While effect may be given to the general desire to extend the Tesawalamai to persons who leave Jaffna and take up their permanent abode elsewhere, it is desirable to allow such persons to decide for themselves whether they shall continue to be governed by the Tesawalamai and at the same time to provide for easy and certain proof of their desire. The proper occasion for the exercise of the right to choose will be their own marriage, which is the starting point of the formation of a family of their own, and of the operation of law upon their matrimonial rights and the rights of inheritance of their issue and kindred.

It is accordingly recommended that an Ordinance should be introduced providing :—

> That a person subject to the Tesawalamai, who after the passing of the Ordinance shall leave Jaffna and reside permanently elsewhere, shall not cease to be governed by the rules of the Tesawalamai relating to inheritance and matrimonial rights, provided that such a person shall be at liberty to contract himself out of that system of law by making a written declaration to that effect before the District Judge of the place of his origin

> or of the place at which he may settle, and on such declaration being made he and his family shall be governed by the general law—K. BALASINGHAM, P. ARUNACHALAM, A. KANAGASABAI.

The Chairman of the Commission, De Sampayo, J. dissented from this report. He said:—

Opinion as to the extension of the Tesawalamai is not at all one way. For instance, Dr. S. C. Paul said that if the law were that any landed property acquired by a husband were common and could not be disposed of by the husband without the concurrence of the wife, he was not in favour of the law being applied to himself or those similarly situated. Messrs. C. Suntheram, C.C.S., C. Gnanasekeram, and S. Vyramuttu expressed themselves to the same effect. This is an important point. Mr. William Wadsworth, in addition to the evidence orally given by him, has submitted a written memorandum, in which he strongly deprecates the suggested legislation. See also the evidence of Mr. W. D. Niles and Mr. Tiruvilingam. The opinions and wishes of these gentlemen, who are prominent members of their community, are entitled to respect.

That the men of Jaffna at the present day show a commendable degree of enterprise and energy and leave Jaffna in large numbers and settle elsewhere is perfectly true, but I regard that fact itself as a reason why they should not be fettered by an ancient system of customs, but should be allowed to have a larger outlook. I do not think that the suggested provision for such men to contract themselves out of the Tesawalamai by a declaration before a District Judge will be satisfactory or effective, or will be thought of at the distracting time of marriage. The marriages, which in consequence of the present freer social intercourse between the various communities are now common, and which must necessarily result, as time goes on, in the great dilution of Jaffna blood, should, I think, be safeguarded; but under the proposed law they will be for ever bound by the choice made by their remote Jaffna Tamil ancestor.

Ord. No. 1 of 1911 does not merely declare the law, but amends it.

The Government did not consider it desirable to introduce legislation as recommended by the majority.

276. It may also be noted that the Ordinance No. 1 of 1911 does not merely declare the existing law; it revised the law to suit altered conditions.

The Attorney-General (Mr. Walter Pereira, K. C.), who moved and Sir Amblavanar Kanagasabai who seconded the Second Reading of the Bill stressed that point:—

The Attorney-General said:—It is time that the whole law was overhauled. I mention them as a justification for the amendments now proposed by this Bill. The Tamils of to-day are not the agricultural and pastoral population they were two hundred years ago. They are a go-ahead race; they have advanced in many directions; they have taken to commerce; and have made rapid progress in other directions. They adorn the professions and the public service, and it is no wonder that, as I say in my Statement of Objects and Reasons attached to the Draft of this Bill, some eighteen years ago it was felt that the Tesawalamai was defective, and not expressed in sufficiently clear and precise language, and a meeting of the best of the Tamil population of Jaffna was held under the presidency of Mr. P. W. Conolly, the District Judge at that time, to revise the Tesawalamai and to suggest amendments. My apology for the introduction of this Ordinance need go no further. It is a matter of history that members of the Bar, Maniagars and other Headmen, the District Judge and the Police Magistrate of Jaffna, and the Veteran Police Magistrate of Kayts, the late Mr. Kathiravelupillai, one of the most prominent and enlightened Tamils of his time, formed themselves into a Committee for the revision of the Tesawalamai. That showed at once the necessity for such amendment as is now suggested, and as the principle of this Ordinance, lies in the necessity for the modernization, so to say, of this old collection of customs, and in the expression of its rules in clearer language, I need, strictly speaking, say nothing further on the motion for the Second Reading of this Bill.

The Hon. Sir Amblavanar Kanagasabai said:—"Mr. Conolly was chiefly instrumental in convening a meeting of the inhabitants of Jaffna for the purpose of appointing a Committee to *draft a code*; and at that meeting it was resolved that the Tesawalamai *should be amended*, and that we should have a complete code of the rules of inheritance which would govern the Tamils of the Northern Province. An appeal was made to Mr. Kathiravelupillai, than whom there was no more competent authority on the Tesawalamai, to make a draft. He made one, and the Committee discussed the various clauses of the draft from time to time, and they adopted a large number of its provisions for a Draft Ordinance which was prepared. The draft has been made the basis of the present Bill. The present Bill is *not merely a declaration of the existing law, but in some parts it may be said to be a new law*; in some parts alterations have been made, and revision has been made."

Jaffna domicil.

276a. It has been held that nothing but a Ceylon domicil can be acquired in Ceylon (*f*), and it would therefore seem that an outsider cannot by settling in Jaffna acquire a "Jaffna domicil" and become subject to the Tesawalamai. The subject is discussed in the chapter on "Provincial Domicil."‡

(*f*) 16 N.L.R. 321; 8 S.C.C. 36.

‡ *See also* Para 254.

CHAPTER XIII.

THE MUKKUVARS.

277. The Mukkuvars of Ceylon are a class of Tamils chiefly found in the Districts of Calpentyn, Jaffna and Batticaloa. The Calpentyn Mukkuvars are either Christians or Mohammedans and are now subject to the general laws of inheritance applicable to the Christian and Mohammedan inhabitants of the Maritime Provinces of the Island. The Mukkuvars of Jaffna and Batticaloa are Saivites, with a sprinkling of Christians among them. Whether Christians or Saivites, these Mukkuvars have their succession to intestate property regulated, in Jaffna, by the Tesawalamai of that province; in Batticaloa, by a custom peculiar to themselves. That custom is commonly called "The Mukkuva Law." Customs of a similar nature are known to exist in some parts of India also (*a*).

Origin of Mukkuva Law.

278. "The true origin of Mukkuva Law" says Brito "should, probably, be looked for in those primitive times when the Mukkuvars had no rules of moral or positive law to determine the paternity of their offspring." (*b*).

How much of Mukkuva law is still in force.

279. How much of Mukkuva Law is still in force has not been the subject of express decision. It was never expressly recognized

(*a*) Brito's Mukkuva Law.

(*b*) Brito's Mukkuva Law; Introduction page 1.

by the Legislature as the Tesawalamai, or Kandyan Law or Mohammedan Law was. There is no reference in Proclamations or Regulations to it. But the Proclamation of 23rd September 1799 provided that Justice should be administered according to the laws and institutions that subsisted under the ancient Government of the United Provinces. This was re-affirmed in Ordinance No. 5 of 1835.

The Mukkuvars of Calpentyn seem to have abandoned the customs of their caste long before the establishment of the Provincial Court of Puttalam and Chilaw. But, says Brito, the records of the Land Raads of Chilaw and of Puttalam, if they could be found now, would probably supply much valuable information on the subject (*c*).

280. It was held in 1874 by the Supreme Court in *Chinnattamby* v. *Minny* (*d*) that the customs were not interfered with by either the Dutch or the British Government. "By the Ordinance No. 5 of 1835, the Proclamation of 23rd September, 1799 is declared to be in force, in so far as 'that the administration of Justice within the Maritime Provinces, should be exercised by all Courts according to the laws and institutions that subsisted under the ancient Government of the United Provinces,' and these laws and institutions are by the said Ordinance to continue in force 'subject,' etc. "The Supreme Court has every reason to

(*c*) Brito's Mukkuva Law.

(*d*) Prins Conderlag, p. 381; 382.

believe that the laws and customs of the Tamils residing in Batticaloa regarding the rights of succession to property, were never interfered with by the Courts of Judicature under the Dutch Government; and the special customs of the 'Moquas' and Vanniahs were recognized in a case at the last sessions holden at Jaffna without its even being contended that they were abrogated." (No. 8933, D.C. Batticaloa (*e*).

Is Mukkuva Law abrogated by Ord. No. 15 of 1876 ?

281. Ordinance No. 15 of 1876 while specially exempting persons subject to Kandyan Law, Mohammedan Law and Tesawalamai from the operation of the Ordinance says nothing about the Mukkuvars. It was argued in *Kandepody* v. *Pulleyan* (*f*) that this amounted to an abrogation of the Mukkuva Law, but the Supreme Court in 1909 did not decide the point. The judgment of the Commissioner of Requests of Batticaloa appeared to proceed on the assumption that the law had not been altogether abrogated.

The Commissioner said:—This land is *Mukkuwa* property, and would be governed by the customary law obtaining among the *Mukkuwas* of Batticaloa. The text-book on the subject is *The Mukkuwa Law* by Brito, published in 1876. The rule is that Mukkuwa maternal *muthusom* property descends in the female line, *i.e.*, A's property will descend to the daughters of A's sisters, the sons having the right of possession during their life, and so on. "This land was purchased in 1842 by a Mukkuwa called Vanniapodi Velapodi. To him the property was simply Thoddam‡.

(*e*) Brito; Introduction. iii; *D. C. Batticaloa*, 8933.

(*f*) 1 Cur. L.R. 81.

‡ Probably Theddam—wrongly spelt.

Since the deed recites that this land is to be possessed and enjoyed by Velapodi, descending in his *marumakkal* (nieces born to sisters) line and as paraveni, it must be inferred that the intention was, since the transferee was a Mukkuwa, that the land should descend according to the customary laws of the Mukkuwa caste. "At the date of sale of one-fourth of this land to Nagandarpodi and Kanapperpodi the land had become the *maternal muthusom* property of the children of Avanachchi and Kanamai, the daughters of Paramatti. The *dominium* was then in the five daughters of these ladies, namely, Valliammai, Kandammai, Manikki, Kunjayai and Manikkapillai. Their brothers were merely tenants for life, holding the enjoyment and having the management and cultivation of the land. There is no law, says Mr. Brito (see p. 33 (10), that prevents the holder of the *dominium* from disposing at will her maternal *muthusom*, movable, or immovable, provided the disposal is effected subject to the rights of her brothers. That is the view I hold of the Mukkuwa Law after a careful study of the cases cited in Mr. Brito's book. If that be the case, provided that, of course no perpetual entail has been created by the deed of 1842, it is clear that the sale to Nagandrapodi and Kanapperpodi is perfectly valid—see deed No. 4425, where the vendors are not only the granddaughters of Paramattai and their husbands, but also her grandsons. But it is contended for the defence that a perpetual entail was created by the words I have recited from the deed of 1842. I do not think so at all. There is no express recital in the deed against alienation, and I am of opinion that the customary law of the Mukkuwas regarding *maternal muthusom* property, notwithstanding the contrary opinion hinted at in Nos. 10524 and 12668 of this Court, did not recognise a perpetual entail—that is, an entail which could not be broken by an owner of the *dominium* with the consent of all the life-interest holders ? The impression that Mukkuwa *muthusom* is subject to an eternal entail is one of the many sources of error that have contributed to throw the law of Batticaloa into confusion. Every village teems with instances of maternal *muthusom* lands alienated away in perpetuity without the excuses

of the necessities of cultivation and (Government) tax. Yet people are told that such lands cannot be sold without such excuses. The ignorance of parties and the indifference of judges and practitioners of law have given use to many absurd rules that were unknown to the Mukkuwa caste. If distinct and unequivocal decrees could be found in support of an everlasting entail, it would still be necessary to consider, further, how far such decrees would be consistent with the civilized principles of law which look with disfavour upon all *fidei commissa* and gifts to dead hands (Brito, p. 7). There being then no express words creating a *fidei commissum* in the deed of 1842, I hold that the sale to Nagandarpodi and Kanapperpodi is perfectly valid. Besides the fact that the grandchildren of Paramattai dealt with the land in this way, and that the other parties interested in the land acquiesced in the sale for the last quarter-of-a-century, seem to me to be ample proof that they at least did not consider the land subject to a perpetual entail. But even if we assume for one moment that such an entail existed, those who are in favour of such entails in the Mukkuwa customary law maintain that maternal *muthusom* property can, notwithstanding such entail, be sold for debts of cultivation and tithe due to Government. If we turn to the deed p. 2 we find that the sale to Nagandarpodi and Kanapperpodi was effected partly to settle debts incurred on this land for cultivation and payment of Government tax. Rs. 500 of the Rs. 1,400 for which the land was sold, represents the debt. It might therefore be agreed that, even if such a thing as a perpetual entail were admissible, the sale was a legitimate one according to all the known canons of the Mukkuwa Law. The view I take of the deed of 1842 is that the land was to descend in Velapodi's family according to the Mukkuwa Law of *marrumakkal paraveni* provided that no sale took place of it by anyone who had the right to sell.

On appeal, Wood Renton, J., held as follows:—In my opinion, the decision of the Commissioner of Requests is right. Mr.

Tambyah argued that the Mukkuwa Law of Inheritance (see Pereira, Laws of Ceylon, I, 18, 19), has been abrogated by implication by Section 2 of the Matrimonial Rights and Inheritance Ordinance, 1876 (No. 15 of 1876), in which the Kandyan and Mohammedan Law and the Tesawalamai alone are preserved. If such an abrogation was effected by Section 2 of Ordinance 15 of 1876, it would not be retrospective or affect rights acquired under a deed of 1842. I have myself carefully examined the passages cited by the learned Commissioner from Mr. Brito's book on the Mukkuva Law, and they support on every point the conclusion at which he has arrived. Mr. Tambyah urged me to send this case back for expert evidence as to the Mukkuva Law of Succession. Even assuming that I have power to make such an order, I do not think that any *viva-voce* evidence, now procurable, could throw so much light on the Mukkuva Law of Inheritance in 1842 as a work by an admitted expert published as far back as 1876, and embodying the results of decisions from 1844 downwards.

282. In *Sethirapillai* v. *Nagamuthu* (*g*) the Court had to consider a deed of 1848 whereby it was provided that a property gifted to two daughters should be possessed and enjoyed by them as *taivali muttisam* from generation to generation. The contention was that this deed created a *fidei commissum* in favour of the female descendants of the daughters. Ennis, J., held in 1916 as follows:—I am not

(*g*) 2 C.W.R. 310.

Females succeed to Females.

satisfied that a custom still exists as a rule of succession among Mukkuwas for property inherited from females to pass to females only, or that it was the intention of the donor to adopt such a custom even if it still exists. The donor was not a Mukkuwa. The custom is contrary to the law of the land; it had fallen into disuse over 200 years ago in the adjacent district of Jaffna (*Chellapah* v.*Kanapathy*, 17 N. L. R. 294); it has not been clearly proved to survive among Mukkuwas and the 6th defendant's son appears to have disregarded any such custom by taking an assignment of a mortgage of this very land from Chempakanchy and her son. The words "*taivali muttisam*" must be taken to indicate the source of inheritance, and the donee's right to deal with it as property inherited from the mother, rather than as indicating the adopting of an obscure rule of succession by descendants of the donee's and, in the absence of any clear intention shown in the deed that the property on the death of the donor's daughter, was gifted over to the female descendants only, the law of the country must prevail.

In *Tyramuttu* v. *Mootatamby* (1921) 23 N.L.R. 1. the Court had to interpret a deed where the donees had to possess "according to the custom of the Mukkuvars as their ancestral property and as property of nephews."

283. On the origin of the Mukkuwa Polity, (*gg*). Mr. Brito writes:—They are based on the language, customs and traditional tales of the people, which cannot with propriety be entered upon in a work of the present character.

(*gg*) Brito p. 41.

1. Intercourse between the sexes was once promiscuous, and in the broadest sense of the word.

2. By degrees the following restrictions were introduced:—(a) Persons of the same Kudi abstained from each other. (b) A person of the direct ascending line and those with whom that person was having intercourse abstained from a person of the direct descending line and from those with whom the latter person was having intercourse. (c) Collaterals abstained from each other, although two or more collaterals habitually chose to have intercourse with the same persons. (d) Persons abstained from the direct descendants of their collaterals.

3. In a state of society in which there was no marriage, natural prudence would dictate to the female the expediency of securing means of livelihood for herself and her future offspring by requiring every male to give up to her whatever he earned during the period he continued to visit her.

4. And, when a female died, everything she left went naturally to her children and was as naturally divided among all her sons and daughters alike.

5. The daughters would continue to earn from their lovers, in the same manner as their late mother did and would transmit their *Theddam* and *Muthusom* to their issue, male and female alike.

6. But the case of a son was different. As distinct Kudis lived in distinct villages, a male had to migrate from his own village in search of women and to abandon to his sisters all that he could not easily carry away with him.

The idea of selling or bartering a *land* was unknown in ancient times.

7. Whether the male afterwards returned to his own Kudi, or died in the Kudi or Kudis in which he had found his women, there could arise after his death no question with respect to his *Theddam*, as he could have left no *Theddam*, that he had not disposed of during his life time. Nor could any persons, on the ground of being his children, claim the *Muthusom* which he had left in his own village. For, no Mukkuva child knew its father.

The *Muthusom* accordingly would go to his sisters, his only undoubted relatives, on the principle that the mother makes no bastard.

8. When in process of time man in the exercise or abuse of his superior strength, began to tyrannize over the woman, her property was placed under the power of her brothers, and, even of her own sons.

All the modern rules of Mukkuva succession seem to be but mere adaptations of the foregoing principles to suit the requirements of the civilized commerce which now obtains between the sexes.

The Mukkuvars have, in imitation of European nations, long since abandoned their polygamous and polyandrous practices. From the foregoing remarks it is easy to see the reason of the following principles which form the foundation of the *Mukkuva Law*.

1. All inheritance is from the mother and none from the father.
2. Succession is traced through the mother.
3. *Muthusom* land is out of the marital power.
4. Males are managers of it for the females.
5. The elder brother is supreme manager.
6. Managers are bound to support their mother but not their sister.
7. Women cannot hold land.
8. The most valuable movables go to the males.

CHAPTER XIV.

KANDYAN SINHALESE.

284. The question, who is a Kandyan, is not easy to answer. Modder defines a Kandyan as "a highland Sinhalese, who has his domicil of origin in the Kandyan Provinces, and who is subject to the customs, laws, and institutions which are known as the Kandyan Law." But as the purpose of the present inquiry is to ascertain who are subject to Kandyan Law, the definition is not very helpful.

Persons to whom Kandyan Law is applicable.

285. The Proclamation issued (*a*) shortly after the British annexed the Kandyan Kingdom had the following clause:—The Dominion of the Kandyan Provinces is vested in the Sovereign of the British Empire, and to be exercised through the Governors or Lieut-Governors of Ceylon for the time being and their accredited Agents, *saving . . . . . to all classes of the people the safety of their persons and property, with their Civil rights and immunities according to the laws, institutions and customs established and in force amongst them.* It is necessary to ascertain the class of persons whom it was intended to benefit, by the saving Clause in the above Proclamation. Are the Kandyan Laws and Customs applicable to all subjects of Sri Wickrama Raja Singha and their descendants or only to his Sinhalese subjects and their descendants ? Can Sinhalese and others from the Maritime Provinces

(*a*) 2 March, 1815.

who settled in the Kandyan Provinces after 1815 and their descendants claim the benefit of this Clause ?

Kandyan Provinces.

286. What are the "Kandyan Provinces" referred to in the above Proclamation, and in several other proclamations, regulations, and ordinances ? At no time were the provinces of the Island so divided as to maintain the "territory of the Kandyan Kingdom" as a separate entity. In 1833 the Island was by Proclamation divided into five Provinces—Northern, Eastern, Southern, Western and Central. In 1845 the North-Western Province was created. The Kandyan Marriage Ordinance of 1870 defines the expression "Kandyan Provinces" as meaning the provinces enumerated in Schedule B and proceeds to name areas in all the above-named six provinces:—

The Central Province.

North-Western Province:—Seven Korales, Demalapattu of Puttalam.

Eastern Province:—The Uda, Palle, and Radda Palatas of Bintenna; the Vannames of Nadene, Nadukadu, and Akkaraipattu; the Sinhalese Villages in the division of Panawa—all in the Batticaloa District; Tamankaduwa, the Sinhalese Villages in the Kaddukulum pattu, in the District of Trincomalee.

Western Province:—Sabaragamuwa, Four and Three Korales and Lower Bulatgama.

Yakwala, in the Southern Province.

Nuwarakalawiya, in the Northern Province.

All Sinhalese Villages in the Mannar District.

When this Ordinance of 1870 was passed the Central Province included the District of

Badulla, now the Province of Uva. Nuwarakalawiya in the Northern Province, is now included in the North-Central Province which was subsequently created. Sabaragamuwa has also since been made a separate province. Sinhalese villages in the Mannar District were annexed to Vavunia District when it was created a separate Agency. The names of most of these villages, Mr. Lewis (*b*) points out, are Tamil, but among the Sinhalese have assumed Sinhalese forms. *Kulam* becomes *Kulama*, *Ur* becomes *Uruwa*; *Madu* becomes *Maduwa*, etc.

287 In Robertson's Case all the three judges expressed the view that with regard to the exact limits of the Kandyan Provinces there was no precise information. Sir P. Arunachalam in a contribution to the Journal of the Royal Asiatic Society (C.B.) 1910, advanced the opinion that the Proclamation of 1833 abolished the distinction between the Kandyan and Maritime Provinces. Referring to Ordinance No. 12 of 1840 he said: "the expression 'districts formerly comprised in the Kandyan Provinces,' therefore emphasizes the fact there were no longer in law any provinces that could be called the Kandyan Provinces." The expression however must be taken to refer to those divisions which belonged to the Kandyan King at the date of the Cession in 1815. The Schedule to Ordinance No. 3 of 1870 may be taken to have defined what the Kandyan Provinces are for

(*b*) Manual p. 98.

all practical purposes. The boundaries of each and every division have been defined by Proclamation of February 28, 1900 for the purposes of the registration of marriages under Ordinance No. 3 of 1870 and this may be said to remove the doubts which formerly existed as to the exact location of the districts (*c*).

288. The Kandyan Kingdom consisted at the date of the British Occupation, of twenty-one chief divisions, of which the twelve principal ones were called *Disawani*, (divisions presided over by a Chief or Governor), and the majority of the rest, *rataval*, (districts presided over by an officer called *Rate Rala*).

289. The Diswani were (1) the Four Korales, (Hatara Korale), (2) The Seven Korales, (*Hat Korale*), (3) Uva, (4) Walapane, (5) Uda Velapalata, (6) Nuwarakalawiya, (7) Matale, (8) Sabaragamuwa, (9) The Three Korales, (*Korale Tuna*), (10) Welassa, (11) Bintenna, and (12) Tamankaduwa.

290. The other nine districts (*rataval*) were (1) Udunuwara (2) Yatinuwara, (3) Tumpane, (4) Hewaheta (5) Uda-Bulatgama, (6) Kotmale, (7) Harispattu, (8) Dumbara, and (9) Pata-Bulatgama.

An exhaustive discussion of the expression "Kandyan Provinces" and an enumeration of the divisions will be found in Modder's Kandyan Law, 1-19 and Arunachalam's Civil Digest; Appendix V.

Is Kandyan Law a Personal Law ?

291. The question whether Kandyan Law is a personal law or territorial law was considered in several cases. Sir Harry Dias, J., and Clarence, J., held the view that before the British Occupation of the Kandyan territory in 1815 Kandyan Law was a personal law,

(*c*) Modder, 12.

(*d*) Robertson's Case, 8 S.C.C. 36.

and that Tamils, Moors and other foreigners in the Kandyan Kingdom were governed by their own laws.

292. Sir Harry Dias, J., said in Robertson's Case (*d*) :—It is beyond doubt that the Central Province . . . . was not exclusively inhabited by the Sinhalese Kandyans. There undoubtedly was a large foreign, *i.e.*, non-Kandyan population, not a mere floating population who had no permanent settlement, (*Mahawanso, Turnour* Tr., P. 117). The Kandyans were no doubt the dominant people, but history informs us that there was a large Malabar or Tamil population as numerous as the Kandyans during the Sinhalese rule. Besides the Tamils, there were Low-Country Sinhalese, Moors and probably Portuguese descendants. (*Ceylon Gazetteer*, P. 217; 2 *Orientalist* Parts ix and x; P. 184). The Proclamation of 1815, recognises the presence of Malabars and Moors in the Capital City of the Kandyan Kings at that time. The Malabars obtained a footing in the North of the Island long before the Christian era, and they carried their conquests down to Anuradhapura, *i.e.*, within ninety-two miles of the Capital City of the Sinhalese Kings. [*Tennent's Ceylon*, Vol. 1. P. 401.] By 840, A.D. the Tamils had overrun the whole of the northern part of the Island between Batticaloa on the east, Chilaw on the west, Jaffna on the north, and the Mahaweli-ganga on the south. [*Tennent's Ceylon*, Vol. 1. P. 15.] A Tamil ruler reigned at Anuradhapura for forty years. [*Ceylon Gazetteer*, p. 11], and occupied the whole of the district which is now known as Nuwarakalawiya . . . . From the foregoing we may safely conclude that at the time of the Cession of the Kandyan Provinces its population was a mixed population, consisting of several nationalities and creeds, each following its own peculiar laws as to marriage and its incidents, and the resulting civil rights and obligations; the Sinhalese Buddhists following their own laws and customs, the Tamils the Hindu Law, and the Mohammedans, the Mohammedan Law, and the Christians, of whose presence in the Central Province there can be no doubt,

Before 1815.

(*d*) (1886) 8 S.C.C. 36.

their own laws. The above considerations lead me to the conclusion that there was not any general marriage law in the Kandyan Provinces, either in the Kandyan times or after the Cession till 1859.

Clarence, J., said:—The population of the Central districts included, besides the "Kandyan" Sinhalese a population of Moors, and, as might have been anticipated from the fact that the reigning dynasty had latterly been Malabar, no inconsiderable number of Tamils. It is beyond doubt that at the time when the hill country came under British sway, its inhabitants included a considerable foreign element other than the "Kandyan" Sinhalese. I know nothing proving that at that time the peculiar incidents of "Kandyan" Law, concerning, for example, marriage, inheritance, adoption of children were ever applied to such foreign parts of the population, to the Malabars, for instance. On the British occupation taking place, the Kandyan Sinhalese were in the enjoyment of their own "Kandyan Law," and are still governed by it, except in so far as it has been touched upon or supplemented by subsequent legislation.

Is Kandyan Law personal?

293. After British Occupation.— Sir Edward Creasy, C.J., held in Kershaw's Case (*e*):— that at any rate after 1815 Kandyan Law extended to all persons in the Kandyan territory and that consequently the wife of a European planter who lived in the Kandyan Province had the rights of a Kandyan wife as to her property and as to her capacity to contract in her own right. He said (*f*):—

If the Proclamation of 1815 (March 2) stood alone, it would show that the Kandyan Laws were intended to apply to Kandyans only. The 4th Clause granted those laws to the Kandyan Chiefs and people. The 9th Clause provides separately for the administration of justice over all the persons, civil or military, residing

(*e*) (1862) Ram. 157.

(*f*) Kershaw's Case, (1862) Ram. 157, at p. 163

in or resorting to these Provinces, not being Kandyans, until the pleasure of His Majesty's Government in England may be otherwise declared. . . . .

It was proclaimed on 31st May 1816 that "the ancient laws of Kandy are to be administered till His Majesty's pleasure shall be known as to their adoption *in toto* as to all persons within those provinces or, their partial adoption as to the natives, and the substitution of new laws and tribunals for the trial and punishment of His Majesty's European subjects for offences committed therein." It thus appears that a temporary administration of the ancient laws of Kandy was designed, and no distinction of persons is directed during such temporary administration. The Proclamation of 21st November 1818, which was issued on the suppression of the Kandyan Insurrection in that year, contained provisions as to administration of justice, which, from Clause 34 to Clause 50 inclusive provide particular tribunals and processes "for hearing and determining cases wherein Kandyans are concerned as defendants, either civil or criminal." Clause 50 provided that "the people of the low-country and the foreigners coming into the Kandyan provinces shall continue subject to the civil and criminal jurisdiction of the Agents of Government alone, with such additions as His Excellency may by special additional instructions vest in such Agents." This Proclamation made some difference as between Kandyans and non-Kandyans, as far as regarded the administrators of the law; but it did not direct any variation in the kind of law to be administered. . . . In 1851 the Judges of the Supreme Court, sitting collectively recommended in answer to a communication from the Governor that among other amendments in the law, the old Kandyan Laws should be retained in the Kandyan Provinces so far as regarded Kandyans themselves, but the laws of the Maritime Provinces should be observed in the Kandyan Provinces as to the persons and properties of all persons other than Kandyans.

The Supreme Court at that time considered the Kandyan Law to apply to *all* residents in the Kandyan districts. The change recommended by the Supreme

Court Judges, which exempted all non-Kandyans from the operation of Kandyan Law, was thought by the authorities here too sweeping; and that it was proposed to legislate specially for particular subjects. Accordingly the Ordinance 5 of 1852 was passed and the second passage of its preamble recites the expediency that the law of the Kandyan Provinces should be assimilated as far as may be to the law of the Maritime Provinces." The 5th Clause of this Oridnance is as follows: Where there is no Kandyan Law or Custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces, for the decision of which other provision is not herein specially made, the Court shall in such case have recourse to the law as to the like matter or question within the maritime provinces. The 8th Clause enacts that the inheritance and succession to the property of Europeans and Burghers in the Kandyan Provinces is to be the same as in the Maritime Provinces; and the 9th Clause ordains that marriage between Europeans and Burghers or between an European or Burgher on one side and a Sinhalese on the other, within the Kandyan Provinces, shall not be valid unless such marriage would have been valid if contracted in the Maritime Provinces. The 10th Clause extends to Mohammedans in the Kandyan Province the right of being judged, in matters between themselves, by the Mohammedan Code.

If we take this Ordinance and consider its meaning by an examination of its contents only, without any light from exterior sources, it is impossible not to regard it as a Legislative declaration that, before it was passed, the Kandyan Law extended to all persons in the Kandyan territory, and as a declaration that the Kandyan Law was to continue so to extend, except in the particular cases wherein the Ordinance itself introduced new law into Kandyan territory or exempted particular classes of Kandyan residents from the operation of the old Kandyan Law. If we read the Ordinance with the aid of historical information and of comparsion with other legislative instruments in *pari*

materie the conviction becomes still stronger that Kandyan Law is not limited to Kandyan natives but extends to cases like the present, always supposing that its operation has not been expressly limited by any enactment on the subject.

294. Commenting on this case Clarence, J., said (*g*) :—With respect to the application of "Kandyan" Law before 1851 to inhabitants of the "Kandyan" country other than Kandyan Sinhalese, I am bound to say that I am very far from being satisfied that the "Kandyan" Law ever was applied before 1851 to Europeans or Eurasians. It is said in Mr. Justice Thomson's work that prior to Ordinance 5 of 1852 "Kandyan" Law "governed Moorish parties." The authority there given is a very short note of a decision of Oliphant, C.J., in 1849, in a case between Moorish parties that claimant was entitled to half of the property claimed, "the plaintiff having failed to prove that claimant's mother Sinna Umma was married in *diga*" (Austin 99). But in a Kandy case noted in Ramanathan, (1843-55) page 163, the Court expressly recognised the right of Moors to be governed by their own religious laws as to inheritance and marriage. . .

I do not at all infer from these documents † that the Supreme Court then considered the "Kandyan" Law to apply to *all* residents in the "Kandyan" districts. I cannot regard them as indicating more than that the Supreme Court then thought that there was much need for assimilating the marriage law for Europeans in the Kandyan districts to that of the Maritime Provinces. It should not be forgotten that, although we are now accustomed to endure, with less or more of resignation, as the case may be, the legal postion that the Roman-Dutch Law is the common law of the central districts of Ceylon as of the Maritime Provinces, yet there was a time when that position had not yet been taken up by the Courts; and that it did not follow, because the Roman-Dutch Law bound the inhabitants

(*g*) Robertson's Case, (1891). 8 S.C.C. 36.

† Letter of the Chamber of Commerce and Reoprt of the Supreme Court referred to in Sec. 293—Page 189.

of the Maritime tracts which we had acquired from the Dutch, that therefore it would be applied beyond the limits of the country so gained. There would be an uncertainty and a variance between the Maritime Country and the "Kandyan" until that matter was duly settled. Whatever may or may not have been the supposition under which the Ordinance was passed, I do not think it binds us to hold that the "Kandyan" Law at that time governed Europeans or Eurasians, if on other grounds, we are of opinion that it did not. But in my opinion, neither the Preamble nor the 5th, 6th, 7th, 8th, and 9th Sections necessarily involve the supposition that the "Kandyan" Law then governed any but "Kandyans." Undoubtedly it indicates that there had previously been no certainty as to the Law of Succession and Inheritance of the Maritime Provinces applying to Europeans or Burghers in the Kandyan Provinces.

Burnside, C.J., said in the same case:—This surely gives strong reason for the conclusion that there were many systems governing the social condition of the several races of the ceded territory—a reason which repels rather than permits the theory that in the peculiar matter of marriage, one system was applicable to all alike, the Buddhist, the Hindu the Mohammedan, and the Christian. But even if we admit, for the sake of argument that such a system of law was universal, where is the proof that it was bodily accepted by direct expression of the Sovereign's will upon the Cession of the Kandyan Territory? I confess I can find none. The Proclamation of 1815, as Sir Edward Creasy admits is rather an authority that the Kandyan Laws were to apply to Kandyans only. All other persons not being Kandyans were subject to other regulations; nor do I think this express distinction was disturbed by the subsequent instructions in 1816 in transmitting which to the Governor of the Colony, the Secretary of State writes: "His Royal Highness has declined adopting the pre-existing laws and Courts of Kandy, etc., until more detailed information shall have been obtained as to the nature of those laws, etc." Those instructions certainly notified "that the ancient laws of Kandy were to be administered till His

Majesty's pleasure should be known as to their adoption *in toto* as to all persons within those provinces or their partial adoption as to the natives, and the substitution of new laws and tribunals for the trial and punishment of His Majesty's European subjects for offences committed therein." I think these words point distinctly to the fact that the ancient laws of Kandy were not yet adopted *in toto* as to all persons. Nor can I conclude that the subsequent Proclamation of 1818 went any further; its avowed appeal "to every Kandyan be he of the highest or lowest caste" the declaration that "the people of the low-country and foreigners coming into the Kandyan country should continue, subject to the civil and criminal jurisdiction of the Agents of Government alone" imply as clearly as words can that in some respects at least civil status of foreign residents was to be different from that of the native. I think the fifth clause of the Ordinance is in itself sufficient evidence that the Legislature recognised the failure of Kandyan Law to meet every case which might arise; and I cannot but conclude, looking to the paramount importance which must have attached to the question now under consideration, that the Legislature would not have omitted to legislate on the matter had it contemplated that by Kandyan Law the status of native Kandyan wives had been imposed on the many European and Eurasian wives then in the hill country. I do not think it would have passed over so vital a matter in silence, when it was concerned to substitute the law of the maritime provinces for that of the Kandyan Territory in other and less important particulars. I cannot regard it as a *casus omissus*. I think the silence of the Legislature may well be considered as significant, that there was nothing to be remedied.

295. Clarence, J., held in Wijesinghe's Case (*h*):—"It cannot be maintained that what has been conserved as Kandyan Law amounted to a distinct *lex rei sitae* governing absolutely the devolution of land, like, for instance, Gavelkind land in Kent. All we *lex rei sitae.*

(*h*) (1891), 9 S.C.C. 199.

know is that a certain section of the community within the Kandyan Provinces, *viz.*, the 'Kandyan Sinhalese' were allowed to retain their own customary law."

Personal Law.

296. In *Mudiyanse* v. *Appuhamy* (*i*) Pereira, J., held "It is not what may be termed a local law, governing all persons living within a certain area; it is rather a personal law attaching to the individuals, wherever they may be, belonging to a certain particular class or section of the Sinhalese subjects of the Crown."

297. Dr. Hayley in his Sinhalese Laws and Customs expresses the view that the Kandyan Law was in no sense a personal law (*j*) and that the judgment in Kershaw's Case is based upon a better legal interpretation than that adopted in Robertson's Case (*k*).

298. The Privy Council in *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* (*kk*) said:—"The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings and habits of European Christians that they have been usually allowed by the indulgence or weakness of the potentates of those countries to retain the use of their owns laws and their factories have for many purposes been treated as part of the territory of the sovereign from whose dominions they come." If then the Kandyan Law would not

(*i*) (1913). 16 N.L.R. 119. (*j*) Hayley, 25.
(*k*) Hayley, 33.
(*kk*) 9 M.I.A. 387 (425); G. 156.

have been applicable to Europeans before the annexation of the country, how could the subsequent acquisition of the rights of sovereignty by the King of England make any alteration. It might enable the King by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. It is submitted that Robertson's Case rightly decided that Europeans residing in the Kandyan Provinces were not subject to Kandyan Law.

299. Dr. Hayley writes (page 25) :—"The Sinhalese Law, as enforced in the Kandyan territories in the eighteenth and nineteenth centuries, was in no sense a personal law. Originating in the customs of the Sinhalese it had long since become the law of a country administered by the authority of the King, himself in later times an Indian, in respect to all races alike, foreigners no less than subjects. In *Mongee* v. *Siarpaye*, Kapuwatte, one of the Chiefs consulted by the Board of Commissioners, stated that under the King's Government it had always been customary to decide cases which arose between Hindu Malabars according to the laws of the Kandyan Provinces and not according to their laws, and that he himself had decided one case of land in that manner, and one or two concerning movable property. Six other Chiefs consulted concurred in this opinion."

300. As to the applicability of Kandyan Law after 1815, to persons other than Kandyans, Dr. Hayley writes (page 35) :—Who then were the people constituting the King's subject in 1815 ? There were, and still are, villages occupied mainly by Moors who are so much part of the permanent population that they have in some cases adopted Sinhalese *ge* names and are sometimes called "Mohammedan Kandyans" by the Board of Commissioners. There were Chetties and other traders from India; Veddas who were employed as troops and paid tribute; Tamils engaged in various

Offices at Court, and, there can be little doubt, numbers of Sinhalese who had formerly resided on the coast before the conquest by the Europeans. Further the royal princes had frequently married Indian Princesses, and Sri Wikrama Raja Sinha, the King, was himself an Indian. The suggestion that the adigars, disawas, and other chiefs and headmen, had been in the habit of administering different systems of law to this mixed population, according to its race, has only to be made to be immediately discarded, even had we not the direct assertion of the chiefs in *Mongee* v. *Siarpaye*. If then, by the law of the country, all persons resident within it were governed by that law (subject perhaps to variations in domestic matters such as marriage) that fact constituted one of the customs and privileges guaranteed to them.

The consideration of this question is continued in the next chapter which deals with Personal Laws generally.

CHAPTER XV.

PERSONAL LAWS.

Personal Laws are more archaic.

301. The conception of a law which is applicable to all classes and which is therefore, a territorial law or the law of the land is deemed to be more advanced than the conception of a personal law or a law depending for its application upon the personal status of the individual. Law addressed to the members of a tribe, or the followers of a religion, irrespective of the locality in which they may happen to be is regarded as more archaic (*a*).

302. Cowell observed:—The notion of a territorial law is European and modern. The laws which Hindus and Mohammedans obey do not recognize territorial limits. The *Shastras* and the Koran revealed religion and law to distinct peoples, each of whom recognised a common faith as the only bond of union, but were ignorant of the novel doctrine that law and sovereignty could be conterminous with territorial limits (*b*).

Hindu and Muslims Laws are based on religion.

303. The reason why Hindu and Mohammedan Law are regarded as personal laws is the fact that these laws are connected with their religion. The preservation of personal law is the necessary corollary to the preservation of religious rites and worship with which the Hindu Law and Mohammedan Law are inextricably blended (*c*).

(*a*) Gour, 140. (*b*) Tagore Lectures 1870.
(*c*) Gour 214. Para 340.

Nature of Personal Laws.

304. Kandyan Law is not based either on religion or on race, and the reasons for regarding it as a personal law require further examination. Before doing so, it is well to point out that it does not follow from the fact that a person is subject to one personal law, that he and his descendants must necessarily continue to be governed by the same, and cannot become subject to another personal law or to a territorial law. It must also be noted that a stranger can acquire rights under a personal law, just as he can acquire rights under a territorial law. A family by settling among persons subject to a personal law, and adopting their customs and mixing up with them may become subject to that personal law. As already pointed out a Hindu migrating from one part of India to another where a different school of Hindu Law prevails, may by adopting the usages and customs of his new domicil, under certain circumstances, abandon the law of his origin and acquire the law of his new domicil. Descendants of persons who were not subject to Hindu Law have been held in India to have acquired the status of Hindus. Notwithstanding the fact that Hindu Law and Mohammedan Law are deemed to be personal laws based on religion, there are instances of Mohammedan communities who are governed by the Hindu Law in India.

Who are subject to Kandyan Law ?

In Ceylon there are instances of descendants of Tamils, Mohammedans and Portuguese who have become subject to the Kandyan Law, and similarly there are

descendants of Indians, Colombo Tamils, Sinhalese, and Portuguese who are governed by the Tesawalamai.

305. Sir E. B. Denham in his Census Report for 1911 says referring to the Kandyans:—

Kandyanized Tamils.

> The ruling dynasty was for generations Tamil, and there must have been constant fusion of the two races. Prisoners from South India were settled in various parts of Ceylon, settlements of weavers were brought over, and in every branch of the State Tamil workmen were employed. Certain castes in Ceylon to-day trace their descent directly from South Indian tribes, and along the coast from Negombo to Puttalam Tamil is as much spoken as Sinhalese by villagers calling themselves Sinhalese, but undoubtedly of Tamil descent.
>
> Even in the Hiriyala hatpattu of the Kurunegala District in the Diddeniya palata there are Sinhalese Karawas, the majority of whom are Hindus and speak Tamil. Their tradition is that their ancestors came from South India and settled first in Negombo. They worship the Kataragama Deiya, and their religious service is in Tamil. Most of them can read and write Sinhalese, but speak Tamil at home. They have ceased to observe most of the Tamil customs, but preserve the custom of tying the *tâli* at weddings. They intermarry with other Kandyan Village Karawas."

306. Mr. Macready in his Administration Report on the Puttalam District for 1867, says of the people of the Demala hatpattu: "The people we now find there call themselves Kandyans, but I suspect that not a little Malabar blood runs in their veins. The men of the present day certainly have much in common with the Malabars as well as with the Kandyans, and the peculiarity of the Tamil cast of countenances is in some instances strongly developed."

Kandyans adopting Low-country and Tamil Customs.

307. The reverse process of Kandyans adopting the customs and usages of the Low-Country Sinhalese and Tamils is also going on Mr. Modder (*e*) says:—

"Kandyans living in villages immediately adjoining the Maritime districts ape their low-country neighbours in various details of dress and costume. In the Pitigal Korale, Kurunegala District, which borders the Negombo and Chilaw divisions, some of the Kandyans have adopted combs, and affect other articles of dress, which are foreign to them. To carry this enquiry further and to show the extent to which the system of imitation is pushed, it may be mentioned that, "living among the Tamils, the Sinhalese of the Vanni have to some extent begun to copy their customs. They have adopted the Tamil system of proper names; thus, a man has his father's name prefixed to his own, and does not take his own from the village or family he belongs to, or the land he owns, as is the common Sinhalese custom elsewhere. Many of their names too are Tamil in a Sinhalese shape, *e.g.*, Vellatte, Kathira-Vellatte, Kathiratte, Sinnatte, Kandappu, Udayare, Kandate. The older generation have taken to wearing earrings but this practice has been discouraged by the present Sinhalese headmen. The Sinhalese have as much faith in the Hindu god, Pillaiyar, (Ganesa) as have the Tamil Villagers." (Lewis' Manual 102). Modder xiv.

Kandyanized Moors.

308. Mr. Modder gives the following account of some Moorish residents in the Kurunegala district (p. xvi):—"The adoption by the settlers of the customs and even the names of the original inhabitants. forcibly reminds us of a remarkable coincidence with regard to the Moorish residents in the Kurunegala districts. Although they adhere to the Muslim faith, they have by long residence among the Kandyans so habituated themselves to the ways and manners of the latter, that it is a common experience to hear of the patronymic given by a Moorman for intsance as

(*c*) Page 14.

Tambi Lebbe Araccilage, etc., not to speak of their marrying out their children in *diga* or settling them in *binna*—terms peculiar only to the Kandyans, whose laws and usages have, by express statutory provisions, been declared not to apply to the Moors.

Rambukkankanda is a Moorish village, which has been registered under the Service Tenures Commission as subject to services to the Ridi Vihare, the tenants are all Mohammedans. "The service which they render to that establishment is confined to the payment of dues and the transport of produce, etc., and has no connection with the services of the Buddhist Vihare, and their own Lebbe or Priest is supported by a farm set apart by the Buddhist landlords for the purpose. There are thus Mohammedan tenants performing without reluctance, service to a Buddhist monastery, which is freely supporting a priest of its Mohammedan tenants." (A. R. 1870, 285). Modder page xvi.

Sinhalese Law and Portuguese Law.

309. Sinhalese Law assumed something of the character of a personal law, in the Maritime Provinces (if it was not so earlier) when the Sinhalese declined the Portuguese proposal, made after Dharmapala's bequest of the Kingdom to the King of Portugal, that they should "receive the same laws as the Potuguese." The Sinhalese delegates replied:—"They were Chinglas, brought up from their youth in the laws which they possessed and observed, and that it would be a very grave matter for them to abandon those laws and take in exchange what were now proposed; the result of so great a change would probably be that neither the one law nor the other would be properly observed, to the great prejudice of His Majesty. They admitted the King of Portugal as their rightful Lord and King, just as if he had been their own

Emperor, born in their country, and as such they would serve him with the laws in which they had been brought up; *but they must be guaranteed the continuance of those laws without any alteration at any time* by His Majesty and his Ministers (*f*)." The Portuguese thereupon undertook to preserve for the "Vassals of Ceilao, *all their laws, rights and customs without any diminution whatever*" and thereafter both the Sinhalese and Portuguese Laws were in force in the Provinces. Some Sinhalese gradually came to be governed by the Portuguese Laws.

Dutch policy.

310. The Dutch followed the same policy and applied the Dutch Laws to Hollanders and to natives who had become "burghers." De Sampayo, A. J., said:— The Dutch East India Company was a trading company, and it is a well-known fact that the Dutch, whether from policy or from indifference, troubled themselves very little about the native inhabitants, except perhaps in the case of a small number of native Christians who were in the service of the Government or resided in the forts, and left them more or less contemptuously to themselves. The Dutch, therefore, were not likely to extend to the native population in their integrity the personal laws by which they governed themselves, and least of all their peculiar and strictly Christian views of the marriage relation. Accordingly we find that native customs and usages were

(*f*) Dr. Pieris' Ribeiro, 92.

recognized, and that, even when Roman-Dutch Law was in any degree applied, it was so applied with such modifications and qualifications as were suitable to the people (*g*).

Personal Law in the Middle Ages.

311. The process by which the Sinhalese Law came to be regarded as a personal law may be compared to the development of law in Europe in the Middle Ages, when the Goths, the Burgundians, the Franks, and the Lombards began to found new kingdoms upon the ruins of the Roman Empire. The Roman citizens were not deprived of the enjoyment of their own laws. The conquering invaders and the conquered inhabitants lived side by side each under their own system. When the German races began to conquer each other, especially when several of them were united by Charlemagne under one Empire, the same forbearance was exercised (*h*).

Each inhabitant of the Frankish kingdom was subject to the law of his own nationality. Thus in France, the Frank was subject to the *Lex Salica*; the Burgundian to the *Lex Burgundionum*; the Visigoth to the *Lex Antiqua Visigothorum*; whilst the Roman lived under the *Lex Romana*. In an Edict of Lothair we find the following: "We decree that in suits between Romans the judgment shall be according to the *Lex Romana* (*i*)." In the formulae of Marculfus (*circa* 660) we find: "You will govern, according to the law and

(*g*) *Karonchihamy* v. *Ango*, 8 N.L.R. 24.

(*h*) Mby 53.

(*i*) Capit add iv, Sec. 45, ed. Georgious.

custom of each one, all the peoples who live under your jurisdiction, the Franks, Romans, Burgundians and others" (bk. 1. f.8.) In the *Lex Ripuaria* it was enacted:—"We have decided that he who lives in the land of the Ripuarians, be he Frank, Burgundian, Alleman or of any other nationality, must answer when summoned before a court of law according to the law of the country in which he was born." "If the person is condemned he must pay his penalty according to his own law, not according to that of the Ripuarian Franks" (*j*).

Matthaeus gives us a number of instances where father and son, husband and wife lived under different personal laws (*k*). Each person retained the law indicated by his birth, so that there existed side by side not only two systems, a Roman, and a barbarian, but several systems, a Roman, a Gothic, a Burgundian, a Lombardic, and so forth. It is the conflict of laws thus produced to which Bishop Agobardus referred, when he said: "it often happens that five men each governed by different laws, may be found sitting or walking together" (*l*).

The judges were bound to find out what the personal law of the parties was, and to judge accordingly, and if they refused they were subjected to a money penalty (*m*).

(*j*) (*Lex Rip.* tit. 38, Art. 3; tit. 31. Art 4.) Wessels 46.
(*k*) De Nob. 1. C. 27. Wessels 47.
(*l*) Mby, 53.
(*m*) (Lex Sal. tit 60, arts. 1 and 2); Wessels 48.

Territorial Laws.

312. Gradually, however, during the Merovingian Dynasty, laws were enacted which applied to all the inhabitants of the King's territory. These laws were territorial, and existed side by side with the personal laws. In course of time their scope was extended until they came to form a very important body of law. At first they were called the Edicts of the Frankish kings, but in the Carolingian period they came to be known by the name of *Capitularia* (*n*).

Feudalism and territorial Laws.

313. But the personal law, even in archaic societies was not always applied to land. Feudalism had much to do with making law territorial in Europe, and it is probable that in Ceylon side by side with various personal laws applicable to foreigners there was one territorial law relating to land tenure and other like matters. The fact noted by Dr. Hayley (*o*) that some portions of Kandyan Law affect European residents—[for instance "if a person of any nationality becomes the overlord of a *nindagama*, the relations between him and his tenants continue to be regulated by the Kandyan Customs."]—is not therefore a point against the personal character of the Kandyan Law.

Persons living on Kandyan soil.

314. Applying the principles enunciated in Indian cases (*p*) it would seem that families who have long lived rooted to the soil of any

(*n*) Wessels 49. (*o*) Page 33.
(*p*) 40 Cal. 407; 24 W.R. 95; 13 W.R. 47; 29 Cal. 541; 2 M.I.A. 132; 12 M.I.A. 81 (92). Gour Sec. 344; page 216.

province where the Kandyan Law prevails and speak the language and follow the customs there prevalent, may be regarded as Kandyan. In the case of Kandyan families who leave the place of their origin to settle down in another place, for instance in Colombo or Vavuniya, where the prevalent law is different, their own personal law follows them. But this is merely a presumption and may be rebutted by proving that the family had by its adoption of the customs and usages of its domicil, declared its intention to abandon its law of origin and follow that of the domicil.

Outsiders marrying in *binna*.

315. When the British occupied the Kandyan Territory, the Kandyans were allowed to be governed by their own laws, and it would seem that outsiders who married Kandyan wives and adopted Kandyan customs came to be regarded as Kandyans. For example, a Tamil or a Low-Country Sinhalese who contracted a *binna* marriage was regarded as Kandyan, for a *binna* marriage was by itself strong evidence of a change of domicil. But outsiders who did not adopt Kandyan customs, as Europeans and Burghers, were apparently not regarded as Kandyans and were governed by other laws.

Kandyan Tribunals.

316. Before the annexation the Kandyan tribunals would appear to have enforced the customs of the parties who sought redress. If both the parties were strangers, and belonged to the same class, no conflict of laws would have arisen and the customs of that class were enforced unless the parties had been absorbed

into the Kandyan community; in such a case the Kandyan custom would be enforced. Where a conflict of laws arose the matter would be decided according to justice, equity and conscience (*q*). In archaic societies it is but natural that the laws of foreigners should be recognized. Asiatic countries permit European settlers to be governed by their own laws even at the present time.

Reasons for holding that Tesawalamai is not a personal law.

317. Many of the reasons which have been urged for holding that the Kandyan Law is a personal law, might be advanced with equal force for the contention that the Tesawalamai and Mukkuwa Law are personal laws. But the Tesawalamai has been declared not to be a personal law. Wood Renton, C. J., in *Spencer* v. *Rajaratnam* (*r*) gives the following reasons for holding so:—" In that translation the Tesawalamai is described as "the Laws and Customs of the Malabars of Jaffna," and as the " Jaffnapatam ancient Customs and Rules." In the letter dated June 4, 1709 by which the Dutch Government promulgated the Tesawalamai, authenticated copies of the collection are directed to be sent "to the Court of Justice and the Civil Land Raad for their guidance, and not, as might have been expected, to the Courts generally throughout the Island, if it had been intended that the Tesawalamai should have an extra-provincial application. Regulation No. 18 of 1806 which kept the Tesawalamai on foot under British

(*q*) *See* Royal Prerogative *infra*.

(*r*) 16 N.L.R. 327.

Rule, assigns as the reason for its promulgation the necessity of re-establishing the security of property within the Province of Jaffna and the prevention of enormities, which for the last years have disgraced" that Province. Sections 1 to 13, which have now been repealed, have practically exclusive provincial application, while Ordinance No. 4 of 1895 which modified the law of the Tesawalamai as to the publication of sales or other alienations of immovable property, expressly states in its preamble that it is dealing with "immovable property situated in those parts of the Northern Province to which the Tesawalamai applies." It is in the light of these provisons that the words in Sections 14 and 15 of Regulation No. 18 of 1806, "the Malabar inhabitants of the Province of Jaffna," have to be interpreted.

318. The decisions to the effect that Tesawalamai is not a personal law are based mainly on the construction of the expression "inhabitant of the Province of Jaffna." If that strict interpretation is to be given to the term inhabitant then all Tamils who become inhabitants of Jaffna should be governed by the Tesawalamai. This view was apparently not accepted in Savundranayagam's Case (*s*).

Tesawalamai Commission.

The Tesawalamai Commission reported in 1920 as follows:—"As is well known, there are very many Tamil families of Jaffna origin settled for a long time, and even

(*s*) 20 N.L.R. 274.

for generations, in various parts of the Island out of the Province of Jaffna, among whom inheritance and other rights have been regulated by the general law of the Island. On the other hand, it appears that there are some Tamil families from India and elsewhere who have by residence in Jaffna got mixed up with the Tamils of Jaffna and tacitly submitted themselves to the Tesawalamai. We do not think it desirable to introduce legislation which will affect these two classes."

319. When Jaffna was a separate kingdom foreigners who were settled there, and even persons subject to personal laws (*e.g.*, Indians) who were absorbed into the Jaffna community would have become subject to the customary laws of Jaffna. Sinhalese who had permanently settled in the Tamil kingdom and had been absorbed by the Tamil inhabitants would have been governed by the Tamil customary laws, but Sinhalese who were not so absorbed, especially those living on the borders of the Tamil kingdom or principalities of the Wanni would have been governed by the Sinhalese customs.

320. The same process was going on in the Sinhalese kingdoms. When the Tamil kingdom was conquered by the Portuguese, the Dutch, and the British, the position would have continued to be the same as when the country was a separate kingdom. Portuguese who had intermarried with the Tamils would have gradually adopted the customary laws of Jaffna even as the Portuguese who had

settled in Wahakotte in the Matale district came to be regarded as Kandyans subject to Kandyan Law. Colombo Tamils who took up their abode in Jaffna became subject to the Tesawalamai. In Mutukistna's collection of cases we find that the rights of several Colombo Chetties who were settled in Jaffna were decided on the footing that they were subject to the Tesawalamai. The idea that strangers settling down in Kandy or Jaffna acquire a Ceylon domicil as distinguished from a Kandyan or Jaffna domicil is opposed to the sentiment of the people and has been modified in some measure by Ordinance No. 23 of 1917‡.

Do persons who leave Ceylon carry their personal laws with them ?

321. The question how far persons subject to personal laws are able to carry their laws with them out of India or Ceylon does not admit of a ready answer. In *Abdur-Rahim* v. *Halimabai* (*t*) where a Cutchi Memon, following the Hindu Law of Succession, though a Muslim by religion migrated to Mombasa and settled among the Mohammedans there, who were governed by the Mohammedan Law of Succession came up for consideration before the Privy Council, Lord Haldane said that when a Hindu family migrates from one part of India to another *prima facie*, they carry with them their personal law, and if they are alleged to have become subject to a new local custom this new custom must be affirmatively proved to have been

‡ See Chapter XVI.

(*t*) 30 Mad. L.J. 227; 43 I.A. 35.

adopted, but when such a family migrates to another country, and, being themselves Mohammedans settle among Mohammedans, the presumption that they have accepted the law of the people whom they have joined should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. Their Lordships considered that such an inference might be raised from the facts that the Memons in Mombasa did not at any time establish any political or social organization for themselves, and that such organization as had been formed, appeared to have been mainly, if not entirely, for purposes of worship, and they also stated that there was no sufficient reason in what was brought before the Courts, in that case, for regarding the Memons who had migrated from Cutch to Mombasa, as other than a number of individual Mohammedans who had settled down among a people who are of their own religion.

In *Mailathi Anni* v. *Subharaya* (*w*), a person who migrated to British territory in India from French territory in India was held not to have ceased to be governed by his old law.

It was held that Hindu Law does not apply to Hindus who, upon migration to a non-Hindu country, such as Burma, South Africa, British Guiana, or Fiji, intermarry with its natives, adopt their local customs, and for all practical purposes, became identified with them. Such are the descendants of Hindu settlers in

(*w*) (1901) 24 Mad. 650.

Burmah who have married Burmese women, and are locally known as Kalais. Considered as a class they are non-Hindus because they have become practically absorbed into the Burmese people (2). It was so held in a case of one Maung Ohn Ghine whose paternal grandfather was a Hindu emigrant from Madras to Burmah where he had married a Burmese woman. His son was therefore a Kalai and had practically settled down in Burmah. Ghine was a resident of Rangoon and had evinced great interest in Buddhism and was as much a Buddhist as he was a Hindu. But the question was which one of the two he must be classed as for the purpose of succession. The Privy Council thought that the question depended upon the combined effect of migration, intermarriage, new occupation, and identification with the new community and the extent of departure from the orthodox law. In the case of Kalais it was found that they had become a distinct community domiciled in a non-Hindu country where they intermarried with the people and had therefore become so far removed from the influence of Hinduism that they could not be classed as Hindus. Gour, 218.

May persons be governed by two systems of law ?

322. A person cannot simultaneously have two distinct and inconsistent laws, for example, one governing his rights in respect of property taken by him from paternal ancestors, and the other in respect of properties received by him from maternal ancestors (*v*).

323. A person may inherit property under two different systems of law but he cannot be governed by two different personal laws. He may be heir to the estate of A governed by one personal law; he may also be the heir to the estate of B governed by a different personal law and in this way he may own property claiming title under two different persons, subject to two different systems of law. But because he inherits or owns property in this way, it does not follow that

(*v*) *Bhagabati* V. *Sohodra*, 16 C.W.N. 834; Gour. 215; para 342.

he himself is governed by those two different systems of law. He can have only one law to govern him and that has to be determined by different considerations.

324. In *the Collector of Masulipatam* v. *Cavaly Venkata Narainapah*, Knight Bruce, L. J., delivering the judgment of the Judicial Committee observed: "According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, *any question touching the inheritance from him of his property is determinable in a manner personal to the last owner.* This system is made the rule for Hindus and Mohammedans by positive regulation; in other cases it rests upon the course of judicial decisions." A person may be governed in some respects by one system of law and in other respects he may be governed by a different system of law, *e.g.*, a Kandyan may be governed by the Roman-Dutch Law in certain matters and by the Kandyan Law in others. To take another instance,—a Mohammedan convert in India may retain Hindu rules of succession; as regards property, the Khojas for instance are governed by Hindu Law, though as regards other matters they are governed by the law of their new faith. Even as regards matters of property, there may be special customs modifying the rules of Hindu Law and in consonance with the rules of the Mohammedan Law; and those special customs will govern the particular matters. But a person cannot as regards one kind of property be governed by one personal law and as

regards property inherited by him under another law be governed by that other law. Estates inherited by a person under different systems of law do not continue to be governed by the different systems.

CHAPTER XVI.

STATUS OF PARTIES TO MIXED UNIONS AND OF THEIR CHILDREN.

325. The status of the wife and children when persons of different races intermarry may now be considered. By Ordinance No. 15 of 1876 (Section 2) it was provided:—Whenever a woman marries a man of different race or nationality from her own, she shall be taken to be of the same race and nationality as her husband for all the purposes of this Ordinance, so long as the marriage subsists and until she marries again. Save as aforesaid, this Ordinance shall not apply to Kandyans or Mohammedans, or to Tamils of the Northern Province who are or may become subject to the Tesawalami.

326. This provision was re-enacted in the Married Women's Property Ordinance No. 18 of 1923 as follows:—Whenever a woman marries, after the commencement of this Ordinance, a man of different race or nationality from her own, she shall, subject to the provisions of Section 4 of "The Jaffna Matrimonial Rights and Inheritance Ordinance, 1911" and of "Kandyan Marriages Ordinance No. 23 of 1917," be taken to be of the same race or nationality as her husband for all the purposes of this Ordinance, so long as the marriage subsists and until she marries again.

Save as aforesaid, this Ordinance shall not apply to Kandyans, Mohammedans, or Tamils of the Northern Province who are or may become subject to the Tesawalamai.

This Ordinance shall not, during the subsistence of such marriages, apply to women married in community of property prior to the twenty-ninth day of June 1877.

Race.

327. It was held under the Ordinance of 1876 that a low-country Sinhalese was not a person of a different race from a Kandyan Sinhalese, and similarly that a Jaffna Tamil subject to the Tesawalamai was not of a different race from other Tamils residing in Ceylon. In *Manikkam* v. *Peter* (*a*) the child of a Kandyan woman who married a low-country Sinhalese who was residing in the Kandyan territory was held not to be a Low-country Sinhalese and that inheritance to his estate was not governed by the general law. Withers, J., said:—

The husband was of course of the same nationality as his wife, but was he of the same race as well ? Reliance was placed by Counsel, who so contended, on the dictum of Mr. Justice Dias in the case of *Wijesinghe* V. *Wijesinghe*. Dias, J., observed that a low-country man *i.e.*, a Sinhalese man settled in the maritime provinces, was as much a stranger in the Kandyan Provinces as a European, and in Robertson's Case the Court had held that the devolution of property of Europeans in the Kandyan Provinces was not subject to the customary laws of the Kandyans, and that in his opinion the same rule would apply to a Sinhalese man of the maritime provinces. But it will be seen that Mr. Justice Dias was dealing with the

(*a*) 4 N.L.R. 246.

case of a Sinhalese man of the maritime provinces who had acquired lands in the Kandyan Provinces. This is a case relating to inheritance to a land owned by a married woman of the Kandyan Provinces. Nor is it a decision on the point before us whether a Sinhalese man of the maritime provinces is of a different race to that of a woman of the Kandyan Provinces. It may be, from his observations in that case, that he would have gone that length . . . . . So we come back to the question of race. What does "race" connote ? It connotes a people belonging to the same stock. It can hardly be contended that the Kandyan Sinhalese and the Sinhalese of the maritime provinces are not people of the same stock.

In *Fernando* v. *Proctor* (*b*) it was held that a Tamil woman (not an inhabitant of Jaffna) who married a Tamil inhabitant of Jaffna, did not become an inhabitant of Jaffna. Hutchinson, C. J., held:—

The Tesawalamai apply to "the Malabar inhabitants of the Province of Jaffna." And Susan Philips was not and never had been an inhabitant of that province. The Solicitor-General, however, contended for the appellants that, by virtue of Section 2 of Ordinance No. 15 of 1876, on her marriage with her husband, who, he says, was a Tamil inhabitant of that Province, she also became a Tamil inhabitant of that Province. If she had been a Sinhalese, she would doubtless by virtue of her marriage with a Tamil have been thenceforth, so long as the marriage subsisted and until she married again, taken to be of the same race and nationality as her husband. But she did not become an inhabitant of the Province of Jaffna. So that whether her busband was or was not an inhabitant of that Province, the judgment of the District Court in favour of the plaintiff was right.

Wood Renton J. said:—Apart from the fact that this Section deals in terms only with the wife and with her position during a subsisting

(*b*) (1909) 12 N.LR. 309.

marriage or till a re-marriage, I do not think that a marriage between Tamils is one between persons of "different race or nationality" within the meaning of the Section, even if the husband is, and the wife is not an "inhabitant" of the Northern Province.

It was held in *Kapuruhamy* v. *Appuhamy* (*c*) that a child of a Low-country Sinhalese man who had become permanently settled in the district of Kandy and had married a Kandyan woman under the Kandyan Marriage Law was not a Kandyan.

Wood Renton J. said:—The learned Commissioner of Requests held, in effect, that, inasmuch as Kandyan and Low-country Sinhalese belong to the same race, a Low-country Sinhalese man who has become permanently settled in the District of Kandy, and has married a Kandyan woman under the Kandyan Marriage Law, is himself to all intents and purposes a Kandyan. I do not find in any of the enactments above mentioned* any definition of the term "Kandyan" or any express provision excluding a Low-country Sinhalese man who has taken up his permanent residence in the District of Kandy and has married there under Kandyan Marriage Law from its purview. In *Wijesinghe* V. *Wijesinghe,* however, a Sinhalese native of the Maritime Provinces and a Buddhist had settled at Ambepusse in the Four Korales, and had there in 1843 married before the District Judge, a Sinhalese Buddhist from the low-country. He acquired land at Ambepusse, and resided there continuously in an official capacity till his death. In a question whether the succession to his land was to be governed by Kandyan or by Roman-Dutch Law, the Full Court held that the Roman-Dutch Law must be applied. It seems to me that *Wijesinghe* V. *Wijesinghe* is an authority directly applicable to the present case, and that I am bound to follow it. It is unnecessary for me to consider the decision of Withers J. in *Manikkam* V. *Peter* (*d*) further than to say that it turned on the

* Proclamation March 2, 1815; January 24, 1822.

construction of Section 2 of Ordinance No. 15 of 1876. The decision of the Full Court in *Wijesinghe* V. *Wijesinghe* is I think, binding upon me.

In *Mudiyanse* v. *Appuhamy* (*e*) the question was whether the deceased, an offspring born within the Kandyan Provinces, of a Kandyan father by a Low-country Sinhalese woman, was a Kandyan. The Supreme Court held that the child was not a Kandyan.

Pereira J. held:—It is only when the words "nationality" is used in its strictly legal sense that it can be said that the wife takes the husband's nationality and the child, the father's. Thus every subject of the Crown, be he Sinhalese, Tamil, Chinese or Hottentot, is British in nationality, that is to say, he is subject to the British flag; but where the word is used in a looser and more popular sense—in the sense of race for instance—the rule relied on has no application at all. I am aware of no rule of law that makes the offspring of a mixed union belong to the race of either the father or the mother. Like the Eurasians of Ceylon and India, and Mulattos of the Spanish settlements, they must fall into some separate and special group or groups or be known by some distinctive designation or designations. For these reasons, the offspring of a Kandyan father by a low-country Sinhalese woman cannot be said to be Kandyan. It is not necessary to inquire how he may be classified. If he is not Kandyan, the special Kandyan Law cannot of course, apply to him. He must be governed by the general law of the land. . . .

It was held in *Manikkan* V. *Peter,* that a Low-country Sinhalese woman is not a person of different race or nationality from a Kandyan Sinhalese, and therefore, the Section has not the effect of rendering a Low-country Sinhalese woman who marries a Kandyan liable to be regarded as a Kandyan. This decision is quite justified by the plain words used in Section 2 of Ord. No. 15 of 1876 and it is

(*e*) 16 N.L.R. 118.

therefore not permissible to speculate as to what was intended by it by the Legislature. The Section refers also to Tamils of the Northern Province, who are governed by the Tesawalamai, and, whatever the Legislature may have intended, it will, I think be doing violence to language to say that the Tamils are of a race or nationality different from that of the other Tamils in the Island. Moreover, the Section is silent as to the offspring of a union between persons who are not of the same race or nationality.

This decision was followed by Wood Renton, C. J., and De Sampayo, J. in *Punchihamy* v. *Punchihamy* (*f*). In this case the question was whether one Ungurala, a child of a Kandyan father and Low-country Sinhalese mother, was a Kandyan. The Court held that he was not to be regarded as a Kandyan. Wood Renton, C. J., said:—

It was strongly pressed upon us by Counsel for the defendants, with whom the Attorney-General associated himself as *amicus curiae*, that the decision of this Court in *Mudiyanse* V. *Appuhamy* was contrary to the Kandyan Law, and in view of that contention, and also of the statement by the learned District Judge that there were "innumerable decisions" on the point, we thought it right to direct that the record should be sent back to the District Court for further inquiry and adjudication on the following questions:—

(1) What is the position, according to Kandyan custom, of the children of a low-country Sinhalese woman married to a Kandyan man ?

(2) What is the position, according to Kandyan customs, of the children of a Kandyan woman married (a) in *binna*, and (b) in *diga*, to a low-country Sinhalese man ?

(*f*) 18 N.L.R. 298.

This further inquiry and adjudication have now taken place. The learned District Judge came to the conclusion that there was no established rule according to Kandyan custom defining the status of the children of Kandyan fathers by low-coutry mothers. The evidence of Mr. Modder, Mr. Moonemalle, and Mr. Palipane shows that they have regarded the issue of marriages between Kandyan and low-country Sinhalese as subject to the Kandyan Law. The two fomer gentlemen say that they have drawn pleadings and conducted cases on that assumption. But in spite of the statement in the previous judgment of the District Court that there were "innumerable decisions" to that effect, and of the fact that the case was sent back in order that evidence of these might be given, not a single concrete case has been cited showing that the question had ever been directly raised in the Kandyan provinces, and that the opinion of the expert witnesses in regard to it had received the sanction of a court of law. But there is a further difficulty. If we are to declare the law on this matter we must declare it as a whole. We must be in a position to lay down principles which will govern not only marriages between Kandyan men and low-country Sinhalese women, but also marriages between Kandyan women and low-country Sinhalese men. But at this stage in the proceedings, unanimity between the experts comes to an end. The evidence of Mr. Modder is to the following effect:—Children of a Kandyan woman married in *binna* to a low-country Sinhalese would come under the Kandyan Law in respect of the mother's property, because the husband takes up his residence in his wife's house, and the policy of the Kandyan Law is to conserve the property in the family of the original owner. If the marriage be in *diga*, the woman forfeits her paternal inheritance, in the same way as if she married a Kandyan in *diga*." According to Mr. Moonemalle, a Kandyan woman married in *diga* to a low-country man in the Kandyan provinces would retain her own customary law. The witness declined to express any opinion on the further point as to what her status would be if she left the Kandyan provinces. According to Mr. Palipane, if a Kandyan woman marries a low-country man in

binna, the children would take the status of their father. It is obvious from these citations that the whole question is in a nebulous state. It was pointed out by Pereira J. in *Mudiyanse* V. *Appuhamy* that it has been held by this Court that low-country Sinhalese are not a different race or nationality from Kandyans, and that there is neither any general rule of law which requires us to hold, nor any authority that would justify us in holding, that the children of marriages between Kandyan men and low-country Sinhalese women are to be regarded as Kandyans. If the law is to be declared in that sense, the task must be accomplished by the Legislature, after taking full account of the different classes of cases for which it will have to provide.

De Sampayo J. said in the same case:—
I agree that the evidence called at the further trial is not such as enables us to find any sure principle by which *Mudiyanse* V. *Appuhamy* can be held to have been wrongly decided, and that, so far as this case is concerned, we should follow that decision, and hold that Ungurala was not a Kandyan, and that consequently the defendants are not Kandyans either, and cannot therefore appeal to the Kandyan Law of Inheritance in support of their claim to succeed as heirs of Ungurala.

328. These rulings left the law in an anomalous state; for it regarded a Tamil wife of a Kandyan as a Kandyan, but a low-country Sinhalese wife was not so regarded. Besides, Pereira, J., held that the law was silent as to the status of the offspring of a union of persons who are not of the same race.

329. A Commission was appointed to consider the effect of the decision in *Mudiyanse* v. *Appuhamy*, and it recommended the passing of legislation to declare the status of mixed unions. This was done by Ordinance No. 23 of 1917 which is as follows:—

The issue of the following marriages, that is to say: (a) A marriage contracted between a man subject to the Kandyan Law and domiciled in the Kandyan Provinces and a woman not subject to the Kandyan Law; (b) A marriage contracted in *binna* between a woman subject to the Kandyan Law and domiciled in the Kandyan Provinces and a man not subject to the Kandyan Law—shall be deemed to be and at all times to have been persons subject to the Kandyan Law.

The expression "marriage contracted in *binna*" includes any marriage contracted in such circumstances that if both parties were subject to the Kandyan Law such marriage would be a marraige contracted in *binna*.

The expression "domiciled" shall be interpreted in the same manner as it would be interpreted if the Kandyan Provinces constituted a separate country.

330. In the Tesawalamai Ordinance No. 1 of 1911, Section 4, it is provided as follows:—Whenever a woman to whom the Tesawalamai applies marries a man to whom the Tesawalamai does not apply, she shall not during the subsistence of the marriage be subject to the Tesawalamai. Whenever a woman to whom the Tesawalamai does not apply marries a man to whom the Tesawalamai does apply she shall during the subsistence of the marriage be subject to the Tesawalamai.

331. Ordinances No. 1 of 1911 and No. 23 of 1917 do not render the above noted decisions of no effect except as to the points covered by them. The judicial interpretation of the term *race* must be taken to have been adopted by the Legislature when it used the term subsequently in the Married Women's Property Ordinance, No. 18 of 1923, Sec. 3. Consequently the status of a Kandyan wife of a low-country Sinhalese resident in the Maritime Provinces, and of their children will have to be decided according to the principles laid down in the above decisions. It should be noted that Section 4 of Ord. No. 1 of 1911 has no retrospective effect.

332.—The following extracts are from the report of the Kandyan Marriage Commission :—The case of a Kandyan husband and a non-Kandyan wife presents no difficulty. The witnesses are unanimous, and we ourselves have no doubt that the customary status of the offspring of such unions was Kandyan, and that their family and property rights were governed by the Kandyan Law. There are numerous instances of such marriages, both in ancient and modern times, and there is no dispute or question as to the position of the offspring being that of Kandyans governed by the Kandyan Law. Most of these marriages have, of course, been between Kandyans and low-country Sinhalese, but the witnesses are agreed that the rule extends to cases where the wife is of any race whatsoever. A modern illustration of this may be found in the North-Central Province, where there is some admixture of Kandyan and Tamil blood. There is not the same general consensus of opinion with regard to the case where the mother is Kandyan and the father belongs to another community. Many of the witnesses examined by us consider that the principle that the children follow the father's status should be applied even to such a case. The opinions

and wishes of the other witnesses, however, are entitled to respect. These witnesses, especially those from Sabaragamuwa, are more near to the heart of the matter and more familiar with the custom in actual operation. They admit an exception to the rule that the children follow the father's status, namely, that where the husband marries in *binna* and takes up his abode in the wife's home, the children are recognized and accepted as Kandyans and are governed by the Kandyan Law. The history of various families shows that the customary status of the offspring of a low-country man who marries a Kandyan wife in *binna* is that of Kandyans.—*Signed by T. E. de Sampayo, T. B. L. Moonemalle, C. W. Vanderwall, H. W. Codrington.*

333. Under Hindu Law, the children of a union are regarded as Hindus when either of the parents is a Hindu, provided the children are brought up and received as Hindus (*g*).

334. Similarly under the Mohammedan Law where either of the parents is a Muslim, the children are presumed to be Muslims (*h*).

335. The question as to what law should govern the issue of Sinhalese parents domiciled outside the Kandyan Provinces where one parent is governed by one system of law, while the other parent is governed by a different system of law is not easy to answer. Section 2 of Ordinance No. 15 of 1876 and Ordinance No. 23 of 1917 do not apply to such marriages. It is doubtful as pointed out by Pereira, J., in *Mudiayanse* v. *Appuhamy* (*i*) whether the children have the status of the father.

(*g*) *Myna Bayee V. Oootaram* 8 M.I.A. 400; Lingappa V. Esudasan 27 Mad. 13.

(*h*) Amir fli. page 23.

(*i*) 16 N.L.R. 118.

Ganapathy Ayer writes as follows in his Hindu Law (*j*):—"It may be stated that it is open to the children to elect which law should govern them as it was open to Christian converts prior to the Indian Succession Act to elect to follow the old law or to give it up and follow a new law within certain limits. This question was raised but not decided in *Chathunni* v. *Sankaran* (*k*) but there could be no doubt about the right of election. A more difficult question, however, is, whether the issue can elect to follow a part and not the whole of the law governing either of the parents. If it is a question of usage, the extent of the usage will govern; but otherwise the question does not admit of a ready answer."

(*j*) Page 127.

(*k*) (1884) I.L.R. 8m. 238.

CHAPTER XVII.

PROVINCIAL DOMICIL.

336. The question whether a person can acquire a provincial domicil of choice,—such as a Kandyan or Jaffna domicil,—will now be considered. Another point for consideration is the effect of a change of residence within the Island. Does a person who has the status of Kandyan Sinhalese or Jaffna Tamil lose that status by taking up his abode in a part of the Island where the inhabitants are not governed by the Kandyan Law or Tesawalamai ? And *vice-versa* does a person governed by the general law of the Island acquire a provincial status, by permanent residence in the area where a special customary law is in force ?

337. In Kershaw's case (*a*) as already stated a European was held to have acquired a Kandyan domicil, but in Robertson's case (b) the Full Court held that it was not possible for Europeans settled in the Kandyan territory to acquire a Kandyan as distinguished from a Ceylon domicil. Burnside, C. J., said:—

It would not be possible in the present day to contend successfully that a domicil of choice could be obtained in a community which does not possess supreme or sovereign power. In the words of Mr. Justice Chifty, there is no authority in English law for such a proposition; and this being so, it is beyond doubt that a purely Kandyan domicil of choice

(*a*) (1862) Ram. 162.

(*b*) (1886) 8 S.C.C. 36; see also Wijesinghe's Case (1891). 9 S.C.C. 199.

could not be acquired. The Kandyan Provinces were by that Proclamation declared to be integral parts of the British Possessions in the Island of Ceylon, and from thenceforth were received under the sovereignty and protection of His Majesty the King of Great Britain; since which time they have continued to be and form a part of, and have been absorbed into, this Colony of Ceylon, which is ruled over by the Governor as the representative of the sovereign, with an Executive Council. . . These together comprise the whole territory of the Colony, but the sub-divisions, whether for administrative, judicial, or revenual purposes, are ever changing at the will of the Executive or Legislative authority; and if there were any such thing as a provincial domicil, it would necessarily be subject to the ever-varying changes of provincial boundaries, which to-day might fix the domicil in one province and to-morrow transfer it to another without any actual change of residence. In my opinion, therefore, there cannot be any such domicil of choice as Kandyan. The domicil of choice, if any, must be a Ceylon domicil.

338. The argument of Burnside, C. J. against provincial domicil based on the ground that if provincial domicil were to be recognized, it would be subject to ever-varying changes of provincial boundaries unduly stresses the inconvenience, overlooking the fact that where villages situate in one district are arbitrarily or for public convenience transferred by Government to another where a different system of law prevails, the inhabitants would not have to change their laws with the transfer.

339. In the same case Clarence, J. said:—These are the circumstances under which the "Kandyan" Law exists to-day, and in my judgment, under such circumstances there cannot be any proper question of a European or Eurasian acquiring a "Kandyan" domicil as distinguished from a Ceylon domicil.

Dias, J. expressed himself as follows:—I agree with the learned Chief Justice that the law does not recognise a mere provincial domicil as the one claimed in this case, as distinguished from a Ceylon domicil; but for the purposes of this argument I will assume

that the matrimonial domicil of the first defendant is "Kandyan," and proceed to show that even in that case she cannot take advantage of the special law she relies on—a law which is peculiar to a certain section of the community, and not the general Marriage Law of the Kandyan Provinces—as I take it to be beyond doubt that, in the event of there being several independent and conflicting customary marriage laws peculiar to certain sections of the community, it is not open to first defendant, by virtue of her matrimonial domicil, to choose any one of them to the exclusion of the rest.

340. In *Spencer* v. *Rajaratnam* (*c*) Wood Renton, C.J., and Ennis, J. referred in 1916 to the loose use of the term domicil:—

Wood Renton, C.J:—"The term 'domicil' is used in the statute law, and at least in the older case law of the Colony, sometimes in its legal and sometimes in its loose and popular acceptation. But it is well settled that nothing but a Ceylon domicil can be acquired in this Colony."

Ennis, J:—"The statute law of Ceylon has more than once used the word 'domicil' as though more than one domicil could be acquired in Ceylon. The word is found in Section 6 of Ordinance No. 21 of 1844 and in Section 25 of Ordinance No. 15 of 1876. In the latter Ordinance reference is made to a person having a domicil in a 'part of this Island' as distinct from the Maritime Provinces, but as the Ordinance does not apply to Kandyans, or to Tamils of the Northern Province subject to the Tesawalamai, I do not understand the reference. Only one domicil can be acquired in Ceylon."

(*c*) 6 N.L.R. 321.

341. In spite of these observations the Legislature used the expression "a man *domiciled* in the Kandyan Provinces" in the Kandyan Marriage Ordinance, No. 23 of 1917, and explained what it meant by the term *domiciled*, by enacting that it should be interpreted in the same manner as it would be interpreted if the Kandyan Provinces constituted a separate country. This statutory interpretation though strictly speaking applicable only to the special cases contemplated in the Ordinance, enunciates a principle which would be a useful guide in answering the questions for consideration in this chapter.

342. The dictum that a person coming from outside Ceylon and settling down in the Province of Jaffna or in the Kandyan Provinces can acquire only a Ceylon domicil and not a provincial domicil has to be qualified in some measure. While it is true that a foreigner residing at Jaffna or Kandy can ordinarily acquire a Ceylon domicil and not a Jaffna or Kandyan domicil, it cannot be said that in no circumstances can neither he nor his descendants acquire such a provincial domicil. The presumption against the acquisition of such a provincial domicil at Jaffna will in the nature of things be stronger in the case of an Englishman than in the case of an Indian Tamil. It is well known that persons coming over from India, have been absorbed into the Jaffna Tamil community, and are without question governed by the Tesawalamai. Similarly Tamils from India who have settled down in

the Kandyan Provinces are recognized as Kandyans and are subject to the Kandyan Law. Portuguese settlers have been absorbed into the Kandyan Community and are governed by the Kandyan Law.

343. It is stated in the report of the Kandyan Marriage Commission :—

"There is also the historic case of the village Wahakotte in the Matale District. It may not be a good illustration, inasmuch as the settlement of the Portuguese was due to force of circumstances and not voluntary. But as regards the absorption of these foreigners into the Kandyan community and the recognition of their descendants as of Kandyan status, it affords interesting evidence of the point under consideration, more especially as these people are Christians in religion."

344. It may be noted that in India, in spite of the theory that a Hindu is born (*and non fit*), many non-Hindus have been absorbed into Hindu Society. The test in the case of all alike—Jaffna Tamils, Kandyans, or Hindus —is the same: How do they regard themselves and how are they regarded by the community which they seek to join ?

345. There can be no question that the term domicil was rightly applied to cases before the cession of the Kandyan territory to the British in 1815. When the Sinhalese sovereignty extended over the Maritime Provinces, there could not have been two kinds of status for the Sinhalese subjects. But when the maritime parts of the Island were conquered by other nations, a distinction arose, and the principle of domicil had operation. If

during that long period of warfare a man of the maritime districts passed into the Kandyan country, he would have resumed or acquired a Kandyan status by a species of *post-liminium*. When, however, the Kandyan Provinces were annexed to the British Crown in 1815, the situation was again transformed. The Island became once more a political whole, but the customs and institutions of the Kandyans were conserved and guaranteed to the poeple of the Kandyan Provinces by the Convention of 1815. The principle of domicil in the strict legal sense then became inoperative, and the Kandyan Law ceased to be a *lex loci* and became a personal law applicable to the class of persons known as Kandyans. But that did not prevent the application of principles relating to change of domicil in the case of *binna* marriages. The Kandyan Marriage Commission reported as follows on this point:—The case where Low-country men married Kandyan wives would appear to have been solved by the Kandyans themselves on the analogy of the principle of domicil, that is to say, if the man married in *binna*, he himself and certainly his progeny were recognized as Kandyans governed by the customary law. This recognition is manifested by the position of the numerous families to which we have alluded. We have no reason to doubt that this was the case, not only with the superior families, but also with the commonalty. A good instance of the latter fact is that of the villagers of Etnawala in Four Korales and Kompola in Seven Korales, who

have for generations recruited husbands from among their kinsmen of Ragama. Unless this condition of affairs is legally recognized, we fear that the result will be grievous to many families of position and distinction, especially those of Sabaragamuwa, and in many cases will lead to the extinction of many ancient names. To a Kandyan the perpetuation of his family traditions and the transmission of his family property according to Kandyan custom are of vital importance. This was emphasized by the gentlemen who made strenuous protests before us against the decision of *Mudiyanse* v. *Appuhamy* as calculated to revolutionize the accepted order among them, and strongly insisted on a remedial measure for restoring the customary status of the offspring of mixed marriages. It goes without saying that the effect of that decision will be to upset many titles and dispositions of property, and to defeat the intentions of heads of families in regard to succession. This may be sufficiently illustrated by the simple case of *diga*-married daughters, who under the Kandyan Law would have no rights of paternal inheritance, but under the general law would share the inheritance with the other children. Apart from the question of title to property, any view of the law which affects the prestige of the families would justly be deprecated by the Kandyans. A case in point is that of the proprietors of *nindagamas*. The *paraveni nilakarayas* not only render personal services, but pay general respect and obedience to the

overlord, who is their traditional chief. They and their overlord form a species of feudal clan. It is obvious that if the overlord is authoritatively declared not to have the old civil status, their mutual relations will be much prejudiced, and, in the case of heiresses, their husbands will under the general law acquire rights which are repugnant to the whole system.—(Signed) T. E. De Sampayo, T. B. L. Moonemalle, C. W. Van der wall, H. W. Codrington.

CHAPTER XVIII.

THE KING

ROYAL PREROGATIVES.

346. The King is an abnormal person under the common law and has certain rights (prerogatives) which ordinary persons do not have. The Fisc and the State, as already observed have also been regarded as persons and have certain rights under our common law differing from those enjoyed by other persons. Some of these extraordinary rights and privileges are appropriately dealt with under the Law of Persons.

Royal Prerogative.

347. The royal prerogative is defined in Halsbury's Laws of England, as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of his regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England (*a*).

347a. The prerogative is not confined to the British Islands, but extends to the Colonies. All the prerogatives vested in the Crown by English Law are exercisable over individuals in Ceylon. But those merely local to England, and which do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not, it

(*a*) 6 Hals. 371.

seems, *prima facie* prerogatives in Ceylon. The minor prerogatives and interests of the Crown are governed by the common law of Ceylon. Though if the law is silent on the subject, the prerogative established by English Law prevails in every respect; subject, perhaps, to exceptions which the difference between the Constitutions of England and Ceylon create (*b*). The attributes of the King —sovereignty, perfection, and perpetuity— which are inherent in and constitute his political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed.

348. The prerogatives of the Crown are not given for the personal advantage of the King, but are allowed to exist because they are beneficial to the subject. They are therefore to be guarded on account of the public: they are not to be extended further than the lawful constitution of the country has allowed them, but within these bounds they are entitled to every protection (*c*). Where prerogative is claimed, the Courts have power to determine the extent and legality or otherwise of any alleged prerogative (*d*).

349. The prerogatives are either direct or incidental. The direct are such positive substantial proofs of the sovereign character and authority as are vested in and spring from the Sovereign's political person, considered by itself, without reference to other extrinsic circumstance, as the right of sending ambassadors.

(*b*) I Thom 9.

(*c*) (*per* Lord Kennyon, *Borke v. Dayrell*, 4 T.R. 410).

(*d*) Case of Monopolies 1602, (11 Coke Rep. 84. b).

Incidental prerogatives always bear a relation to something else, distinct from the King's person and are indeed only exceptions, in favour of the Crown, to those general rules which are established for the rest of the community: such as, that the Crown's simple debt (in England) shall be preferred before the subsequent speciality debt of any subject (*e*).

The King is a Corporation Sole.

350. As already observed the King is a juristic person. He is regarded under English Law as a Corporation Sole. The conception of the King as a corporation is the key to some of his attributes in constitutional theory (*f*).

Fisc.

351. The Roman and the Roman-Dutch Law also gave to the State the character of a juristic person. The Fisc originally meant the Emperor's exchequer as distinct from the State exchequer. The distinction disappeared with the increase of the power of the Emperor and the decline of the power of the Roman Senate. The *fiscus* then came to mean the State treasury and then the State itself and in that capacity was regarded as a juristic person‡ The Fisc or the State is the nearest approach to what the English Law calls a *Corporation Sole*.

The King never dies.

352. The law ascribes to the King as to other corporations in his political capacity, an immortality. The King never dies. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any

(*e*) I Thom. 10; see also 1 Blackstone, 239, Para 35.

(*f*) Aru 35.

‡ Under the Roman Law in disputes between the subject and the Fisc, it was a general rule, in all cases, of doubt, to decide against the Fisc—Mackenzie's R. L. 162 and 163.

interregnum or interval, is vested at once in his heir who is, *eo instanti*, King to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*, *demissio regis*, *vel coronae*, an expression which signifies merely a transfer of property (*g*).

The King can do no wrong

353. Another attribute to the royal character is irresponsibility: it being an ancient fundamental maxim that the King can do no wrong. "This is not to be understood as if every act transacted by the Government was of course just and lawful. Its proper meaning is only this—that no crime or other misconduct must ever be imputed to the Sovereign personally. However tyrannical or arbitrary therefore may be the measures pursued or sanctioned by him, he is himself sacred from punishment of every description. If any foreign jurisdiction had the power to punish him, as was formely claimed by the Pope, the independence of his kingdom would be no more, and if such a power were vested in any domestic tribunal, there would soon be an end of the Constitution by destroying the free agency of one of the constituent parts of the legislative power. On the same principle no suit or action can be brought against the Sovereign even in civil matters. Indeed, his immunity both from civil suit and from penal proceeding rests on another subordinate reason also, namely, that no Court can have jurisdiction over him. For all jurisdiction implies

No action lies against the King.

(*g*) 1 Bl. Com. 249.

superiority of power, and proceeds from the Crown itself. But who, says Finch, "shall command the King ?" (*h*).

354. In *Munasinghe* v. *Assistant Government Agent, Puttalam* (*i*). Grenier, J. explained this attribute of the King as follows:—The true and real effect of this prerogative is that no Courts, Civil or Criminal, have jurisdiction over the King, and that he is sacred from punishment of every description. It does not mean that he takes upon himself the responsibility of every act of the subordinate Government, however unjust and unlawful it may be, and permits his servants to invoke this prerogative in order to protect themselves from the consequences of their carelessness or misconduct. It must be remembered that every act of Government is not an act of State, for otherwise it will be open to any official in the position of a Government Agent or Assistant Government Agent in this Colony to shelter himself behind the royal prerogative whenever he does anything which is not just and lawful. The attribute of irresponsibility is purely one which belongs to the royal character and person, and I therefore fail to see in what sense it can be said in this case, with reference to the act of the Assistant Government Agent of Puttalam that he was irresponsible for what he did, and that it was

(*h*) Stephen's Commentaries Vol. II p. 478; *Munasinghe* v. *A. G. A., Puttalam*, 13 N.L.R. 156.

(*i*) 13 N.L.R. 156.

open to him to rip up any part of the proceedings already had, by virtue of the royal prerogative founded on the fundamental maxim that the King can do no wrong.

355. The position of the King's representatives in the Colonies is not the same as that of the King. But as regards Ireland all official acts of the Lord Lieutenant were regarded as "acts of State" apparently even if *ultra vires* (*a*).

356. The position of a Colonial Governor will be considered in the next chapter.

Grant prejudicial to the country.

357. The King is not only incapable of doing wrong but can never mean to do an improper thing; in him is no folly or weakness. Therefore, if the Crown is induced to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the commonwealth, or to a private person, the law will not suppose the Sovereign to have meant either an unwise or an injurious action, but declares that he was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by, or upon, those agents whom the Crown has thought fit to employ (*f*).

358. The privilege of canvassing the personal acts of the Sovereign belongs to no individual, but is confined to the two Houses,

(*a*) 23 Hals. page 310.
(*f*) See 6 Hals. para 549 (p. 374). I Thom. p. 13.

where, however, the objections must be proposed with the utmost respect and deference (*g*).

359. In the King can be no negligence, or laches and therefore no delay will bar his right. *Nullum tempus occurrit regi* was the standing maxim upon all occasions. This rule is now subject to various exceptions. On the question whether this branch of the royal prerogative which is founded on the maxim *Nullum tempus occurrit regi* is in force in Ceylon, Mr. Berwick said:—The maxim in question is a part of the prerogative law of the English Crown which prerogative is a part of the common law of the 'Realm of England,' of which Ceylon forms no part. It follows from the common law of England having no authority here and from the royal prerogative of the English Crown deriving its authority from the common law of England that neither has that prerogative any authority in Ceylon, except so far as the particular branch of it claimed is (1) one necessarily incident to sovereignty or except (2) it has been imposed on this Colony by the Crown in its legislative capacity as a new law or (3) unless it already formed part of the law of the country, as the prerogative of its rulers before conquest or cession (*h*).

Negligence.

Prescription.

(*g*) 1 Bl. Com. 247.
(*h*) *Per* Berwick D. J., (D.C. Colombo, 1245), Vanderstraaten 83.

360. No prescription runs against the Crown as regards the general prerogatives (*i*).

361. The general principle is that laches is not imputable to the Government; and the maxim is founded not on the notion of extraordinary prerogative but upon a great public policy. The Government can transact its business only through its agents, and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not save the public from serious losses if the doctrine of laches can be applied to its transactions (*j*).

Fountain of Justice.

362. The Sovereign is the *fountain of justice* and the conservator of the peace of the realm. That is, not the *author*, or *origin*, but the *distributor*. He has alone, says Thomson, the right of erecting courts and hence, all jurisdictions of courts are mediately or immediately derived from the Crown under the modifications of the Colonial Councils. All Courts in Ceylon have been created by charter, or by ordinance, with the prior consent of the Crown. The Governor could not, constitutionally, propose the erection of a new jurisdiction to the Legislative Council without the prior consent of the Crown; and if that Council were to create a new court without such prior consent, the Ordinance would necessarily be disallowed, as abridging the prerogative of the Crown without its own previous consent (*k*).

(*i*) I Thom. 13.

(*j*) *United States* v. *Kirk Patrick* 9 Wheaton 720; *see* Voet 4.4.55; Aru Vol. I p. 214.

(*k*) I Thom. 18.

363. Moreover, the courts erected by the Sovereign can only proceed according to the course of common law, without the consent of Parliament. Thus the Courts in Ceylon have an equitable jurisdiction; but this they derive from the Roman-Dutch Law, and not from their royal foundation. By the Charter of 1833 the Supreme Court is a Court of Equity; but that does not make it a Court of Chancery, in its wider sense, but only leaves intact its fundamental equitable jurisdiction; equity being common law under the law of the United Provinces (*l*).

364. The Jurisdiction of Courts is either mediately or immediately derived from the Crown, their proceedings run generally in the King's name, they pass under his Seal, and are executed by his officers.

365. The King is deemed always to be present in Court (*m*) and he cannot in England be non-suited either in criminal or civil proceedings (*n*) for a non-suit is a desertion of the suit, by the non-appearance of the plaintiff in Court. But, says Thomson, (*o*) as a non-suit in Ceylon does not proceed on the same principle, but is rather a dismissal of the cause, or dissolution of the instance for want of

(*l*) I Thom. 18.

(*m*) 1 Bl. Com. 269.

(*n*) 6 Hals. 399. The proper course is for the Attorney-General to enter a *non vult prosequi* which has a similar effect to a non-suit. *See also* Criminal Procedure Code, Sec. 194.

(*o*) Vol. I. p. 12.

evidence, by the Court, and not at the election of the plaintiff this prerogative may not apply to Ceylon.

Prerogative of Pardon.

366. Another prerogative of the King is the right of the Crown to pardon offences (*p*). The power of the Crown to pardon a forfeiture and to grant restitution, can however only be exercised where things remain in *statu quo*, but not so as to affect legal rights vested in third persons (*q*).

367. The prerogative of pardon extends to the remission of a sentence of a purely punitive character for contempt of Court (*r*).

King is never a minor.

368. In consequence of the legal doctrine of perfection, the Sovereign in his regal or political capacity can never be a minor or under age, and all acts done by him in the exercise of the prerogative are valid in law, even though he has not attained the age of twenty-one years, and during his non-age he has no legal guardians (*s*).

Crown is entitled to relief by way of restitutio.

369. Under the Roman-Dutch Law the Crown is entitled to relief by way of *restitutio in integrum* on the same grounds as a minor (*t*). Voet says: In the matter of restitution, the Fisc, the church, townships are not to be distinguished from minors, so that on whatever grounds and against whatever obligations

(*p*) Bl. I 266.
(*q*) *Rex* v. *Amery* 2 Term Rep. 569.
(*r*) In *re* A Special Reference from Bahama Islands (1893) A.C. 138.
(*s*) 6 Hals Sec. 552.
(*t*) Voet. 4.4.55.

minors are granted restitution, on the same grounds, the Fisc, the church, the poor, townships, etc., are granted restitution. For the general principle prevails that the property of all these, equally with that of minors, has to be administered by others, and the negligence of the administrators should not in equity be allowed to prejudice the interests of those who not being 'persons' in the proper sense cannot administer their own property."

Not bound by any Statute.

370. The Sovereign is the supreme legislative authority. As a deduction from this the Crown is not bound by any Ordinance, unless named therein by special and particular words. For example, the Crown, not being expressly named in the Insolvency Ordinance, is not bound thereby, although it may (if it thinks fit) avail itself of the provisions of the Ordinance. Thus an insolvent would not be entitled to a discharge from a Crown debt under that Ordinance. The most general words that can be devised (as "any person or persons, bodies-politic or corporate") do not in the least affect the Crown, if they tend to restrain or diminish any of its rights or interests. Yet where an ordinance is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well as on the Sovereign as upon the subject; and generally the Sovereign may take the benefit of any particular state, though not expressly named (*u*).

(*u*) I Thom. 14.

371. Ordinance No. 21 of 1901 provides as follows:—No enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby (*v*).

372. Ordinance No. 24 of 1884 has not the effect of rendering the Crown bound by the Insolvency Ordinance, 1853, to the length of requiring the Crown to prove Crown debts under Crown debtors' insolvencies. *Queen's Advocate v. Silva,* 9. S.C.C. 78; see also Ram. (43-45) page 47.

373. Where an insolvent having been adjudicated insolvent upon the petition of a private creditor and received a certificate of conformity, the Crown, holding a judgment against the insolvent, and not having proved under the insolvency, had the insolvent arrested on writ against person, it was held that the certificate was of no avail against the execution of the writ against person, and that the Crown was entitled to have the insolvent committed. (9 S.C.C. 78.)

374. Story says:—In general, Acts of the legislature are meant to regulate the acts and rights of citizens, and in most cases the reasoning applicable to them applies with different and often contrary force to the Goverment itself. It appears therefore a safe rule founded on the principles of the common law that the general words of a statute ought not to include the Government or affect its rights unless that construction be clear and indisputable on the text of the Act.

Not bound by estoppels

375. Both in England and in Ceylon the Crown is not bound by, although it may take advantage of estoppels. It was held in Ceylon that the maxim is inapplicable to cases where the Crown itself gives the subject the right to sue it, as in the Waste Lands Ordinance, No. 1 of 1897 (*w*).

(*v*) Ord. 21 of 1901. S. 14.
(*w*) *Munasinghe v. The A. G. A.* 13 N.L.R. 145.

Grants from the Crown. Rule of Construction.

376. In construing grants from the Crown a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor and in favour of the grantee in order to give full effect to the grant. But in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant; and in no species of grant does this rule of construction more especially obtain than in grants which emanate from and operate in derogation of the prerogative of the Crown (*x*).

Crown bound by patents.

377. A patent has to all intents the like effect as against His Majesty the King, his heirs, and successors as it has against a subject excepting always that the Governor may at any time after the application use the invention for the services of the Crown on terms to be before or after the use thereof agreed on between the Governor and the patentee, or in default of such agreement, on such terms as may be settled by the Court after hearing all parties interested (*y*). It was held before the above Ordinance No. 15 of 1906 was enacted, in *Jackson* v. *Davies* (*z*), that the Crown was not bound by the letters patent.

(*x*) *Feather* v. *R.* 6 B. & S. 283; per Cockburn, C.J.; Aru. 352. The rule does not apply to grants for valuable consideration which should be construed liberally in favour of the grantee 1 Step. Com. 421-8 Camp. R.C. 232.
(*y*) Ord. No. 15 of 1906. (*z*) 8 S.C.C. 145.

Sale of land to Crown—no deed necessary.

378. Section 20 of Ordinance No. 7 of 1840 for the Prevention of Frauds and Perjuries provides that the Ordinance should not apply to any grants, sales, or other conveyances of land from or to the Crown, or to any mortgage made to Government or to any deed or instrument touching land to which Government is a party or to any certificate of sale granted by fiscals (*a*).

A formal grant by the Crown is necessary to pass title to a purchaser of immovable property from the Crown. *Chellammah* v. *Namasivayam* (1907). 3 Bal. 209.

A grant of land from the Crown does not confer an indefeasible title on the grantee (*b*).

The warranty which the law presumes on the part of the vendor against the eviction of the purchaser does not apply where the vendor is the Crown (*c*).

378a. Foreign territory may be acquired by England through settlement by British subjects, or by conquest, with or without a formal act of annexation in either case, and also by treaty, or by Articles of Capitulation following upon a successful war, or by the peaceful cession of territory by treaty entered into with a Foreign State. 6 Hals. 422.

Territory so acquired becomes a British Colony, and the authority of the Crown extends thereto as fully in all respects as it exists in England. 6 Hals. 422.

(*a*) *Marikar* v. *Banda Aratchi*; 2 C.W.R. 251.

(*b*) *Silva* v. *Bastian* (1912). 15 N.L.R. 132; *Ismail* v. *Andri Appu* (1905). 1 Bal. 145; *Condert* v. *Lewis* (1915). 4 Bal. Notes 40; *Podda* v. *Pabuli* (1905). 8 N.L.R. 358.

(*c*) *Fernando* v. *Queen's Advocate* (1872). Ramanathan 57; See also (1877). Ram. 317.

Laws of conquered country to remain till altered.

The King cannot legally disregard or violate the articles on which the country is surrendered or ceded; but such articles are sacred and inviolable, according to their true intent and meaning. It is necessary and fit that the conquered country should have some laws; and, therefore, until the laws of the country thus acquired are changed by the new Sovereign they still continue in force. Chitty 29. So, where the laws of the vanquished territory are rejected without the substitution of other laws, or are silent on any particular subjects, such territory is to be governed according to the rules of natural equity and right. (Salk. 412.)

Where law silent, equity to apply.

Though the King may keep in his own hands the power of regulating and governing the inhabitants, he cannot infringe or depart from the provisions of a Charter by which he has though voluntarily granted them any liberties or privileges, although it would appear that he can withdraw a Charter and grant fresh Charters in cases of positive necessity and upon an extraordinary exigency. In every question, therefore, which arises between the King and his Colonies respecting the prerogative, the first consideration is the Charter granted to the inhabitants. If that be silent on the subject, it cannot be doubted that the King's prerogatives in the Colony are precisely those prerogatives which he may exercise in the mother-country. Pereira 39: Ch. 33.

CHAPTER XIX.

THE GOVERNOR

The Governor's position.

378b. The position of the King's representatives in the Colonies is not the same as that of the King. When questions arise as to the limits of a Colonial Governor's liability, civil or criminal, for acts done in his capacity of Governor the following questions have to be answered:—(1) Whether apart from his position of Governor any liability has arisen. This is a matter of general law except in so far as the position of Governor may involve greater responsibility and consequently justify more prompt measures for the repression of violence or disorder likely to lead to violence. (2) If a liability has been shown to exist, were the acts complained of done by the Governor of the Colony as Governor ? (3) If so done, were they Acts of State ? that is, acts covered by the powers assigned to the Governor.

It is not enough that the acts shall be such as the King, through his ministers might lawfully do; it must be ascertained by reference to the Letters Patent and Instructions with which the Governor of a Crown Colony is furnished, or to the executive powers conferred by imperial or colonial law upon a Governor in a self-governing Colony, whether the acts done are justified by the powers conferred (*d*). If they are, the Governor is protected; he is a

(*d*) *Cameron* v. *Kyte* 1835, 3 Knapp 332.

servant of the Crown, doing that which the King might do by his servants and has commissioned him to do if required. If the acts done are outside the powers conferred, the fact that the Governor assumed to do them as Governor will not protect him from their legal consequences (*e*).

May the Governor be sued ?

A Governor may be sued in the Courts of his own Government (*Hill* v. *Bigge*, 1841, 3 Moo, P.C.C. 465; *Musgrave* v. *Pulido*, 1879, 5 App. Cas. 107). In the former case a Governor's freedom from arrest on civil process issued by the courts of his own Government was urged as an argument against his liability to be sued in those courts. Lord Brougham, however, pointed out that the liability to be taken in execution was not the necessary consequence of a person's liability to have a judgment against him, the privilege from legal process then still existing in certain persons not protecting them from suits. His Lordship held that a Governor does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his Commission, and being only the Officer to execute the specific powers with which that Commission clothes him, and under the Commission usually issued by the Crown he cannot claim, as a personal privilege, exemption from liability to be sued in the Courts of his Colony.

378c. In *Jansz* v. *The Attorney-General* and *the Governor of Ceylon* (*c*) the plaintiff sued the Attorney-General as representing the Crown, and in the alternative His Excellency the Governor, to recover damages for the publication in the *Government Gazette* of a notice to the effect that no petition signed by him as a petition-drawer would be accepted by His Excellency the Governor or by any of the Heads of Departments. The Court dismissed the action. Wood Renton, J. said:—

(*e*) Aru. 372.

(*c*) 1 Cur. L.R. 185.

"I think that the Governor was not infringing any right of a character of which a Court of Law can take cognisance, when he made the order complained of in this case. That order does not touch the right of the subject to petition. It does not prevent the appellant from drawing any number of petitions that he pleases. It merely prohibits petitions drawn by him from being received in Government Departments. There is no analogy between the case now before me and that of *King* v. *Arnolis*,[1] which is referred to in the petition of appeal. The question in that case was whether a person, who is alleged to have given false information in a petition to the Governor, and who is charged in consequence thereof with an offence under Section 180 of the Penal Code, can plead to that charge whatever privilege attaches under the Bill of Rights to petitions to the Sovereign himself. In disposing of that case, I was at some pains to point out that it was very doubtful whether an absolute privilege was created by the Bill of Rights at all; in the second place, that it is also doubtful whether the Bill of Rights applies to a colony in the constitutional position of the Island of Ceylon; and in the last place, that, even if it does so apply, there is abundant authority, including decisions of the Privy Council itself (*Hill v. Bigge*,[2] *Musgrave v. Pulido*[3]), for the proposition that the Governor of a colony does not *virtute officii* occupy the position of a Viceroy, and that he has merely the constitutional powers which are delegated to him by his Commission from the Crown itself. It does not follow from that decision, or from either of the Privy Council decisions above cited and in my opinion it is not the law, that a Governor is liable to be sued in the Courts of his own colony for official acts, even if they cause prejudice to individuals, unless such acts infringe some legal rights belonging to the parties who complain of them."

1 (1908) 11 N.L.R. 265.
2 (1841) 3 Moo. P.C.C. 382.
3 (1879) 5 Ap. Ca. 102.

Pardon.

378d. When any person has been sentenced to punishment for an offence, the Governor may at any time without condition or upon any conditions which the person sentenced accepts suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. The Governor may without the consent of the person sentenced, commute a death sentence into one of imprisonment, rigorous or simple, or reduce the period of imprisonment into any lesser term. Criminal Procedure Code, Sections 328 and 329.

CHAPTER XX.

CROWN DEBTS.

Prerogative Rights of the Crown to priority of payment of debts.

379. In England debts due to the Crown by any person have preference of payment over debts due by him to any other person. In Ceylon the Crown has in respect of certain debts a tacit hypothec over the property of the debtor.

The preference which the Crown enjoys in respect of its debts would be said by English lawyers to result from the King's prerogative of pre-eminence.

Under the Roman and Roman-Dutch Law the reason for the preference was said to be that the Fisc was in the privileged position of a minor (*a*).

Crown debts.

380. The prerogative of preference in case of debts has been the subject of legislation in Ceylon. The Ordinance No. 14 of 1843 is exhaustive on the subject of special privileges enjoyed by the Crown in connection with Crown debts. Sections 4 and 5 of the Ordinance are to the following effect:—

Section 4. All land and tenements which any Treasurer, Government Agent, Assistant Government Agent, Collector of Customs, Government farmer or renter or other officer employed in the collection, charge, receipt or expenditure of the revenue, public money,

(*a*) Voet 4. 4. 55.

stores or other property belonging to Government, or any other public accountant now hath or at any time hereafter shall have within the time during which he shall remain accountable to Government, shall be liable for the payment of all arrearages or debts and all fines, penalties, and forfeitures due or adjudged to the Crown by or from such officer or public accountant, and the said lands and tenements and all other goods and property of the said officer or accountant shall be seized and sold in execution for the payment of all such debts. etc., as may be adjudged due or payable to the Crown by any competent Court of Law, in the same manner as if the said officer or accountant had the day he became first an officer or accountant specially mortgaged the said lands and tenements to the Crown for the full payment of all debts and had also at the same time by a notarial bond acknowledged the said debts to be due to the Crown.

Section 5. All debts due to the Crown upon mortgage, judgment, award, bond or other speciality, or upon simple contract from any other persons than officers mentioned in the preceding clause shall be entitled from the accruing thereof respectively to a preference of payment over all specialities or other debts which shall, subsequent to such date, have been contracted by or become due from such Crown debtors to any other person or persons whatsoever.

Tacit hypothec limited to contracts connected with collection of revenue.

381. In *Attorney-General* v. *Pana Adappa Chetty* (*b*) it was contended for the Crown. (a) That under the Roman-Dutch Law the Crown had a legal general hypothec over all the property, movable and immovable, of every person with whom it has entered into any contract; and (b) That this Common Law legal general hypothec remains wholly unaffected by Ordinance No. 14 of 1843. The Court held on the first point that the tacit hypothec of the State was limited to contracts connected with the collection of revenue. Garvin, J., said:—

> Voet (*c*) when dealing with the subject of legal hypothecs states: "For it is allowed to the Fisc, and after this exemplar to the chief of the State, in the property of administrators (of the affairs of the Fisc and Prince); and in that of those with whom the Fisc has contracted; and also in the property of citizens for taxes and imports; . . . . ."
>
> The tacit hypothec over the property of him with whom it has contracted is a right conceded to the Fisc. But it is a question whether this can be regarded as a sufficient authority for the broad proposition that the privilege may be claimed by the Crown in connection with any contract made by any branch of the administration. The term "Fisc," in its strict meaning, is that branch of the administration which is charged with the collection of the revenue. There is, therefore, ground for the inference that the contracts referred to are those entered into in connection with the collection of the public revenue, such as contracts, by which the right to collect is farmed out. Voet in this chapter refers to the farming of the revenue, the leasing of taxes to publicans, and the transfer to them of tacit hypothec by the Fisc, but nowhere does he state that this right of tacit hypothec arises in respect of every contract whether made by the Fisc or any

(*b*) 29 N.L.R. 440. (*c*) Berwick 318; Bk. 3.22.2.8.

> other branch of the administration, or give any reason to suppose that the right was more extensive or intended for any other purpose than to secure to the State the collection of the revenue and its due management and application by its administrators. . . . . The balance of authority seems to favour the view that the tacit hypothec of the State over the property of those with whom it has contracted must be limited to contracts connected with the collection of the revenue —as for example the contracts of farmers or lessees of the revenue.

Ordinance exhaustive of the privileges enjoyed by the Crown.

382. On the second point raised the Court held that Ordinance No. 14 of 1843 was now exhaustive on the subject of special privileges enjoyed by the Crown. Fisher, C. J., said:—

> If it be true that under Roman-Dutch Law as applied in Ceylon the property of *all* debtors to the Crown was subject to a tacit hypothec, and that Section 4 and the corresponding Sections in previous Ordinances confirmed what was already the Law as regards persons to whom the Section applied, I think the only inference that can be drawn from the language of these Ordinances is that after the rights of the Crown were put on a statutory basis by the enactment of Section 4 of Ordinance No. 2 of 1837, such a situation no longer obtained with regard to Crown debtors who do not come under the Section. For ordinary debtors are not only not mentioned in Section 4, but they are expressly referred to in Sections 5 and 8. Their deliberate exclusion, therefore, from Section 4 would in my opinion indicate that thenceforward they were to be on a different footing from the persons mentioned in that Section. . . . . .
>
> The very next Section,—Section 5—deals with debts due to the Crown by another class of debtors, namely, "by other persons than officers and public accountants mentioned in the preceding clause," and gives the Crown certain preferential rights of payment over all debts which had been contracted by or become

due from "such Crown debtors to any other person or persons whatsoever," subsequent to the date upon which the debt to the Crown accrued.

Section 6 safeguards the position of persons and bodies corporate who are the holders of duly executed mortgages of immovable property prior in date to the claim of the Crown and of persons and bodies corporate who under Roman-Dutch Law have a legal lien, mortgage, or privilege which is entitled to preference over such mortgages.

Section 7 relates to movable property and protects *bona fide* purchasers, &c., for good consideration who became such prior to the execution of a judgment obtained by the Crown.

Section 8 is to my mind very significant. It provides that all alienations and dealings with their lands or goods by persons who are "debtors" to the Crown, and in my opinion the word "debtors" means persons who at the time of such dealing are already debtors to the Crown, made fraudulently with the intention of delaying or defrauding the Crown of its rights are to be deemed void and of no effect and declares that those who are parties to such transactions are guilty of an offence and liable to a penalty.

If the Crown had a tacit hypothec such as is contended for in this case it would be a paramount charge, and no dealing with the property could be effected, except subject to the paramount charge. There would thus be no need so far as the Crown was concerned to be protected against subsequent dealings or to declare them void. In my opinion this Section, which was I think merely intended expressly to put the Crown in the same position as private persons in respect of transfers of property made to defraud creditors, is inconsistent with the existence of a tacit hypothec. . . . . A careful survey, therefore, of this legislation leads, in my opinion, to the conclusion that Ordinance No. 14 of 1843 is exhaustive on the subject of special privileges enjoyed by the Crown in connection with the security and recovery of debts and consequently that the tacit hypothec contended for, if it ever existed, no longer exists.

No tacit hypothec over property of arrack renters.

It was held in *Queen's Advocate* v. *Perera* (*d*) that the Crown had no tacit hypothec over the property of persons who had purchased the exclusive privilege of selling arrack. Cayley, C. J., said:—

The purchaser of the privilege of selling arrack is not a Government farmer or renter or other officer employed in the collection, charge, receipt, or expenditure of the revenue, &c., or public accountant. If he fail in paying any part of the purchase money in terms of his agreement or bond, he is simply a Crown debtor under Section 5. Such a purchaser does not collect or expend any revenue, nor has he to account to the Crown for anything that he receives. So far as the Crown is concerned, all the purchaser has to do is to pay his purchase money. The purchasers of this monopoly are, I am aware, frequently called in popular language "arrack renters," but this term does not appear to me to be properly applicable to them.

Rights of the Crown in respect of debts under the Kandyan Law.

383. The Crown had no preferential rights in respect of debts under the Kandyan Law.

384. Arunachalam cites the following report of the Judicial Commissioner on this point (Law of Persons page 349) :—

"Before replying to the question, whether by the Kandyan Law, the Crown has the preference of other creditors, the Judicial Commissioner consulted the Second Adigar and other Chiefs on the subject; and thereupon Dehigama, Senior Diyawadana Nilame stated that a certain Moorman called Kaloo Lekama borrowed 3,000 *ridies* from the Treasury in the reign of King Kirtisree. He stipulated to trade with the money and to pay into the Treasury a certain rate of interest per annum. Two years elapsed, and no interest being paid, Angammena Adigar, who was also one of the two Wannaku Nilames of the Royal Treasury, sent to

(*d*) 4 S.C.C. 136; see also *The Attorney-General* v. *Pana Adappe Chetty* 29 N.L.R. 431; and Vanderstraaten's Reports p. 89.

demand payment, but the debtor avowing his inability to satisfy the claim, was threatened with prosecution that his failure would be reported to the King. This report was, however, deferred being made for a day or two, as the King happened to be then absent at Gampola. In the interval one Mawla Meddama Mohandiram to whom the said Kaloo Lekama owed 300 *ridies* having received intimation of the affairs invited the debtor to his house on some pretence, and then inhibited him by *Welekma*.* The Adigar hearing of this reported the circumstances to the King who declared that as the other creditor had anticipated him by first securing the debtor's person, his debt should be discharged before the King could bring him to account; and as the debtor himself was unable to pay Mawla Mohandiram, the King directed that that sum should be paid from the Treasury, and the debtor being released from his thrill, be brought up to the Palace. This being done, the debtor was taken into custody on account of the claim of the Crown and part of his debt exacted from his and the rest remitted, not however before the debtor had undergone severe chastisement for imposition, inasmuch as he stipulated to perform what he afterwards failed to effect, viz., to trade with the King's money as a prudent merchant and realize a certain profit thereon."

Fradulent, transfer, etc. Void.

385. All gifts, grants, sales, transfers, mortgages, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, of any debtors to the Crown which have been or shall at any time hereafter be brought about with intent to delay, or defraud the Crown, of its rights shall be deemed and taken to be utterly void and of none effect and any party or parties thereto knowing of such fraud shall be guilty of an offence and be liable on conviction thereof to a fine of the amount of one year's value of such lands or tenements and the whole value of the

* The same as *dharna* of the Hindus.

said goods or chattels, as well as the consideration given for the same and to imprisonment, with or without hard labour, for any period not exceeding one year (*e*).

G. A. to seize property of debtor upon knowledge or notice of debt.

386. Any Government Agent or Assistant Government Agent (or other person duly authorized by writing signed by such Government Agent) upon his own knowledge of the default of payment by any debtor to the Crown or notice to him given of any debt having accrued due to the Crown, may seize the property of any Crown debtor to an amount computed to be sufficient to cover the debt and the costs attending the seizure.

Crown debts are not affected by the Insolvency Ordinance. Austin 126; Ram: (1820-33) 158. It is open to a debtor who was in prison for 21 days on a writ issued by the Crown to apply for adjudication as an insolvent. Crown is bound by Section 20 of the Insolvency Ordinance. In *re Ferdinando* (1889) 9 S.C.C. 17. But the Crown can arrest in execution a debtor who had obtained a certificate of conformity 9 S.C.C. 78. Crown is not bound to deposit subsistence allowance for the arrest of a debtor. *The Attorney-General* v. *Ponniah,* 11 N.L.R. 245.

Ordinance No. 14 of 1843 does not take away the Common Law remedy of the Crown; proceeding under the Ordinance is discretionary. *Buller* v. *Perera.* Ram. (1843-55) 11; Austin 80. Rent reserved to the Crown by a lease constitutes a Crown debt within the scope of Section 5, and the Crown's legal hypothec over the debtor's property attaches from the date of the lease, and not at the date when the particular instalment of rent fell into arrear, in respect of which a breach of the lease was committed. *The Attorney-General* v. *Benjamin*, 7 S.C.C. 139; Vand. 89.

(*e*) Ord. No. 14 of 1843 Sec. 8.

The general hypothec over the property of the Crown debtor does not commence till the debt has actually accrued due (Section 5) except in an extreme case, as where a debtor is endeavouring to alienate his property obviously with the fraudulent intention of defeating a debt about to become due. Marsh. Judgt. 532; Morg. Dig. 56; 2 Thom. 301. But in the case of officers (under Sec 4.) the hypothec dates from the date of appointment. Gren. (1873) D. C. 26; see also Vand. 89; 4 S.C.C. 136; 29 N.L.R. 431; Coolies are entitled to preference for three months' wages over the claim of the Crown by virtue of Section 18 of Ordinance No. 11 of 1865 *Queen's Advocate* v. *Perera*, (1881) 4 S.C.C. 136. Where a debtor's money is brought into Court the Crown has a right to intervene even without a judgment in its favour, and be awarded preference for Customs dues etc. *Palaniappa* v. *Ismail* (1902) 5 N.L.R. 322.

Sureties to the Crown paying the debt of the principal are entitled to the rights of the Crown without cession of action *Saibo Dore* v. *Bawa* 3 Lor. 319; 2 Thom.300. Joint estate of husband and wife was held executable for Crown debt. *Queen's Advocate v. Sivagamipillai,* (1884) 6 S.C.C. 46. Where a deed was executed *mala fide* and for inadequate consideration and with the intention of defrauding defendant's creditors, one of whom was the Crown the deed was held to be void and of no effect under Section 8 of the Ordinance.

Schneider J. held (*obiter*):—If the information or libel, which is required to be filed within seven days after the seizure, was filed after that period had elapsed, it would not vitiate the proceedings. "If it had been necessary I would accordingly have held that the warrant of the Court to the Fiscal had been rightly issued, although the libel had not been filed within the time-limit mentioned in the Ordinance." *G. A., S. P.* v. *Kaluphana* 25 N.L.R. 13.

The Attorney-General v. *De Croos* 26 N.L.R. 51. Certain lands were mortgaged by the defendants as security for the payment of money due to Government on the purchase of arrack rents. The defendants having committed default in payment, the Crown sued them on February 22, 1924. Thereafter, on March 19, 1924, and April 8, 1924, the Government Agent caused to be seized certain other properties of the judgment-debtors, as the security covered by the bond was not considered sufficient to satisfy the claim. In effecting the seizures the Government Agent purported to act under Section 2 of Ordinance No. 14 of 1843. In compliance with the further provisions of the Ordinance contained in Section 3 certificates were filed in Court and warrants of sequestration were issued and executed on April 28, 1924, March 2, 1924, and May 5, 1924. At this stage of the proceedings the present respondent, as purchaser of the lands seized on conveyances dated July 4, 1924, obtained in execution of mortgage decrees of December 19 and 30, 1923, entered in his favour, sought to intervene and moved that the orders for sequestration be vacated and the properties sequestered be released from seizure on the ground that the seizure should have preceded the filing of the action. It was held that the respondent was not entitled to intervene in the action.

De Sampayo, J., held that the proceedings were regular. The "libel" mentioned in Section 3 of the Ordinance of 1843 is merely the formal complaint to the Court, and is not meant to be a plaint.

The further proceedings contemplated in the Section refer only to the warrant of sequestration, and not to any action supposed to be instituted with the filing of the libel.

CHAPTER XXI.

ROYAL PREROGATIVES.

IMMUNITY FROM ACTION.

387. Though no suit can be brought against the King even in civil matters by reason of his attribute of pre-eminence, the subjects are not without any remedy against private injuries. In England, in civil cases, arising out of contract, or relating to real or personal property, otherwise than in tort, a remedy is available against the Crown by petition of right (*a*).

Petition of Right.

388. If any person has, in point of property, a just demand upon the King, he had the right to petition him in his Court of Chancery, where his Chancellor administered right as a matter of grace, though not upon compulsion. The delay and expense attending this proceeding by petition (*Petition de droit*) induced the Legislature to afford the subject a much more summary method of interpleading with the Crown. This was effected by extending and rendering almost universal the remedies by "*monstrans de droit*" and "*traverse of office.*" The proceedings on these remedial petitions are now conducted in England on the same principles as ordinary suits. The procedure by way of Petition of Right is now regulated by the Petition of Right

(*a*) 6 Hals. sec. 631.

Act, 1860. The object of this statute was to assimilate the proceedings relating to petitions of right as nearly as might be to the course of practice and procedure then in force in actions between subject and subject. A petition of right may now be instituted in the King's Bench Division or in the Chancery Division or in the Probate, Divorce, and Admiralty Division of the High Court of Justice according as the subject-matter of the petition or any material part thereof is matter properly appertaining to any such Division of the High Court (*b*).

Extent of relief obtainable by Petition of Right.

389. In *Colombo Electric Tramway Co. Ltd. v. The Attorney-General* (*c*) Wood Renton C.J. had occasion to explain the extent of relief obtainable by petition of right in England. He said:—

> The extent of the relief obtainable by petition of right is well established. In *Tobin v. Reg.*[1] the suppliant's ship had been seized and destroyed by a naval commander under the authority of the Crown in pursuance of statutes for the suppression of the slave trade. The Court of Common Pleas (Erle C.J., Williams, Willes, and Keating JJ.) held that a petition of right would not lie, *inter alia,* because the action was one of tort. Sir Hugh Cairns had argued for suppliant that "a petition of right does lie to recover unliquidated damages for a wrong. Not indeed for such a wrong as an assault, but if the Crown is to be held responsible for the seizure of chattels, the Crown must continue to be liable where the wrong cannot be recompensed by the return of the chattels." This contention was overruled by the Court. "Whatever," said Erle C.J., 'was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right of the Crown to property or an interest in property which had been seized for the Crown.

(*b*) I Bla. 242; Pereira 42; 23 and 24 Vict. 34.
(*c*) 16 N.L.R. 178.
(1) (1864) 33 L.J., C.P. 199.

"A petition of right does not lie to recover damages from the King for a mere wrong supposed to have been done by him. Not a single instance of a recovery of such damages from the King has been cited." In *Feather v. Reg*[2] the suppliant had obtained a patent for improvements in the construction of ships. Admiralty Commissioners had infringed it. Cockburn C.J., Crompton, Blackburn, and Mellor JJ., followed *Tobin v. Reg.*,[1] and held that a petition of right would not lie. "The only cases," said Cockburn C.J., "in which the petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or where the claim arises out of a contract as for goods supplied to the Crown or to the public service.....No case has been adduced.....in which a petition has been brought in respect of a wrong properly so called.

In *Thomas v. Reg.*,[3] Blackburn, Quain, and Mellor, JJ. held that a petition of right will lie for breach by the Crown of a contract resulting in unliquidated damages. "It appears," said Blackburn J., "that at the time of the passing of the Act" (*i.e.*, the Petition of Right Act, 1860) "there was a general impression that petition of right was maintainable for a debt due or a breach of contract by the Crown."

The argument against the petition of right lying in such a case is, we think, entirely grounded on the absence of ancient precedents. And that is undoubtedly a strong argument." It was contended in *Thomas v. Reg.*,[3] however, that the remedy was available only in cases in which the freehold was concerned. But the Court negatived this contention on the authority of *The Bankers' Case*.[1] *The Bankers' Case*[1] was regarded as a precedent in point. *Thomas v. Reg.*[2] was followed in *Windsor v. Annapolis Ry. Co.*,[4] during the argument of which Lord Halsbury said:—

(2) (1865) 6 B. & S. 257.
(1) 14. How St. Tr. 6.
(3) (1874). L.R. 10 Q. B. 31.
(4) (1886). 11 A.C. 607.

The King can do no wrong means that he cannot commit a tort—he can do wrong in other senses.

The remedy by petition of right has not, so far as I can see, been carried beyond the point at which these authorities leave it, and would not extend to such a claim as we have to deal with in the present action. If the analogous right granted to private individuals by the Courts in Ceylon is to be made more comprehensive, the enlargement of its scope must be the work of the Legislature. I hold that the appellants' action is not maintainable against the Crown.

Waiver by the Crown of prerogative right not to be sued.

390. This prerogative not to be sued, which is as extensive in the Colonies as in Great Britain, has been waived by the Crown in Ceylon. And accordingly it was held that an action lies against the Crown or the Government of Ceylon for the recovery of property, and of money due on a contract.

Right to sue the Crown under the Roman-Dutch Law.

391. In *Le Mesurier* v. *Layard*, Bonser, C.J., held:—

The Roman-Dutch Law allowed persons who had a claim against the Government to sue it as of right (*non-petita venia*) through its officer, the *Advocate Fiscal* (*i*).

392. In *H. Siman Appu* v. *Queen's Advocate* (*j*) it was held by the Privy Council that since the conquest of the Dutch a very extensive practice of suing the Crown had sprung up, and had been recognised by the Legislature, and that such suits were now incorporated into the law of the land.

393. It is true said Middleton, J., in *Munasinghe* v. *A. G. A.* (*k*) that Chitty on the

(*i*) *Le Mesurier v. Layard* 3 N.L.R. 227.
(*j*) 9 A.C. 571.
(*k*) 13 N.L.R. at p. 133.

Prerogative (*l*) lays down, that "where Colonial Charters afford no criterion or rule of construction the common law of England with respect to the Royal Prerogatives is the common law of the plantations," and that Lord Watson in the *Maritime Bank of Canada (Liquidators of)* v. *Receiver-General of New Brunswick*, said: "the prerogative of the Queen when it has not been expressly limited by local law or statute is as extensive in Her Majesty's Colonial Possessions as in Great Britain." I am by no means sure, however, that the Crown has not by waiving its prerogative right not to be sued, and by its recognition of the waiver by legislation, tacitly admitted the right of the subject to avail himself of this defence against the Crown."

Right to sue the Crown in actions for the recovery of specific property and *ex contractu*.

394. In *Hendrick v. Queen's Advocate*, (*m*) the Supreme Court held:—The practice adopted here of suing the Crown in the name of the Queen's Advocate both in real actions for the recovery of specific property and in actions for the recovery of moneys due *ex contractu* has prevailed here for a long series of years, and has been recognized by this Court in hundreds of decisions—indeed has not, ever been called in question until now. Nor has any person with a claim against the Crown ever sought redress here by way of petition of right; certainly, no such petition of right has ever been referred to this Court for investigation and report. It was urged by the Queen's Advocate that the practice of suing the Crown is an attempt to impugn the Royal Prerogative, by virtue whereof no suit or action can be brought against the Sovereign; and such, no doubt, it would be if the prerogative has not been waived in this respect. This Court in Fraser's Case humbly expressed an opinion that it had been so waived, and we humbly venture to share that opinion.

(*l*) p. 35.

(*m*) 4 S.C.C. 77.

Action in tort.

395. The question whether the Crown can be sued in tort in Ceylon was raised in several cases. Bonser, C. J., held (*obiter*) in *Le Mesurier* v. *Layard*, (*n*) that the Crown was liable to be sued in tort. He said: "The rule of English Law, that the Crown cannot be sued in tort depends on the maxim which appears to be peculiar to that law *rex non potest peccare*: the King can do no wrong. I am not aware of any authority for the proposition that the Government of the United Provinces ever claimed the attribute of impeccability." He held that the action may be brought against the Attorney-General as the lineal successor of the old Advocate Fiscal in Ceylon.

Crown not liable to be sued in tort.

396. In the *Colombo Electric Tramway Co., Ltd.* v. *The Attorney-General* (*o*). Wood Renton, C. J., in an exhaustive judgment reviewed all the earlier Ceylon cases and the Roman-Dutch authorities on the subject, and held that neither under the Roman-Dutch Law, nor under our Law, was the Crown liable to be sued in tort. In the "British Ensign" Case (*p*) the Privy Council upheld that ruling.

Wood Renton, C. J., said:—

After the best consideration that I can give to the authorities to which we have had access, I am not prepared to hold that the appellants have shown that either under the Roman or the Roman-Dutch Law the sovereign power could be sued *ex delicto* or *ex quasi-delicto*. Most of the authorities quoted to us were examined by Sir Charles Layard, the Attorney-General, in his argument in *Le Mesurier v. Attorney-General*.[1]

(*n*) 3 N.L.R. 227.
(*o*) (1913) 16 N.L.R. 161.
(*p*) 27 N.L.R. 289.
1 (1901) 5 N.L.R. 65. Also see Voet 1, 3, 15; 2, 4, 11; 6, 1, 23; 18, 4, 6; 43, 16, 5.

The only instance to be found amongst them of a claim *ex delicto* made against the sovereign power is the payment by the States-General of Holland of damages to Philip of Spain for injury done to his house in Rotterdam.[2] Submission to a claim for damages by such a monarch as King Philip II. forms a somewhat slender precedent in support of the contention that, under the Roman-Dutch Law, the sovereign could be sued *ex delicto* or *ex quasi-delicto* by the subject. No other precedent has been unearthed by the industry of the Bar in the present case. Referring to the passage in the Dutch Consulations,[3] which was cited in *Sanford* v. *Waring*[4] His Lordship said:—

The appellants' Counsel were unable to identify the *venia* referred to in this passage with the "sanction" dispensed with in Ceylon by the Proclamation of January 22, 1801, and even if they could have done so, the passage in question relates merely to a claim for arrears of annuities, and does not show that the Fisc could be sued in delict.

The same observation applies to the following citation from Bort's Domain[5]:—

All disputes with regard to regalia, either between the Prince and private parties, or between parties themselves, must at the first instance come before the Court of Holland, which has jurisdiction by Section 7 of the Instructie of the said Court in all matters concerning domains.

For aught that appears to the contrary, the disputes here referred to may have involved merely the question whether certain rights were *jura regalia* or not. In any case the passage does not show that any private party could sue the Prince *ex delicto*.

But even if the appellants had been able to demonstrate that the right to sue the Prince in delict existed under the pure Roman-Dutch Law, the

2 Van Leeu. Kotze I., p. 12, note (h).
3 Decl. IV. Cons. 123.
4 (1896) 2 N.L.R. 364.
5 XVI. Decl. s. 1. And see also Perez., bk. 10, tit. 1, s. 46.

questions would still remain, in the first place, whether the Dutch had introduced that part of their law into Ceylon, and, in the next place, whether, if so, it had not been superseded, on the British occupation, by that branch of the royal prerogative which confers on the sovereign immunity from action in tort at the instance of the subject. The extent to which the Dutch introduced their own law into the outstations is a subject of great difficulty, and as yet very partial elucidation.[1] We have no access here to the original authorities, or to the recent Dutch or German commentaries upon them. But it is settled in Ceylon[2] that if any rule of Roman-Dutch Law is found to be inconsistent with the well-established practice of the Colony the reasonable inference is that it was never introduced. It is on this principle that the indefeasibility of title derived from the Crown, created by a Constitution of Zeno, and undoubtedly incorporated into the Roman-Dutch Law, has been held never to have formed part of the law of this Colony. But, supposing that the Dutch Government could be sued in delict in Holland, and had extended the same right of action to its subjects in Ceylon, the immunity of the English Sovereign by virtue of his prerogative from being sued in tort would take effect, unless it were excluded expressly, or by necessary implication,[3] as, for instance, where in Ceylon[4] a clear right, pre-existing under Roman-Dutch Law, of prescribing against the Crown was recognized in practice and by subsequent legislation. The appellants' Counsel contended that in the case of a conquered or ceded colony no branch of the royal prerogative attached, unless it either was a necessary incident of sovereignty, or could be regarded as a continuation of the prerogative of the conquered or ending Power. The immunity of the English Sovereign from being sued in tort is, however, a direct consequence of the fundamental maxim of English Constitutional Law that "the King can do no wrong," and its extension to all the colonies,

1 See Burge, 2nd ed., vol. I., pp. 90 et seq.
2 *Silva v. Balasuriya*, (1911) 14 N.L. R. 452.
3 Cp. In re Wi Matua's Will, (1908) A.C. 448.
4 D. C. Colombo, 1,245, (1870) Vanderstraaten 83, 84.

whether conquered, ceded, or settled, has been assumed in every case in which the question has arisen.[5] The argument that the existence or extent of any branch of the royal prerogative in a conquered or ceded colony depends on the question whether it can be linked on to a prerogative of the same character and extent existing before the conquest or the cession is, I think, disposed of by authority. The cases of *Exchange Bank of Canada v. Reg.*[1] as interpreted by the Privy Council in *Liquidators of the Maritime Bank of Canada v. Receiver-Gereral of New Burnswick*[2] and *New South Wales Taxation Commissioners v. Palmer*[3] show, for instance, that the priority enjoyed by the sovereign over subject-creditors in respect of debts of equal degree will, unless limited by local law of waiver, apply in its fulness in a conquered or ceded colony, although it was not existent in, or was limited by, the antecedent law of that colony.[6]

Has, then, the immunity of the sovereign from liability to be sued in tort been abandoned, either expressly or by necessary implication, in Ceylon ? No such abandonment can be inferred from the language of Section 2 of the Proclamation of September 23, 1799. That Section merely made provision for the continued administration of justice in accordance with the pre-existing law. Section 117 of Ordinance No. 11 of 1868 was interpreted by the

5 *Siman Appu v. Queen's Advocate,* (1884) 9 A. C. 586; *Farnell v. Browman,* (1887) 12 A. C. 643, in which Counsel in supporting the appeal admitted that, but for the special legislation on which he relied as conferring a right of action in tort against the Crown, the case would be unarguable; and *Attorney-General of the Straits Settlements v. Wemyss,* (1888) 13 A. C. 197.

1 (1886) 11 A. C. 157.
2 (1892) A. C. 437.
3 (1907) A. C. 179.
5 (1886) 11 A. C. 157.
6 Cf. In *re* Henley & Co.. (1878) 9 Ch. D. 469; In *re* Oriental Bank Corporation, (1884) 28 Ch. D. 643; In re Bateman's Trusts, (1873) L. R. 15 Eq. 355.

Privy Council in *Siman Appu* v. *Queen's Advocate*[1] as creating no new rights but only regulating procedure. Section 456 of the Civil Procedure Code, 1889, is an enactment of the same character. It provides in effect that actions which can be brought against the Crown in Ceylon are to be instituted against the Attorney-Gerenral as representing the Crown. To interpret the Section as if it also enacted that any claim for relief falling under the definition[2] of "action" in the Civil Procedure Code could be made against the Crown would do violence both to its language and to its spirit. If the law had recognized a right of action against the Crown for tort, we might have expected that some instances at least of its successful exercise could have been found. Not one is forthcoming. The mere absence in such a case as this of "ancient precedents" is, as Lord Blackburn observed in *Thomas* v. *Reg.*,[3] "a strong argument." But there is more. There is an almost unbroken current of judicial opinion and authority to the effect that such an action will not lie. The point was raised in *Fraser* v. *Queen's Advocate.*[4] Fraser was postmatster of Galle by Colonial, and packet agent of Galle by Imperial, appointment. He was suspended under the Colonial Regulations, and sued the Queen's Advocate as representing the Crown for arrears of salary. Creasy C.J. and Stewart J., whose decision was affirmed by the Collective Court, held that the claim against the Queen's Advocate in respect of salary as packet agent could be supported only by an allegation that the Colonial Government, by suspending Fraser, "had prevented him from fulfilling the duties of his packet agency, whereby the Imperial Government had refused to pay his salary," and added (it was unnecessary to decide the point), "we greatly doubt whether such an action was ever maintainable here." In *Don Hendrick v. Queen's Advocate,*[5] the original record of which I have called for and examined

1 (1884) 9 A. C. 586.
2 S. 5.
3 (1874) L. R. 10 Q. B. 31.
4 (1868) Ram. 63-68, 216.
5 (1881) 4 S. C. C. 76.

in view of the fact that the report of the case *4 S.C.C. 76* purports only to give a "substantial" reproduction of the judgment, and of the contention of the appellants' Counsel that, notwithstanding the sense in which Burnside C.J. (the Queen's Advocate sued in the case), Dias J., and Clarence J. interpreted it in *Newman v. Queen's Advocate,*[6] it was no authority for the proposition that the Crown cannot be sued in tort in Ceylon, the plaintiffs alleged that the Government Agent had "unlawfully and unjustly" ordered the crops of their paddy lands to be taxed at a rate which was too high for private property, and which would create a presumption that they belonged to the Crown, and, in accordance with the settled practice,[1] sued the Queen's Advocate as representing the Crown for declaration of title and damages. There was no averment that the plaintiffs had been disturbed in their possession, and accordingly the Queen's Advocate demurred to the libel, maintaining that it disclosed no cause of action. The District Judge overruled the demurrer, treating the action as one *quia timet*. On an appeal by the Queen's Advocate, the Collective Court (Cayley C.J., Clarence and Dias JJ. upheld the the demurrer. The judgment, which is reported *verbatim* and not merely in "substance" in *4 S. C. C. 76,* is short, and was apparently not reserved. "The cause of action," said Cayley C.J., "is an alleged 'unlawful and unjust order' made by the Government Agent. Whether this order was carried out or not is not stated, but what is complained of is clearly an alleged tort on the part of the Government Agent, for which the Crown is not responsible." Although the Judges do not say so in terms, the *ratio decidendi* of this case obviously was that nothing had occurred to enable the plaintiffs to claim a declaration of title, and that an action in tort would not lie against the Crown.

The case of *Newman v. Queen's Advocate*[2] is a decision of the Collective Court, to the effect that an action in tort will not lie against the Crown in Ceylon.

6 (1884) 6 S. C. C. 29. See *Jayawardene v. Q. A.,* (1881) 4 S. C.C. 77.

1 (1881) 4 S. C. C. 77. 2 (1884) 6 S. C. C. 29.

The plaintiff sued the Queen's Advocate for damages for personal injuries sustained by him while travelling as a passenger on the Ceylon Government Railway. Section 13 of Ordinance No. 10 of 1865[3] imposed upon the Government of Ceylon liability for loss and damage to goods in course of transit by rail, but was silent as to passengers. The case was argued in appeal before Burnside C.J., Clarence and Dias JJ. All three Judges were agreed that a pure action of tort would not lie against the Crown, and Burnside C.J. and Dias J. held that the plaintiff's action must be dismissed. Clarence, J. dissented on the ground that the action was only one of tort based on contract, and that in such a case the Crown might be held liable. Even the dissent of Clarence, J. will not help the appellants here. The judgments of Burnside, C.J., and Dias, J., are direct decisions against them. The effect of this chain of authorities was recognized in *Siman Appu v. Queen's Advocate,*[4] whereas the Privy Council state, it was conceded on all hands that an action in tort will not lie against the Crown in Ceylon. In *Sanford v. Waring,*[5] and again in *Le Mesurier v. Layard,*[6] Bonser C.J. raised, without deciding, the question whether, notwithstanding all the previous decisions and dicta on the point, the Crown was not liable to be sued hereinafter all. In support of this view, the learned Chief Justice referred to the Roman-Dutch authorities above mentioned, and particularly to the submission of the States-General to the claim of Philip, and also to the decisions of the Privy Council in *Attorney-General of the Straits Settlements v. Wemyss*[1] and *Farnell v. Bowman.*[2] In *Le Mesurier v. Attorney-General,*[3] however, Bonser C.J. modified the view that he had expressed in *Sanford v. Waring,*[4] to the extent of

3 And see section 18 of Ordinance No. 9 of 1902.

4 (1884) 9 A. C. 586, and *Cp. Farnell v. Bowman,* (1887) 12 A. C. 643.

5 (1896) 2 N. L. R. 361.

6 (1898) 3 N. L. R. 227.

1 (1888) 13 A. C. 197.

2 (1887) 12 A. C. 643.

3 (1901 5 N. L. R. 65.

4 (1896) 2 N. L. R. 361.

admitting that its soundness must be regarded as at least doubtful, and suggested that the Legislature should bring the law of Ceylon into line with the enactments held by the Privy Council in *Attorney-General of the Straits Settlements* v. *Wemyss*[1] and *Farnell* v. *Bowman*[2] sufficient to make the Crown liable to be sued in tort in the Straits Settlements and New South Wales, respectively. No such legislation has been enacted. I have already dealt with the Roman-Dutch authorities on which Bonser C.J. relied. I venture to think that they do not justify the inference that he drew from them. The special legislation which formed the *ratio decidendi* in *Attorney-General of the Straits Settlements v. Wemyss*[1] and *Farnell v. Bowman*[2] is of a character very different from Section 117 of Ordinance No. 11 of 1868 and Section 456 of the Civil Procedure Code, 1889. In each case it directly created rights of action against the Crown, and its language was wide enough to include actions of tort. Section 117 of Ordinance No. 11 of 1868 and Section 456 of the Code of 1889 merely prescribe the procedure by which rights of action, already existing, against the Crown are to be enforced. The appellant's Counsel argued that if, as the Privy Council held in *Siman Appu* v. *Queen's Advocate*,[5] Section 117 of Ordinance No. 11 of 1868 was wide enough to include actions *ex contractu*, there was no logical reason why that Section, or Section 456 of the Civil Procedure Code, 1889, should not extend to torts also. But in *Siman Appu v. Queen's Advocate*[5] the Privy Council, as I understand their judgment, did not hold, and would not have been prepared to hold, that Section 117 of Ordinance No. 11 of 1868 would by itself have sufficed to create a right of action *ex contractu* against the Crown. On the contrary, they held that, so far from creating new rights it merely regulated the procedure as to existing rights, and that, therefore, the recognition in conformity with the established practice of the Courts in

1 (1864) 33 L. J.G. P. 199.

2 (1865) 6 B. & S. 257.

5 (1884) 9 A. C. 586.

Ceylon, of actions against the Crown *ex contractu* by no means involved as a logical consequence the conclusion that the Crown could be sued in tort. I think that the real explanation of the development of the law in Ceylon as to suing the Crown is that the Courts have gradually enabled the subject in Ceylon to obtain by action against the Crown the relief that the subject in England obtains by petition of right, but nothing more.

397. Referring to the above judgment the Privy Council observed in the British Ensign Case (*q*) as follows:—They would, however, wish to remark that as to the question of whether the Roman-Dutch Law differs from the English in holding that the Crown may be liable for a tort, inasmuch as the matter has been often mooted and has been solemnly settled by the case of the Colombo Electric Tramway Company and inasmuch as the question in Ceylon is always not only what is Roman-Dutch Law, but how far has any part of it been recognized in Ceylon, they would require very clear arguments to induce them to reverse the Court of Appeal on such a matter.

The ss. "British Ensign" entered the Colombo harbour in the ordinary course and was allotted berth No. 21 by a pilot. When the steamer attempted to leave the harbour on the following morning, she found herself aground on a large and dangerous rock. Through grounding on this rock or through the efforts which were made to get her off it, she sustained serious damages. The plaintiff-company sued the Government of Ceylon for damages. It was held that the Government of Ceylon was not liable in damages.

"In the case of our harbour such obligations as rest upon the Crown with reference to the safety of the

(*q*) The *British Petroleum Co. Ltd. v. The Attorney-General* 27, N.L.R. 389.

harbour are obligations arising out of the relation between the Crown as the harbour authority and the persons using the harbour. A breach of these obligations could only give rise to an action in tort, if such an action lay against the Crown, and the payment of these dues does not create a contractual relationship between the Crown and the subject."

"If an action in tort would lie against the Government, such an action would be excluded in the present instance, in so far as it was based on the negligence of the pilot."

On appeal the Privy Council held, that the action failed since, if it was based on a contract with the Government of Ceylon, it would only be a contract to provide a berth to which it was safe to go; and if the ship was improperly removed by the pilot, the Government was exempt from liability for his negligence by Section 11 of Ordinance No. 4 of 1889.

Attorney-General to be sued in actions against the Crown.

398. All actions by, or against, the Crown must be instituted by, or against, the Attorney-General. In Courts of Requests, any person duly appointed under sub-Section (d) of Section 25 of the Civil Procedure Code may institute an action for and in the name of the Crown as party plaintiff (*r*).

Attorney-General must get one month's notice of action.

399. No action can 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 the Attorney-General or Officer or left at his office, stating the cause of action and

(*r*) C.P.C. Sec. 456.

the name and place of abode of the person intending to institute the action and the relief which he claims; and the plaint in such action must contain a statement that such notice has been delivered or left (*s*).

Does the A. G. represent the Government of Ceylon ?

400. In *Le Mesurier* v. *Layard* (*t*) the plaintiff sued the Hon. Mr. C. P. Layard, the Attorney-General averring in the plaint that he represented "the Government of Ceylon." The District Judge dismissed the action on the ground that the Attorney-General did not represent the Government of Ceylon but the Crown.

Bonser, C. J., said:—It seems to me something like a quibble to say that the Attorney-General represents the "Crown," but does not represent " the Government of Ceylon." Her Majesty, acting by her servants and officers, governs this Island. For most purposes the two expressions are convertible, and our local Statute Book shows numerous instances of their being so treated. I hold that this action is an action against the Crown and was rightly brought against the defendant in accordance with Section 456 of the Civil Procedure Code.

Lawrie, J., however held:—" It seems to me that there is a difference between the *Crown* and the *Government of Ceylon*. The one is greater than the other. There may be actions which will not lie against the Crown, which are sustainable against the Government."

(*s*) C.P.C. Sec. 461. (*t*) (1898) 3 N.L.R. 227.

Ennis, J., held (*u*):—in any case in which the Crown in Ceylon could be sued, there is no material distinction between the terms "Government of Ceylon" and "Crown," and this seems to have been the ground of decision in Le Mesurier's Case where it was held that the Attorney-General was the right defendant. But just as the Attorney-General of Ceylon does not represent the Crown in all cases, *e.g.*, in cases in which a remedy is sought against the Imperial Government (Fraser's Case), for he represents only the Crown in Ceylon, so it is open to argument whether he represents the Government of Ceylon, where the local Government is acting in a matter (for which an action could not be maintained against the Crown) outside the scope of its authority. I am of opinion that the Attorney-General represents the Government of Ceylon, whenever it acts politically, *i.e.*, as a political body, and that as a political body the Government of Ceylon is not a corporation capable of being sued. It is only liable to be sued in cases in which the Crown in Ceylon could be sued.

Wood Renton, C. J., said in the Colombo Electric Tramway Case :—

The next contention on the appellant's behalf was that, even if this is an action of tort, and such an action is not maintainable against the Crown, it is maintainable against the Government of Ceylon. The appellants, however, have not sued the Government of Ceylon.

(*u*) 16 N.L.R. 194.

But the matter is concluded, so far as we are concerned, by the decision of the Collective Court in *Le Mesurier v. Layard.*[4] In that case the plaintiff sued the Attorney-General, as representing the "Government of Ceylon," for arrears of salary. The Attorney-General objected that he represented not the Government of Ceylon but the Crown. The District Judge upheld this objection and dismissed the action. The Supreme Court (Bonser C.J., Withers J., Lawrie J. dissenting) reversed his decision on the ground that for most purposes the expressions "Government of Ceylon" and "Crown" are identical and that an action against the Government of Ceylon is an action against the Crown. Sections 456-462 of the Civil Procedure Code strongly support this view of the law, referring as they do throughout—except in Section 458, to which I will revert in a minute—to the "Crown" as the party whom the Attorney-General is to represent. Moreover, if the distinction which the appellants seek to draw between the "Crown" and the "Government of Ceylon" is sound, this curious result follows, that the latter is not entitled to the notice of action which Section 461 secures even to a village headman sued in respect of any act purporting to have been done by him in his official capacity. It was argued that Section 458 of the Civil Procedure Code, which enacts that the Court, in fixing the day for the Attorney-General to answer to the plaint, shall allow a reasonable time for the communication with the Government through the proper channels told in favour of the appellants' contention on the point under consideration. I do not think so. Section 458 merely provides for the ordinary contingency of the Attorney-General requiring, on behalf of the Crown, to consult the head of a department, or the Government Agent of a Province, as to the circumstances under which any action arises or as to the defence which ought to be set up, before filing answer. I am unable to regard as serious the contention of the appellants' Counsel that the Government of Ceylon can be treated as if it were a statutory corporation, such as the Municipal

4 (1898) 3 N. L. R. 227.

Council of Colombo, entirely distinct from, and entitled to none of the immunities of, the Crown, or a mere department of Government, such as the Commissioners of Public Works (*Graham v. Public Works Commissioners*[1]).

Does an action lie against officers of the Crown in their official capacity in contract or in tort ?

401. Government Departments are the agents of the Executive, and their acts bind the Crown, but at common law, in England, no action is in general maintainable against officers and servants of the Crown in their official capacity, either in contract or in tort, and the case would, it seems, be the same in criminal suits; this doctrine applies equally to a Secretary of State as to any other Government Official (*v*). Moreover, the public revenues cannot be reached by an action in such a form, the proper and perhaps only remedy in such cases being by petition of right. But the latter remedy is not, in general, available in tort, or for acts of negligence either by the Crown or its servants (*w*).

Under the general rule servants of the Crown and public officers cannot be made personally liable upon contracts entered into by them in their official capacity, unless from the particular circumstances of the case the intention to render themselves personally liable appears. They may, however, be sued and made personally liable for tortious or criminal acts committed by them in their official capacity, without showing malice or want of probable cause; and State necessity, or the

1 14 How. St. Tr. 6.

(*v*) 6 Hals. page 413; Sec. 633.

(*w*) 6 Hals. sec. 633.

Act done on order of superior officer.

orders of the Crown or of a superior officer, cannot be pleaded in defence. This principle does not apply to injuries ensuing from the proper performance of duties imposed upon a servant of the Crown by statute (*x*).

Ennis, J., held in the Colombo Electric Tramway Case that individual members of the Government are not liable in damages for acts done by them in the ordinary course of their duties and in obedience to the orders of the Government, which are not necessarily or manifestly unlawful. But Wood Renton, C. J., would seem to have held otherwise.

Servant of the Crown not liable for wrongful acts of his subordinate.

402. A servant of the Crown is not personally liable for the wrongful acts of his subordinates, unless he has expressly authorized or ratified such acts (*y*).

Arunachalam makes the following comments on the above:—For such a wrong the remedy is an action against the person actually doing the wrong, and the action must be against that person as an individual and not in his character of a servant of the King. In *The Queen* v. *The Lords Commissioners of the Treasury* (*z*) the Rule is thus stated:—"No action, whether of *mandamus* or otherwise lies against the servants of the Crown—*e.g.*, the Lords of the Treasury or the P. M. G.—nor against persons in their employ, as such public servants." In that case, which was for a *mandamus* upon the Lords Commissioners of the Treasury to cause certain moneys

(*y*) Arunachalam's Civil Digest page 380.

(*z*) (Q. B. 1872,) I Campbell's Ruling Cases, 802.

to be paid, Cockburn, C. J., said: "We must start with the unquestionable principle that when a duty was to be performed (if I may use the expression) by the Crown, this Court cannot affect to have any power to command the Crown. In like manner where the parties are acting as servants of the Crown, they are not amenable to us in the exercise of our prerogative jurisdiction."

Black, J., said: "The general principle applicable, not merely to cases of *mandamus*, but running through the whole law, is that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant so long as he remains in the service of the particular master. To take a familiar instance, if an application were made for a *mandamus* to the Secretary of a Railway Co., to do something, it would not be granted merely because the railway company, his employers, were under an obligation to do it. Now it can make no difference that the principal here, the Sovereign, can only be sued by the petition of right and perhaps not at all . . . The obligation, such as it is, is upon Her Majesty to be discharged through her servants, so that the servants cannot be proceeded against." It follows upon the personal exemption of the King from being a defendant, that the principle *respondeat superior* is wholly absent in actions of tort against the King's servants, for *ex-hypothesi* the King, who is the ultimate superior cannot be liable. No servant

of the Crown may set up as defence to a wrongful act the express orders of the Crown, or orders implied by the allegation that what he did was on an act of State. The lawfulness of the act is determinable in a court of law. Every case of this character will be governed by the ruling in *Enteck* v. *Carrington* (19 State Trials, 1030): "With respect to the argument of State necessity or a distinction that has been arrived at between State officers and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction." The principle *respondeat superior* is never extended (except in the special and peculiar case of the master of a ship) to fix a liability upon a superior servant for the act of an inferior one. So in *Lane* v. *Cotton* (K.B. 1701), 1 Lord Raym, 646, it was decided by three judges of the King's Bench, (Holt, C. J., dissenting,) that an action would not lie against the Postmaster-General for the loss of a letter by a subordinate; that the head of a public office under Government, with power to appoint and remove the servants of the office, who are to be paid by and give at his directions security to Government, is not responsible to an individual for a loss which occurred by the default of such servants; the servant who is guilty of the default is. And this case was followed and treated as having established a settled rule of law by Lord Mansfield and his colleagues in *Whitfield* v. *Lord Despencer* (*a*).

(*a*) (1778) Cowp. 754.

Dismissal of public servant gives no right of action against Crown.

403. A servant of the Crown holds his office during its pleasure, and his dismissal gives no right of action against the Crown. Judges of the High Court in England are removable only upon the Address of both Houses of Parliament, according to the Act of Settlement (*b*). This rule does not apply to Ceylon or other Colonies, where the judges may be suspended from office by the Governor in Executive Council, the suspension being reported to the Secretary of State in order that the King may with the advice of the Privy Council confirm or disallow the suspension (*c*).

404. In *Fraser* v. *The Queen's Advocate* (*d*) the Supreme Court held:—It never can be supposed that by thus directing a mode in which charges against an officer for misconduct are to be enquired into by the Governor and Council, the Crown intended to divest itself of the power of treating the officer as holding during pleasure only. There are many cases in which it may be most desirable and important to remove an officer, though he has committed no absolute offence, and though he has shown no absolute physical or mental incapacity for going through the duties of his office with literal exactness, and with perfunctory though unsatisfactory completeness. But the exigencies of the place or time may demand the immediate presence of an officer of superior tact or energy, or capacity, with reference to

(*b*) 12 and 13 Will iii. c. 2, Sec. 3.

(*c*) Royal Charter of 1833 Sec. 8, and the Courts Ordinance No. 1 of 1889, Sec. 11. 1 Aru. 366.

(*d*) Ram. (63-68) p. 321.

the special sphere of action. We put one possible or probable case; many others may readily be imagined. If an officer under any such circumstances is directed to leave his office, he may have a moral claim to receive fair and generous treatment by some other office being offered to him. But he cannot have any legal right to retain the office, which he received on the terms of holding it during pleasure, when it pleases the Crown or the authorised Ministers of the Crown, to suspend or remove him.

405. In *Shenton v. Smith* the Privy Council said:—"Unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by law suit but by an appeal of an official or political kind. Neither principle nor authority has been adduced to show that in the employment and dismissal of public servants a Colonial Government stands on a different footing from the Home Government. The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government can insist on holding office till removed according to the process laid down by Colonial Regulations. Any Government which departs from the Regulations is amenable, not to the servant dismissed, but to its own official superiors to whom it may be able to justify its action in any particular case."

405a. Reference to the following decisions on points discussed in this chapter will be found useful :—

Where the plaintiff claimed not only the land but also damages and *mesne* profits arising from alleged wrongful possession on the part of the Crown, the plaintiff was allowed to strike his claim and *mesne* profits and proceed with his action for the recovery of the land only. *Le Mesurier* v. *Attorney-General* (1901) 5 N.L.R. 65. 2 Br. 91. Land in the possession of the Crown cannot be recovered in a suit against the servant of the Crown who is in temporary occupation of it as such servant. From Voet's statement of the law (Com. ad Pand., VI 1-22) it seems clear that property can only be effectually recovered by the owner in an action against the wrongful possessor, *i.e.*, the person who occupies the property, either himself or by his agent, with the *animus dominii*. If the action be brought against a *nudus detentor*, he is entitled to be dismissed from the action as soon as he discloses the name of the person on whose behalf he detained the property. The only way by which a subject can recover his land, which he alleges to be in the wrongful possession of the local Government of this Island, is by an action brought against the Attorney-General. *Sanford* v. *Waring*, 2 N.L.R. 362.

Where the Government provides a hospital, and admits patients into it on the terms that they shall have the use of the rooms and the instruments and medicines and appliances and the services of physicians and surgeons and nurses and attendants gratuitously, with only a charge for admission, there is no implied undertaking on the part of the Government to be liable for the negligence of any of the servants employed in such hospital. "The Government did not undertake to perform the operation on the patient and nurse and attend to her while she was in the hospital, but only to supply proper rooms and appliances and competent surgeons and physicians and nurses." *Attorney-General* v. *Smith*, 11 N.L.R. 126.

In an action brought by a plaintiff against the Attorney-General, representing the Crown, to recover remuneration for the use of two motor cars, the property of the plaintiff, which were requisitioned by the Military at the time of the Riots of 1915, and used by them for periods of ninety-one days and thirty-nine days, respectively, it was held by Shaw, J: Whether it was in fact necessary under the circumstances that existed to requisition the plaintiff's cars under the prerogative powers and whether or no the cars were kept longer than the necessity demanded, if the General purported to act under the prerogative right, and did so unnecessarily, then the act would be a tortious one, for which the officer responsible would be liable in damages, unless he could bring himself within the protection of the Ceylon Indemnity Order-in-Council, 1915. In no case, however, can the Crown be made liable for the act of its officers if the act be a wrongful one, for an action will only lie against the Crown in Ceylon in such cases as a remedy would be available by way of Petition of Right in England, and no such remedy is there available in respect of tort. The Crown is under no legal liability to pay compensation to the plaintiff for the use of his cars by the Military, and any such compensation can only be obtained as a matter of grace from the Crown. (20 N.L.R. 203.) But on appeal the Privy Council held that the plaintiff had a right to go before a Board appointed under the Order-in-Council of October 28, 1896, and there to get compensation assessed. *Dias* v. *Attorney-General*, 22 N.L.R. 261.

The Crown cannot be held liable for an alleged tort committed by persons employed by the Government Railway Contractor. (1869) Vand. 21.

If a defendant in an action of trespass justifies under the Crown, he may apply to the legal advisers of the Crown to appear, and, if they think proper, to defend him, but the fact of his so justifying is no ground for dismissing the action as against him. (1859). 3 Lor. 270. The proper person to be sued in an action arising *ex contractu* by a subject against the Crown is the Queen's Advocate. The Government

of Ceylon, as owners of the Ceylon Government Railway, are responsible as carriers by land for loss of goods entrusted to them to be carried, where such loss is occasioned by the negligence of its servants, there being nothing in Section 13 of Ordinance No. 10 of 1865 which relieves them from any such responsibility, although the burden of proving negligence is on the party asserting it. In proving negligence it is not necessary to prove that any particular person is to blame. Ram. (1872, 75 and 76,) 157.

An action for damages against a parcels clerk for refusal to deliver a consignment of fish unless parcels rate was paid, was held not to be maintainable, as plaintiff's remedy, if any, was on contract with the Ceylon Government Railway and was not founded on tort. *Cassim* v. *Perera*, (1917).. 19 N.L.R. 505.

A district medical officer was appointed by the Governor under Section 19 of Ordinance No. 14 of 1872, and his salary was fixed by a district medical committee under Sections 7 and 19. The medical officer sued the Government for the recovery of his salary. The action was not maintainable against the Government in the absence of a contract on the part of the Government to pay the plaintiff his salary. *Tothill* v. *Queen's Advocate* (1884) 6 S.C.C. 112.

The Government is liable for rice supplied to the Public Works Department on orders by officers of that department for the consumption of labourers employed on the roads. *Raman Chetty* v. *Crown*. Siebel's Liability of Estate Owners, 20; Rajaratnam's Digest, 679.

Where an action was brought for damages for breach of contract by refusal to grant licenses to distil arrack, the plaintiff was held entitled to damages. *De Soysa* v. *Attorney-General* (1917). 19 N.L.R. 493. (Privy Council).

CHAPTER XXII.

PREROGATIVE RIGHTS OF THE CROWN TO PROPERTY.

406. The Crown has in Ceylon certain prerogative rights relating to property. These rights are now regulated for the most part by statute.

407. Ordinance No. 5 of 1890, was enacted to make provision, as stated in the Preamble, "for the better protection of the prerogative rights of the Crown in respect of all gold, silver, gems, or precious stones which may be found in mines in private lands in this Colony."

408. Under the Kandyan Law gems, mines, metals, and pearl banks are the property of the King. The right of digging for gems was a royalty reserved for the King, and the inhabitants of particular villages were employed in searching for them.

409. The Civil Law thus differed from the English Law in important respects. The Crown is entitled in England to all the produce of gold and silver mines on private land, and to nothing in other private mines; under the Civil Law the Fisc is entitled to one-tenth share only of the produce of private mines, and this right is not limited to gold and silver, but embraces gems and base metals and minerals.

The Roman-Dutch Law followed the Civil Law (Voet 41.1.13; 49.14.3). Voet mentions, and rejects, the claim sometimes made by the Fisc to the whole produce. But as regards the Colonies of Holland he

quotes (41.1.13) an Ordinance of the States-General dated 13th. October 1629, which provided that all metals, minerals, and precious stones found in the possessions of the Dutch East India Company should belong to the Company (*e*).

410. In the Plumbago Case (*f*) it was held that the Crown had the right to levy a royalty on plumbago dug from private lands. Mines and minerals belong to the soil-owner subject to the payment of one-tenth share to the Crown, and (unless specially reserved) pass under a conveyance of the soil.

411. The exclusive right of fishing for pearls in the Gulf of Mannar has been claimed by the native kings from the dawn of history. The Portuguese, Dutch and British Governments have claimed a similar right without question.

412. It is now declared by Section 3 of Ordinance No. 2 of 1925 that the exclusive right of fishing for and taking pearl oysters off the coasts of Ceylon and in all bays and inland waters of the Island is vested in the Crown.

413. The anchoring of any vessel on the pearl banks is prohibited, as also is the fishing for pearls without a license. Section 6 of the Ordinance prohibits the possession of any net, dredge or fishing line or tackle on the pearl banks, except such as are permitted by regulations.

(*e*) Aru. 264.
(*f*) (1873). Grenier D.C. Part III, 128. Aru. 265.

414. This right claimed by the Government of Ceylon is contrary to the general rule that the use of the sea and the right of fishing therein is open to all men and is not the exclusive property of the Crown or the State.

415. As regards the pearl banks within reach of cannon-shot or a marine league from the coast, the right is quite clear. It is settled principle of International Law that every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as a cannon-shot will reach from the shore, or at least three miles from the low-water mark. As to the pearl banks beyond the three-mile limit, (and the Ceylon banks are mostly far beyond this limit) the question is not free from difficulty. The general rule was declared by Lord Stowell to be that "in the sea out of reach of cannon-shot universal use is presumed. This (*i.e.*, the reach of cannon-shot or a marine league) is the limit fixed to absolute property and jurisdiction." In the "Franconia" Case (*g*). Lindsay, J., said: "Beyond this 3-mile limit, or at all events, beyond the reach of artillery on its own coasts, no State has any power to legislate, save over its own subjects or over persons on board ships carrying its flag." In *Gommel* v. *Commissioner of Woods and Forests* (*h*), in which the exclusive right of the Crown to the salmon fishery on the coast of Scotland was in question, Lord Wensleydale said: "that it would be hardly possible to

(*g*) R.V. Kean, 2 Ex. D. 63. Aru. 237.
(*h*) 3 Macq. 419-465. H.L.

extend fishery seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country—that which is within the dominion of the country by being within cannon range—and so capable of being kept in possession." "The rule of law," says Phillimore (International Law, I. p. 235), may now be considered fairly established, viz., that this absolute property and jurisdiction does not extend unless by the specific provisions of a treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot from the shore at low-tide (*i*). Whatever distance may be finally fixed, the general rule as to the common use of the open sea beyond that limit is subject to the principle that long and uninterrupted possession by one nation excludes the claim of every other. According to Vattel (I 286), although the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement and thus becomes a title in favour of the nation against another (*j*).

All treasure trove is the absolute property of the Crown.

416. All treasure trove is the absolute property of the Crown and the person finding the same is not, as of right, entitled to any portion of it (*k*).

(*i*) Aru. 235-237.
(*j*) Aru. page 235-238.
(*k*) Ord. No. 17 of 1887, Sec. 2.

"Treasure trove" means any money, coin, gold, silver, plate, bullion, precious stones, antiquities, or anything of any value found hidden in, or in anything affixed to, the earth, and the owner of which is unknown or cannot be found.

Duty of finder and of person who acquires possession of treasure trove.

417. It is the duty of every person finding treasure trove, and every person to whose knowledge the finding of treasure trove shall in any way come, and of every person to whose possession treasure trove shall in any way come, forthwith to report the fact of such finding and to surrender the treasure trove in his possession to the nearest Police Magistrate, if any such Magistrate resides within a distance of ten miles from the place in which such finding shall have occurred, or in which such person shall be at the time he acquires possession of such treasure trove. But if no such Magistrate resides within the distance aforesaid, such report and surrender shall be made to the nearest chief headman or to the nearest police officer not under the rank of sergeant, and it shall be the duty of such headman or police officer forthwith to give information of such report, and deliver possession of any treasure trove which may have been surrendered to him to the nearest Police Magistrate.—(*Section* 3 of 1891.).

418. Under the Roman-Dutch Law treasure trove is an ancient deposit which has been concealed during such a long time that the proprietor of it is not known and cannot be discovered. *See* Arunachalam's Civil Digest 228; For the Roman-Dutch Law, *see* Voet 41.1.11; Grot. 2.4.38; Van der L. 1.7.2. Cens. For 2.3.17.

419. Antiquities are defined in Section 2 of the Antiquities Ordinance No. 15 of 1900 as follows:—

Antiquities the absolute property of the Crown.

2. (3) The expression "antiquities" means and includes any of the following objects, lying or being or being found in the Island, which date or may reasonably be believed to date from a period prior to the annexation of the Kandyan Kingdom by the British; that is to say:—

(a) Statues and statuary, sculptured or dressed stone and marble of all descriptions, engravings, carvings, inscriptions, paintings, writings, and the material whereon the same appear, all specimens of ceramic, glyptic, metallurgic, and textile art, coins, gems, seals, jewels, jewellery, arms, tools, ornaments, and generally all objects of art and movable property of antiquarian interest.

(b) Temples, churches, monuments, tombs, buildings, erections, or structures and immovable property of a like nature or any part of the same.

420. Sections 3 and 4 of the Ordinance defines the rights of the Crown as follows:—

3. (1) No antiquity shall, by reason merely of its being discovered on land in the ownership of any person, be claimed to be the property of such person; provided that such person shall be deemed to be interested in the same, in accordance with the provisions of this Ordinance.

(2) The antiquities referred to in sub-Section (3) (b) of Section 2 shall be deemed to be the absolute property of the Crown, unless in any case some persons shall be the owner of the same.

(3) All undiscovered antiquities of the class referred to in sub-Section (3) (a) of Section 2, whether the same be lying on the

surface of the ground or be hidden beneath the surface, are hereby declared to be the property of the Crown, subject to the provisions of this Ordinance.

Antiquities not the absolute property of the Crown.

4. (1) On the discovery of any antiquities other than those referred to in Section 2, sub-Section (3) (b), one-third part thereof shall be taken by the Crown, one-third part by the owner of the land where the antiquities have been discovered, and subject to the provisions of this Ordinance, one-third part by the finder.

(2) Where the finder is himself the owner of the land where the antiquities have been discovered, subject as aforesaid, two-third parts shall be taken by him and one-third part by the Crown.

(3) Where any such antiquities as aforesaid are discovered on land belonging to the Crown, two-third parts of the same shall be taken by the Crown, and, subject as aforesaid, the remaining one-third part by the finder.

CHAPTER XXIII.

PREROGATIVE RIGHTS.

CROWN LANDS.

421. Sinhalese kings were for many centuries lords paramount of the soil. All properties were derived from them and reverted to them on *escheat*.

422. Sir Hugh Clifford in the course of a debate in the Legislative Council referred to the following authorities in support of the above proposition (*a*) :—

423. "First comes Robert Knox :—

" The country being wholly his the King farms out his land not for money but for service." Again :—"The land that is under his jurisdiction is all his with the people, their estates and whatever it affords or is therein." Anthony Bertolacci, a Civil Servant of high rank and long service, says :—"In the territories of Candy on the contrary, *where all the land belonged to the King by law*, and where it had all been granted, or *was still occasionally granted* by him to certain castes and families, under the imposition either of personal service to be performed, or of certain shares of the produce to be paid to him ; or where these lands were to be given to individuals *to be held only for life, subject to the will of the Crown* ; or as a compensation for executing the duties of certain public offices, and consequently was held only as long as the individual was continued in these offices,—the power of the great Adigars, Disawes and of the best and richest families of Candy was reduced to nothing so soon as it ceased to be supported by the favour and protection of the

Sir Hugh Clifford's Speech.

(*a*) Hansard 1905 page 165.

King." And again in a footnote in the same work he says :—"I have remarked that the great power which was possessed by the King of Candy originated in my opinion *from his being considered the only lord and proprietor of land in the Kingdom.*" There we have evidence beginning in the 18th century and going on to the beginning of the 19th.

Davy writes as follows :—All forests and chena were considered royal domains and could not be cut down or cultivated without express permission."

Mr. H. C. Sirr says in his "Ceylon and the Sinhalese" published in 1850 :—"All forests and jungles were regarded exclusively as a royal property and no one could either cut down timber or cultivate it without the King's express sanction." Sir John D'Oyly, in his *Notes* says :—"The possession of land is the foundation of the King's right to the services and contributions of the people." It is true that this refers only to cultivated land, if cultivated land was theoretically and even actually the property of the Kandyan Crown—and there are innumerable instances of it being resumed and re-granted—it is not an unreasonable corollary that waste and cultivated land, whether forest or chena was equally the property of the Crown.

424. Continuing, Sir Hugh Clifford said with reference to Ordinance No. 12 of 1840 (referred to in the next paragraph) :—

Therefore, Ordinance No. 12 of 1840 which called upon the people to adduce proof that their land had been granted by the King, and made it nominally revert to the Crown, in the event of that proof not forthcoming, was not in any sense a new law, but embodied the Kandyan Law as it was then thoroughly well understood by people who had such a deep knowledge of Kandyan customs as, I say without fear of contradiction, cannot be paralleled in our day.

They merely in passing that Ordinance crystallised the then existing law ; but, Sir, they did more than that, because, as I have said they gave to the Kandyan people something which they had never possessed in history.

I would draw attention to the fact that that principle of prescription, which is now said to apply to everyone who has taken up forest and chena lands by your leave or without your leave, is something which had no origin in the Kandyan customs at all, but was imported direct from Downing Street and was a free gift to Kandyan peasants.

In these circumstances I am unable to follow those who consider that Ordinance No. 12 of 1840 was introduced in ignorance or that it was in any sense an innovation on Kandyan Law except in the direction of new generosity extended to the Kandyan people.

Ord. No. 12 of 1840.

425. The rights of the Crown to forest, waste and unoccupied lands and chenas have now been defined by statute. The most important Ordinance dealing with this is Ordinance No. 12 of 1840. The Preamble and Sections 1, 6 and 8 are as follows:—

Preamble.

Whereas divers persons, without any probable claim or pretence of title, have taken possession of lands in this Colony belonging to Her Majesty, and it is necessary that provision be made for the prevention of such encroachments:

Information of Encroachment. Section 1.

It shall and may be lawful for the District Court, upon information supported by affidavit charging any person or persons with having, without probable claim or pretence of title, entered upon or taken possession of any land which belongs to Her Majesty, her heirs, or successors, to issue its summons for the appearance before it of the party or parties alleged to have so illegally entered upon or taken possession of such land, and of any other person or persons whom it may be necessary or proper to examine as a witness or witnesses on the hearing of any such information; and the said District Court shall proceed in a summary way in the presence of the parties, or in case of wilful absence of any person against whom any such information shall have been laid, then in his absence to hear and determine

such information; and in case on the hearing thereof it shall be made to appear by the examination of the said party or parties, or other sufficient evidence to the satisfaction of such District Court, that the said party or parties against whom such information shall have been laid hath or have entered upon or taken possession of the land mentioned or referred to in such information without any probable claim or pretence of title, and that such party or parties hath or have not cultivated, planted, or otherwise improved and held uninterrupted possession of such land for the period of *five* years or upwards, then and not otherwise, such District Court is hereby authorized and required to make an order directing such party or parties to deliver up to Her Majesty . . . . peaceable possession of such land . . . .

Waste Lands to be deemed the property of the Crown. Section 6.

All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate which can be only cultivated after intervals of Kandyan Provinces (wherein no *thombo* registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person of a *sannas* or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues, or services having been

rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts; and in all other districts in this Colony such chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause.

If party 10 years in uninterrupted possession of Government Land. Section 8.

Whenever any person shall have, without any grant or title from Government, taken possession of and cultivated, planted, or otherwise improved any land belonging to Government, and shall have held uninterrupted possession thereof for not less than ten nor more than thirty years, such person shall be entitled to a grant from Government of such land, on payment by him or her of half the improved value of the said land, unless Government shall require the same for public purposes, or for the use of Her Majesty, her heirs, and successors, when such person shall be liable only to be ejected from such land on being paid by Government the half of the improved value thereof, and the full value of any buildings that may have been erected thereon.

Waste Lands Ord. No. 1 of 1897.

426. Another Ordinance which deals with this subject is the Waste Lands Ordinance No. 1 of 1897. Section 24 of the Ordinance is as follows:—

Presumption as to forest and Waste Land.

For the purposes of this Ordinance:—

(*a*) All forest, waste, unoccupied, or uncultivated lands and all chenas and other lands which can be only cultivated after intervals of several years, shall be presumed to be the property of the Crown, until the contrary thereof be proved.

Occupation of a small portion of land not to create presumption of ownership of a large tract of land.

(*b*) The occupation by any person of one or more portions or parcels of land shall not be taken as creating a presumption of ownership against the Crown in his favour for any greater extent of land than that actually occupied by him.

Definition of unoccupied land.

(*c*) The term "unoccupied land" includes uncultivated land and all land which at the time of the passing of this Ordinance was not in the actual occupation of any person or persons, and also all lands which shall not have been in the uninterrupted occupation of some person or persons for a period exceeding five years next before notice given by the Government Agent or Assistant Government Agent under Section 1 in respect of the same.

427. In the Forests Ordinance No. 16 of 1907, Forest is defined as "Land at the disposal of the Crown" and "Land at the disposal of the Crown" is defined to include:—

Forest Ordinance No. 16 of 1907.

(1) All forest, waste, chena, uncultivated, or unoccupied land, unless proof is adduced to the satisfaction of the Court that some person—

Land at the disposal of the Crown.

(a) Has acquired, by some lawful means, a valid title thereto; or

(b) Has acquired a right thereto as against the Crown by the issue to him of any certificate of no claim by the Crown under Ordinances No. 12 of 1840 or No. 1 of 1844; or

(c) Is entitled to possess the same under a written grant or lease made by or on behalf of the British, Dutch, or native Governments, and duly registered in accordance with law.

(2) All lands resumed by the Crown under the provisions of "The Land Resumption Ordinance, 1887," and all lands which have been declared to be the property of the Crown by any order passed under "The Waste Lands Ordinances, 1897 to 1903," or to which the Crown is otherwise lawfully entitled (*b*).

428. In *Queen* v. *Habibu Mohammadu*, 1846, Ramanathan, 1843-1855, 129, the Collective Court explained "probable" in the preamble of Ordinance No. 12 of 1840 as "that which has more of evidence for, than against it, which is more likely to be true and substantial than false and unfounded."

429. In *Hamine Etena* v. *the Assistant Government Agent, Puttalam* (*c*), Bertram, C. J., explained the meaning of the terms "Forest," "Waste," "Unoccupied" and "Chena."

430. **Forest.**—Bertram, C. J., explains this term as follows:—

No definition of the word is contained in the Ordinance. There is an interesting discussion of its meaning to be found in a notable contribution to the

(*b*) Section 3. (*c*) 23 N.L.R. 289.

interpretation of the Waste Lands Ordinance, namely, the judgment of Sir Ponnambalam Arunachalam, as District Judge, in the Adipolla *Sannas* Case. (See the Appendix to his *Digest of the Civil Laws of Ceylon, pp. cviii et seq.*). He there refers to a case cited before him (*Wickremeratne* v. *Tenne*), in which Lawrie, J. seems to suggest that "forest" must be interpreted as meaning "virgin primeval forest." I agree with Sir Ponnambalam's observations on this point. "Forest" does not necessarily mean "virgin forest," nor can any satisfactory reason be given why it should have this artificial meaning here. The word "forest" is used in England in more senses than one. It may mean, as it is defined in the English Encyclopædia Dictionary: "An extensive wood or tract of wooded country; a wild uncultivated tract of ground interspersed with wood." In this sense "forest" may often include wild stretches of open moor land. On the other hand, it may be used in its more natural sense, the sense in which it is ordinarily used in literature and conversation, namely, a tract of country continuously or all but continuously covered with large trees. A forest in this sense is something at once more dignified and more extensive than a wood, but it is of the same nature.

He held that a tract of land six acres in extent was sufficiently extensive to entitle it to be described as a forest.

Jungle of 15 to 16 years' growth was held not to be forest. Matara Cases. 80.

431. **Waste Land** primarily denotes open country in which there are few or no trees. Bertram, C. J., says:—

I have not been able to discover the source from which this expression percolated into our legislation. We had appropriated it as early as 1840, so that the source is more likely to be English than Indian. Probably it dates from the era of the Enclosure Acts, when the question of the uitilization of "waste lands" seems to have been one of the subjects of general discussion. See *Jan Austeen*: *Northanger Abbey*:

"By an easy transition . . . . to forests, the enclosure of them *waste lands,* Crown lands, and Government—he shortly found himself arrived at politics." There are references in the nature of definitions in our own reports, but none of them are very full. Sir Ponnambalam Arunachalam, in the Adipolla *Sannas* Case (*p. cix supra*), says: "There is no evidence that any of these lands is not susceptible of cultivation, which I take it to be the meaning of 'waste.'" In *Assistant Government Agent* v. *Samarasinghe*, Browne, J. seems to define "waste" as land not susceptible to cultivation. He says he would not class the land in question as "waste": "When there is evidence that however steep is the lie of the land there, it would have been susceptible to cultivation." Ennis, J., on the other hand, in D.C. Chilaw, No. 5,053,[2] speaks of waste land as land which was put to no direct remunerative use.

The Imperial Dictionary defines "waste" adjectively as "not tilled or cultivated; producing no crops or wood," and substantively as "untilled or uncultivated ground; a tract of land not in a state of cultivation, and producing little or no herbage or wood." Webster's Dictionary apparently following a common authority (referred to as "Brande") defines "waste land as "any tract of surface not in a state of cultivation, and producing little or no useful herbage or wood." "Waste," however, in English law has a more definite significance. The waste or waste lands of a manor are lands which belong indeed to the lord, but which are left vacant, and over which the freeholders and tenants of the manor exercise commonable rights. The term does not imply absence of herbage, as the normal use to which the wastes are put is that of pasture. Neither, on the other hand, does it imply absence of trees. Other forms of waste are recognized, which include both forests and woodland. (See *Halsbury's Laws of England, article on "Commons," paragraphs* 1016-1018), and these forms of waste are subject to a right known as "estovers." *Halsbury (supra), paragraph* 1001, citing from Bracton, says: "Common of estovers

is the profit which a man has in the soil of another to cut or prune from his forest or other wastes, wood for his building, inclosing, and firing, or other necessary purposes." Nor does the term "waste" imply that the land in question is incapable of cultivation. The numerous Enclosure Acts of the 18th century, now so universally reprobated, were all Acts for the enclosure of manorial wastes for purposes of cultivation. Still, there appears to me no doubt that the term "waste land" in English Law (making all allowance for the specific forms of waste I have already mentioned) primarily denoted open country on which there were few or no trees. The best legal definition of "waste" is that of Watson, B., in *the Attorney-General* v. *Hanmer and others*. "The word 'waste' means desolate or uncultivated ground, land unoccupied, or that lies in commons. This is the plain and common acceptation of the word . . . . It lies open, desolate unoccupied, uncultivated . . . Again, in the description of lands or manors, the terms 'lord's waste' or 'waste of the manor,' are well known. The large open commons, within and parcel of the manor, over which rights of common or other commonable rights are exercised are 'wastes' of the manor. Moors, also, are strips of unoccupied land within the manor . . . . . The true meaning of 'wastes' or 'waste lands' or 'waste grounds of the manor is the open, uncultivated, and unoccupied lands, parcel of the manor, or open lands, parcel of the manor, other than the demesne lands of the manor." Making allowance for the fact that we have, unfortunately, no commons in Ceylon, I think the same meaning should be attached to the same phrase in our own Ordinance.

432. **Unoccupied Land.**—Explaining this expression the Chief Justice says:—

On this point we have the important case of *Meera Lebbe* v. *Fernando*, in which two eminent Judges, Phear, C.J., and Berwick, J., expressed the opinion that in the application of the presumption created by Ordinance No. 12 of 1840, the words "unoccupied" and

"uncultivated" must be interpreted as meaning unoccupied and uncultivated within living memory. Phear, C.J., indeed, said that this had been more than once held by this Court. I confess that I have some difficulty in appreciating on what grounds the Court thought that the words were to be so interpreted. Sir Ponnambalam Arunachalam apparently experienced the same difficulty in his judgment above referred to (see *page cxiii* of the work cited *supra*), and himself proposed a solution. The interpretation adopted in *Meera Lebbe* v. *Fernando*[1] appears to be inconsistent with an opinion expressed by Lawrie, A.C.J., in *Assistant Government Agent* v. *Le Mesurier*.[2] "Proof that the land now waste and unoccupied was occupied at a time before the memory of man does not rebut the presumption that it is the property of the Crown. What has to be ascertained is the state of the land shortly before the institution of the action." It is not clear whether Withers, J., concurred in this latter dictum, though he expressed no dissent. At any rate, until the matter has been considered by the Full Court, I think that, so far as the presumption under Ordinance No. 12 of 1840 is concerned, the principle laid down by Phear, C.J., and Berwick, J., must be considered as authoritative.

But under the Waste Lands Ordinance we are in a different position. That Ordinance itself explains the word "occupied" for the purpose of proceedings thereunder. By Section 24 (*b*) it assumes that just as the fact of a land being unoccupied creates a presumption in favour of the Crown, the fact of it being occupied creates a presumption of ownership against the Crown in favour of the occupier, and it declares that this presumption shall not apply "for any greater extent of land than that actually occupied by him." There is also a reference to "actual occupation" in paragraph (*c*) of the same section, and it seems clearly the intention of the Section that any occupation which is relied upon either as creating a presumption against the Crown or as preventing a presumption in favour of the Crown from arising must be "actual occupation." It is further provided by paragraph (*c*) that the term

unoccupied land is to include "all land which shall not be in the uninterrupted occupation of some person or persons for a period exceeding five years next before notice given by the Government Agent or Assistant Government Agent." It thus appears that for the purpose of the Ordinance land is considered unoccupied, unless it has been both actually and uninterruptedly occupied for a period of five years prior to notice. These provisions clearly make a very important difference.

Sir Ponnambalam Arunachalam, in the judgment above referred to, seeks to give a specific legal meaning to the word "occupation." He would connect it with the term "*Occupatio*" as used in Roman Law. "*Occupatio*" in Roman Law means a special act. It means the taking of land either by corporal seizure or by any act indicating intention to seize with a view to assuming possession *animo domini*. But it is clear that the word "occupation" in this Ordinance is not used in this special technical sense. It denotes not an act, but a continuous condition. Land is spoken of as being occupied in this Ordinance just in the same way as in ordinary parlance, a house is spoken of as being occupied when it has a tenant. If, therefore, we apply the test whether this land has been in actual and uninterrupted occupation of the plaintiff for a period of five years before notice, it is clear that the answer must be in the negative. The only occupation she speaks of is that which took place in consequence of the clearing of the two perches and the building of a hut thereon, for which she was prosecuted in the Police Court, and her occupation of that house, according to one of her witnesses, Christogu, only lasted two weeks. It seems to me clear, therefore, that the land was unoccupied land within the meaning of the Ordinance.

Apart from this test, there is another which might be applied. By Section 24 (*c*) the term "unoccupied land" includes all land which at the time of the passing of the Ordinance was not in the actual occupation of any person or persons. There is no evidence to show that this land was occupied at all in the year 1897, the

date of the passing of the Ordinance. On the contrary, there is positive evidence that it had been wholly abandoned.

Cases.

Unoccupied and uncultivated land means land unoccupied or uncultivated during the whole of living memory. Land adjacent to the cultivated land of the claimant and cultivated at the time of the action cannot be so described. Matara Cases, 80.

Land which is covered with water and which a man uses as a tank to irrigate his adjoining lands, ought probably not to be held to be waste or unoccupied so as to be presumed to be Crown land; but that ruling cannot be applied to land which is dry or unoccupied for nine out of every ten years. *Dandu Maricar et al* v. *Edirisuriya et al* (1910) 5 Bal. 39.

The words "unoccupied" and "uncultivated" as used in Section 6 are intended to designate land which has never been occupied or used for the purpose of cultivation within the reasonable limits of time to which ordinary evidence or the knowledge of persons who can speak to the matter extends. *Meera Lebbe* v. *Fernando* (1879). 2 S.C.C. 139.

Waste lands means land incapable of cultivation, such as sandy tracts. Matara Cases 80. Under Section 6 the character of waste and uncultivated land must attach to the land *generally* and not to any small portion of it, more particularly where the reason of such portion having been allowed to become waste is satisfactorily explained. Austin 223; I Thom. 25. In the case of chenas, the more the acts of chenaing the stronger the presumption. The presumption does not apply to the land cultivated with citronella and resting between crops. *The Attorney-General* v. *Babiyasa* (1897). Matara Cases, 80.

433. **A Chena** according to Sir John D'Oyly, is "high jungle ground in which the jungle has been cut and burnt for manure at intervals of from five to fourteen years for the purpose of cultivating dry grain (such as

hill paddy, kurakkan, &c.), and roots (such as manioc, sweet potatoes, &c.), and other vegetables, and which, after two or at most three crops, is abandoned till the jungle grows again." (*d*).

434. Bertram, C. J., in the case already referred to (*e*) explains *chena* as follows:—

A chena land, in my opinion, is land which either still is or within a reasonable period was under process of periodical cultivation. The mere intermittance of chenaing for some interval of time would not necessarily destroy this character. Whether it has done so in any particular case is a question of fact. But land which was at one time chena, but has now been abandoned and left to lapse into jungle, though it was once chena land, is chena land no longer.

435. In *the Attorney- General* v. *Appuhamy* (*f*) Schneider, J., explained the terms *chena*, and the terms *mukulana*, *watta*, and *lande*:—

The word "chena" which is used in the Ordinance is a term adopted from the Sinhalese villager, and its true significance must be sought for according to his use of the term. The villagers speak of high forest as "mukulana." When the trees in a "mukulana" or a portion of one are felled and the land cleared, whether for planting in rubber, tea, or

(*d*) (*A Sketch of the Constitution of the Kandyan Kingdom*, R.A.S. Transaction, Vol. III, Part II, 1833).

(*e*) 23 N.L.R. 289.

(*f*) 24 N.L.R. 112.

coconut, or for cultivation with the ordinary chena products, they will speak of the clearing as "hena." They will continue to do so until the tea, or rubber, or coconut begins to yield, when the land will be called "watta" (garden), with the name of the product prefixed as tea garden, rubber garden, coconut garden. If chena cultivation is practised, the chena will be cultivated at intervals of years which will range from seven to twenty years according to the nature of the soil or other circumstances. The land will be called "chena," although the jungle may be twenty years old. Such jungle is spoken of as "lande." If the land is abandoned for about forty and fifty years, and the trees assumed large proportions, it will once again come to be called "mukulana."

It is a fallacy to suppose that a land which was a chena loses its character as a chena immediately it is planted with some product such as tea or rubber. Once a chena it remains a chena till it is converted into a "watta," or reverts to a "mukulana."

Kandyan chenas—Presumption not limited to such chenas as can be cultivated after intervals of several years.

436. In *Hamid* v. *Special Officer* (*g*) it was held that the presumption that chenas within the Kandyan Provinces belong to the Crown, is not limited to such chenas as can only be cultivated after intervals of several years. The presumption was held to apply to a chena land which was capable of continuous cultivation with coconuts.

(*g*) 21 N.L.R. 533.

437. When this case went up in appeal. the Privy Council held (*h*):—

The character and quality of the chena lands must be determined by the actual use of the land itself, and not by its potential possibilities. Land that is chena land cannot be taken out of the category merely by evidence to show that by another method of cultivation, by the application of other processes in other hands, it might be cultivated in a different way.

They do not think that the expression: "of several years" has any application to chenas.

They think that the Section means that each enumerated head stands alone and unqualified, and the last of these is the "other lands which can only be cultivated after intervals of several years."

They are general words intended to gather up and to sweep into the ambit of this Section, such lands as might not be within the description of the preceding words.

Kandyan chenas—Title by prescription cannot be proved against the Crown.

438. It was held in *The Attorney-General* v. *Punchirala* (*i*) that in the case of chena lands in the Kandyan Provinces, title by prescription cannot be proved against the Crown.

Wood Renton, C. J., said (*j*):—

We are, therefore, brought face to face with the question whether by prescription a title under that Section can be set up against the Crown in the case of

(*h*) 23 N.L.R. 151.
(*i*) 18 N.L.R. 153; and 21 N.L.R. 51.
(*j*) 18 N.L.R. 153.

chena lands within the Kandyan Provinces. Apart from authority, the answer to this question would appear to me clearly to be in the negative. . . . . The natural interpretation of this language is that no title can be set up against the Crown to lands of the class dealt with in the Section, save a title by *sannas*, or by grant, or by payment of customary taxes, dues or services within the prescribed period. The word "deemed," as has often been pointed out in this Court, has not an invariable meaning. Sometimes it signifies "presumed," at other times it means "shall be taken conclusively to be." But the force of the clause in Section 6, depends, not solely nor mainly on the use of word "deemed," but on the express limitation of the kinds of title that can be set up to chena lands within the Kandyan Provinces which is introduced by the words "except upon proof only," and also on the mere presumption created by the rest of Section 6 as regards forest, waste, unoccupied, or uncultivated lands, and chena lands in all other districts in the Colony. . . . . But no prescription runs against the King either as regards his general prerogative or as respects the Kandyan Proclamation of Prescription. Whatever part, therefore, of the village still remains unconceded is the property of Government and to the Government consequently must the plaintiff's application be made.

De Sampayo, J., said (*k*) :—

Previous to 1870 it appears to have been thought that prescription was unavailable against the Crown at all, but in D.C. Colombo 1,246 (Vand. 59 page 83) it was decided that the Crown in Ceylon was in the same position as the *fiscus* under the Roman-Dutch Law, and that possession of land for a third-of-a-century gave title by prescription against the Crown. This has since been the accepted law on the subject. Section 5 of Ordinance No. 5 of 1852 provides that where the Kandyan Law is silent on any matter arising for adjudication within the Kandyan Provinces, for the decision of which other provision is not specifically made, the Court shall have recourse to the law on the like matter in force within the Maritime Provinces.

(*k*) 21 N.L.R. 51.

Consequently the law of prescription above laid down may be considered to have become applicable to the Kandyan Provinces. That being so, if a question arose as to title to "forest, waste, or unoccupied or uncultivated lands," within the meaning of Section 6 of the Ordinance No. 12 of 1840, or to chenas in provinces other than the Kandyan Provinces, the private claimant might rebut the presumption in favour of the Crown by proof of prescriptive possession for a third-of-a-century. But the question now is as to chenas situated within the Kandyan Provinces and that depends on the construction of special provision contained in the same Section with regard to them.

The provision is that such chenas shall be deemed to belong to the Crown, and not to be the property of any private person, "*except upon proof only* by such person of a grant or *sannas* for the same, ... or of such customary taxes, dues, or services having been rendered within twenty years for the same as have been rendered for similar lands being the property of private proprietors in the same districts." The words italicized by me make it quite clear that no other proof is allowable for the purpose. If that is the true construction of the provision of Section 6, as I think it is, then Section 5 of Ordinance No. 5 of 1852 above referred to has no effect as regards chenas within the Kandyan Provinces, because to hold that the law of prescription applied to such chenas would be to contravene directly the provision of Section 6 of the Ordinance No. 12 of 1840. If that were intended, the legislation would have been more explicit.

439. The question whether the presumption raised by Section 6 of Ordinance No. 12 of 1840 and Section 24 of Ordinance No. 1 of 1897 have reference to the condition of the land at the date of the action was raised in *Mudalihamy* v. *Kirihamy* (*kk*).

(*kk*) (1922). 24 N.L.R. 1.

A Bench of five Judges held:—

The presumption in favour of the Crown under Section 6 of Ordinance No. 12 of 1840 has reference to the condition of the land at the time when the encroachment was made, and not to the condition of the land at the date of the passing of the Ordinance, or at the date of an action regarding the title to the land.

The words of the Section should be construed as though they read: "All lands proved at any material time to be forest, waste, etc., shall be presumed to be the property of the Crown at that time until the contrary thereof be proved;" and, similarly, "all lands proved at any material time to be chena shall, if situated in the Kandyan Provinces, be deemed to belong to the Crown at that time."

Under the Waste Lands Ordinance the material time is the date of the issue of the notice under Section 1 (subject to the introspective effect of Section 24 (*c*). The presumption there enacted in Section 24 (*a*) is merely for the purpose of the Ordinance, and the object of any legal proceeding under the Ordinance is to determine whether the land in question at the date of the notice came within any of the categories to which the presumption applies . . . . .

There is nothing to prevent a plea of prescription being set up to chena lands in proceedings under the Waste Lands Ordinance.

In this case (*ll*), Bertram, C. J., said:—

The effect of Section 6 may be presented as follows:—

(1) All forest, waste, unoccupied or uncultivated lands shall be presumed to be the property of the Crown until the contrary is proved.

(2) All chenas

(a) *In the Kandyan Provinces* shall be deemed to belong to the Crown, and not to be the property of any private person claiming the same against the Crown, except upon proof by such person (1) of a *sannas* or (2) of payment of customary taxes.

(b) *In other districts* shall be deemed to be forest or waste lands. . . . . .

Presumption of Section 6 not confined to summary procedure under Sec. 1.

The Section 6 must be read in its context, and its context is the whole Ordinance. It is impossible to contend (though the attempt has been made) that the presumptions of Section 6 were intended to apply only to the summary procedure of the first Section. The Ordinance was a general enactment dealing with the whole question of encroachments of Crown property, and the Section was intended not only to declare or define the general law, but also to provide an instrument for enforcing certain particular provisions of the Ordinance. With regard to the state of the general law at the time, this is most conveniently stated by Lawrie, J., in what is generally known as the Ivies Estate Case. (*Appurala* v. *Dawson.*[1]).

> "It is different where the land, granted by the Crown is not in the present possession of any one, when it is forest, waste, unoccupied, or uncultivated. Independent of the Ordinance No. 12 of 1840, such lands are, in this Colony as in all countries where there is a Crown or Government, presumed to belong to the Crown or State. When the Ordinance No. 12 of 1840 enacted that all forest, waste, unoccupied, or uncultivated land shall be presumed to be the property of the Crown, it did no more than enact the law then existing. The effect

(*ll*) 24 N.L.R. 1. 1. (1892). 3 S.C.R. 1.

of the enactment was rather to restrict presumption than to create it."

"The British Crown, soon after the British accession to the Kandyan country, recognized the rights of its Kandyan subjects to own land, but it did not relinquish the right recognized by all the authorities on Kandyan Law to forest, wilderness unreclaimed, and untenanted by men, to mines of precious stones, metals, pearl banks, etc. To these the Crown has now, and always has had, right."

Lawrie, J., however, expresses the opinion, that as regards chenas periodically cultivated there is no presumption of Crown ownership independent of the Statute.

Middleton, J. in *Babappu* v. *Don Andris*[1] states the law somewhat differently. He says that forest lands were universally recognized as Crown, and that the Government of the day extended the principle to all those comprised in Section 6. I do not know the source of this opinion. Davy is cited in Mr. C. R. Cumberland's memorandum referred to in the case as saying (p.85): "All forest and chenas were considered royal domains, and could not be cut or cultivated without express permission."

I should prefer to take Lawrie, J.'s account as the most reliable statement of the law at the date of the enactment of the Ordinance. The history of the Ordinance itself and of its subsequent amendment I need not recount, as it is fully stated in the well-known judgment of Wood Renton, J. in *Babappu* v. *Don Andris* (*supra*). Viewed then in the light of this state of the law and of the history of the Ordinance, it is plain that, if Mr. Pereira is right, in so far as the Section affected to state the law, it fell far short of the law as it existed, and in so far as it affected to enlarge the scope of the law, it failed effectively to do so.

But it was not merely with reference to the existing state of the law that the Section was enacted, but also, as it seems to me, for the purpose of assisting the enforcement of two special provisions of the Ordinance, namely, Sections 1 and 8.

(1) (1910). 13 N.L.R. 273.

Section 1 as originally enacted contemplated the ejectment of squatters on Crown land even after the lapse of thirty years. Even this limit was not intended to apply to land of the descriptions mentioned in Section 6 (though by an inexactitude of drafting, rectified in the following year, effect was not given to this intention). In its final form the Section provided for the summary ejectment of trespassers from lands of this description, however prolonged the occupation. Section 6 would have been useless for the purpose of enforcing such a Section, if its presumptions related only to the state of affairs existing at the institution of proceedings.

So also as to Section 8. This conceded to occupiers of Crown lands without title certain rights, when the occupation had lasted more than ten years. But the proviso in the following Section excluded from the benefit of the concession all cases where the Crown lands occupied were of the categories enumerated in Section 6. To ascertain whether the lands occupied were of any of these categories at the date of the occupation, it would be necessary to go back ten years, and to prove that they were Crown lands at all, it would be necessary to apply the presumption with reference to that date. How then could the presumption be applied, unless it was capable of an antecedent operation ?

The consequences of adopting the interpretation suggested are thus so fundamentally fatal to the object of the Ordinance that we are forced to the inquiry whether there is not an alternative interpretation, which, even though less apparently simple and natural, should preferably be adopted—*ut res magis valeat quam pereat.*

There is such an alternative interpretation. It is that the words should be construed as though they read: "All lands proved at any material time to be forest, waste, etc., shall be presumed to be the property of the Crown *at that time* until the contrary thereof be proved," and, similarly, "all lands proved at any material time to be chena shall, if situated in the

Kandyan Provinces, be deemed to belong to the Crown *at the time.*" In view of the history and the object of the Legislature, I do not think it can be said that this interpretation is a forced one, and am of opinion it should be adopted.

Presumption applicable to actions outside the Ordinance.

440. The presumption could be relied upon in an action for declaration of title and damages which is outside the special proceedings provided in the Ordinance (*m*).

Section 6 of Ordinance No. 12 of 1840 applies to all chena lands in the Kandyan Provinces—even those in a royal village or Gabadagama (*m*).

Decisions. Section 6.

Evidence that land is situated within the limits of an old Kandyan Gabadagama does not raise a conclusive presumption that the land is the absolute property of the Crown; for there may be *paraveni* lands as well as *maruwena* lands within the limits of a Gabadagama. *Queen's Advocate* v. *Kirimenika* (1880). 3 S.C.C. 18; *Leana Aratchy* v. *Mukelemea* (1878). 2 S.C.C. 2.

The principle that the Crown is not to be presumed to be the owner of scraps of uncultivated land belonging to its subjects can find no application where the extent cultivated is a small portion as compared with the uncultivated land. *Don Andris* v. *Jameshamy* (1911). 14 N.L.R. 347.

A swamp, waste, or uncultivated land which is within the limits of, or adjacent to, cultivated land belonging to a private owner, will not be presumed to be the property of the Crown. *Saibo* v. *Andris* (1898). 3 N.L.R. 218.

The presumption mentioned in Section 6 applies in all cases of ejectment to which the Crown is a party, and is not confined to actions instituted under the 1st Section. *The Attorney-General* v. *Wanduragala.* (1901). 5 N.L.R. 98; 2 Br. 131.

The provision in Section 6 that "all chenas, etc., in the Kandyan Provinces shall be deemed to belong to Crown and not to be the property of any private person

(*m*) 24 N.L.R. 112.

claiming the same against the Crown" refers only to suits in which the Crown is a party. In a case between private parties, when the plaintiff admitted that he held neither *sannas* nor grant of any kind, and that no taxes or services had been paid or rendered for the same, it was held that the plaintiff was wrongly non-suited. [*Quære*, whether, comparing them with the first part of the clause, the words in Section 6 "and not be the property of any person claiming the same against the Crown" have not crept into the Ordinance *per incuriam.*] *Mulkaduwawe* v. *Rang Ettena.* Ram. (1843-55), 25; 1 Thom. 26.

Section 6 does not apply to lands belonging to the Daladá Maligáwa, for which no *sannas* were issued nor taxes paid. "It would be absurd to suppose that the presumption was intended to apply to lands in respect of which proof of the only means provided for its rebuttal was an impossibility." *Silva* v. *Kindersley* (1913). 17 N.L.R. 109.

Possession of chena under 30 years. Section 8.

441. It was held in *Babappu* v. *Don Andris* (*l*) that a person who possesses and cultivates chena (jungle) land for a period under thirty years does not acquire any right under Section 8 of Ordinance No. 12 of 1840. The effect of Section 2 of Ordinance No. 9 of 1841 is to exclude the application of Section 8 of Ordinance No. 12 of 1840 to any land referred to in Section 6 of that Ordinance.

442. Middleton, J., said:—

The privilege under Section 8 of Ordinance No. 12 1840 was reserved for those usurping cultivated cinnamon or perhaps paddy lands forming a part of the Crown domain, though not perhaps quite apparently. I think, therefore, that Section 8 will not apply to any lands of the description set out in Section 6, if there is clear evidence before the Court that they are lands derived by the parties or their predecessors in title from forest, chena, waste, or uncultivated lands of the

(*l*) 13 N.L.R. (1910) 273.

Crown. If the period of prescription of thirty years against the Crown has elapsed, they will, of course, fall into the category of private lands, and can be dealt with without reference to Section 8.

Wood Renton, J., said:—

Effect of Ord. 9 of 1841.

I would hold that the effect of Section 2 of Ordinance No. 9 of 1841 is to exclude the application of Section 8 of Ordinance No. 12 of 1840 to any land referred to in Section 6 of that Ordinance. There can be no doubt but that this is the strict and literal interpretation of the enactment in question, and I am not sure that its object in so providing cannot be surmised. Section 1 of Ordinance No. 12 of 1840 conferred on the Crown wide powers of resuming possession, by a summary procedure, of lands of which private parties had taken possession "without probable claim or pretence of title." Section 8 embodies the common law principle of the right of retention of lands by a *bona fide* possessor in a special form applicable to lands belonging to Government. Section 2 of Ordinance No. 9 of 1841 excludes from the scope of that remedy, as well as of provisions as to five years' uninterrupted possession in Section 1, the lands referred to in Section 6, which are of such a nature that a person entering upon them without grant or title from the Crown cannot be said to be a *bona fide* possessor.

As regards other lands, the summary remedy by way of information is applicable where there has been less than five years' uninterrupted possession. Where there has been five years,' but less than ten years,' uninterrupted possession, ejectment can be obtained only by ordinary process of law. Between ten years and thirty the occupier has the statutory interest created by Section 8. More than thirty years' uninterrupted possession of an adverse character will establish title by prescription against the Crown.

It will be observed that the repealed Section 9 of Ordinance No. 12 of 1840 provided that "nothing . . . . in the first clause of this Ordinance contained shall extend to any land referred to in the sixth." The result, if that provision had stood unamended, would

have been to prevent the Crown from summarily recovering under Section 1 land which is declared by Section 6 to be presumptively its property, and on which there could not well be an unauthorized entry by a private individual otherwise than "without probable claim or pretence of title." Section 2 of Ordinance No. 9 of 1841 prevents this result by limiting the exclusion of Section 1 from the lands referred to in Section 6 to "the provision touching prescription contained" in the former of these Sections. The Crown that is to say, is to be at liberty to exercise its summary powers under Section 1 against unauthorised possessors, "without probable claim or pretence of title," of any land deemed to be its property under Section 6, and in such a case the possessor cannot defend himself by setting up a plea of uninterrupted possession for five years or upwards. If this view is correct, it not only supplies us with a possible *raison d'être* for the enactment of Ordinance No. 9 of 1841, but points to the conclusion that Section 2 of that Ordinance means what it says. That conclusion is still further strengthened by the reference in Section 2 to public roads, streets, or highways which are vested in the Government on behalf of the public, and in regard to which there could not readily be any *bona fide* possession by private individuals. I think that the interpretation of Section 2 of Ordinance No. 9 of 1841, pressed upon us by the respondents' Counsel, viz., that it contemplates, in such a case as the present, the condition of the land not at the date of the original occupancy, but at the date of sale, is excluded not only by the history of the enactment, but by its terms and by the language of Section 8.

Section 8 of Ordinance No. 12 of 1840.

Section 8 of Ordinance No. 12 of 1840 confers on the possessor of Crown land a statutory interest. His rights either to a Crown grant or to compensation when the land is required for public purposes are however, subject to the condition that he shall be ready and willing in the former case to accept a grant and to pay the prescribed compensation and in the latter case to give up the land on the required compensation being tendered by the Crown.

(x) 6 Hals, 412. Secs. 633 and 634.

If he fails to comply with this condition the parties are remitted to their ordinary rights under the common law, *i.e.*, it will be competent for the Crown whether it desires land in the occupation of a *bona fide* possessor for more than ten and less than thirty years for public purposes or not to eject him by ordinary process of law subject to his legal rights to compensation for improvements.

It will, *a fortiori*, be competent for the Crown to avail itself of the same procedure subject to the same condition when the land is required for public purposes. *Perera* v. *Fernando* (1906). 2 A.C.R. 112.

Where a Crown grant conveyed an allotment of land but excluded the planter's share, it was held, that the *planter's share* here did not refer to a share in the trees only. By Section 8 the planter is himself entitled to a grant of land upon payment of half the improved value and this is a right which no alienation by the Crown can deprive him of. (8 N.L.R. 358). "This practically means that the planter is entitled to half the land as it stands, and it is extremely probable that the Crown grant recognised that claim and such recognition would naturally pave the way to a division of the land into two equal portions." *Davith Sinno* v. *Don Charles* (1908). 2 "Leader" 117.

Where a person has been in uninterrupted possession of the land belonging to the Crown for not less than ten years nor more than thirty years, such person acquires under Section 8 a permanent interest in the property; and he cannot be ejected therefrom unless the land is required for public purposes or for the use of His Majesty; and the Crown cannot by selling the land to a third party deprive the possessor of the benefit given to him by that Section. *Podda* v. *Pabuli* (1905). 8 N.L.R. 358.

Lawrie, J., held that the right to a grant from the Crown under Section 8 is personal to the cultivator and possessor himself and does not descend to his heirs, and further that though a grantee from the Crown had in fact not fulfilled the requirements of the above Section still the grant gives him good title to the land as

against one who might have been entitled to obtain but did not in fact obtain a grant. *Weeraratne* v. *Ensohamy* (1893). 3 C.L.R. 49.

The words "with intent" in Section 8 only govern the words immediately following down to the words "rights of ownership," and it makes no difference whether a person has already entered on the land or not, before the publication of the notice in the *Gazette*, if he does any of the acts mentioned thereafter.

A person who has already entered and begun to cultivate, etc., may continue to do so, but must not do any act which would alter the condition of things subsisting at the time the notice was published. *The Assistant Government Agent* v. *Don David Kulatunga* (1901) 2 Br. 13. the Government was entitled to payment of half the value at the time of actual payment and not at any date prior to it.—D.C. Kandy. 42, 211 Gren. (1873), D.C. 27. Section 8 applies only to those who possess and cultivate adversely to the Crown and without any acknowledgment of title in the Crown. 3 C.L.R. 49.

Waste Lands Ordinance.

An order made under Section 4 (1) of the Waste Lands Ordinance containing the "simple admission" for a claim does not give absolute title to the claimant. Drieberg, J., said: "When there is a simple admission of a claim the ruling in *Kiri Menika* v. *Appuhamy* 19 N.L.R. 298, has no application, and the claimant does not get absolute title by the order embodying the admission." *Dingiri Banda* v. *Podi Bandara* 29 N.L.R. 359. See also *Gunasekera* v. *Silva* 4. C.W.R. 226.

An order under the Waste Lands Ordinance was held to be no bar to an action *rei vindicatio* brought without the production of the order made in favour of the plaintiff. *John* v. *Seneviratna* (1917). 4 C.W.R. 388.

Where some claimants sold their interests before proceedings under Ordinance had begun, the decree in favour of claimants was held not to wipe out title of vendees, but to enure to their benefit. *Fernando* v. *Hendrick* (1920). 22 N.L.R. 370.

The Court has no power to grant the claimant a larger right than that claimed by him in the statement of claim. (*obiter*) "The proceedings in Court should be confined to the persons named in the reference, except in the special case contemplated by Section 8. 26 N.L.R. 501.

In view of the perilous consequences which follow on the publication of a notice under it, no irregularity can be waived. 3 N.L.R. 175. The Ordinance must be strictly though of course reasonably construed. Koch, 65.

The time for which the notice is to run is of the very essence of the notice, and non-observance of the requirements regarding it renders subsequent proceedings of no effect. 3 N.L.R. 175.

The word "enter" in sub-Section (1) of Section 22 does not refer merely to the original entry, but includes every entry subsequent to the publication of the notice prescribed in Section 1. 12 N.L.R. 71.

In Section 8 (1) the words "with intent" do not govern the whole of the succeeding clauses down to the end of the sub-Section, but only the words immediately following down to the words "rights of ownership." 5 N.L.R. 37.

The procedure to be adopted by judge, where several claimants appear and claim divers interests under divers titles and in mutual opposition. See 6 N.L.R. 129.

The mere fact that the land which is the subject of the reference has appeared to the Government Agent to be forest, etc., and that he has given the notice required

by Ordinance in respect thereof is not of itself sufficient ground of presumption that the land is such as falls within the scope of the Ordinance. 8 N.L.R. 265.

The nature of the proof required in rebuttal of the presumption created in favour of the Crown by Section 6 of 12 of 1840 is not impliedly repealed by Section 24 of 1 of 1897. 4 A.C.R. 69.

A summary of some of the important Sections of the Waste Lands Ordinance is given below :—

Government Agent to publish notice calling for claims. [§ 3, 5 of 1900.]

1 (1) Whenever it appears to the Government Agent that any land is forest, chena, waste, or unoccupied, it shall be lawful for him to declare by a notice that such land, in respect of which no claim is made to him within the period of three months from the date specified in such notice shall be deemed the property of the Crown and may be dealt with on account of the Crown.

Where no claim is made land to be declared property of the Crown.

2 (1) If no claim is made within the period of three months from the date specified in such notice, the Government Agent will make an order declaring such land to be the property of the Crown.

(2) Every such order shall be published in the *Government Gazette* and shall be final and conclusive, subject to the provisions contained in Sections 20, 21, and 26 hereof, and the *Government Gazette* containing such order shall be, subject as aforesaid, received in all courts of law in this Island as conclusive proof that the land mentioned in the order was at the date of such order the property of the Crown.

(3) Whenever within the said period of three months it is brought to the knowledge of the Government Agent that some person is interested in any land which is the subject of a notice under Section 1, and that such person is then absent from the Island and was so at the date of the first publication of such notice in the *Government Gazette*, the Government Agent shall not make his order declaring such land to be the property of the Crown until the expiration of a further period of six months, commencing on the expiry of the said period of three months.

Inquiry into claims.

3 (1) If in pursuance of the notice published under the provision of Section 1 (*a*) claim shall be made to any land specified in any notice or to any interest in such land within the period of three months, or in any case in which such period has been extended under the provisions of sub-Section (3) of the preceding Section within such extended period, the Government Agent must proceed to make inquiry into such claim.

4 (1) The Government Agent shall call upon the claimant, by notice in writing served upon him or left at his last known place of abode, to produce before such Government Agent the evidence and documents upon which he may rely in proof of his claim; if when so called upon the claimant does not appear, or does not produce such evidence and documents, or withdraws his claim, the Government Agent may then make an order declaring such land to be the property of the Crown, and the provisions of sub-Section (2) of Section 2 shall apply to such order. If the claimant appears and produces such evidence and documents, the Government Agent after considering the same and making any further inquiry that may appear proper, may either admit the whole or part of such claim or enter into an agreement in writing, which shall be signed by the Government Agent and the claimant, for the admission or rejection of the whole or any portion of such claim, or for the purchase of the whole or any portion of the land which is the subject of such claim, and shall embody such admission or agreement in an order.

(2) Every such order shall be published in the "Government Gazette" and shall be final and conclusive, and the "Government Gazette" containing such order shall be received in all courts of law in this Island as conclusive proof of the admission or agreement entered into under sub-Section (1). Provided that in any case in which the land or portion of land which is the subject of such admission or agreement is more than ten acres in extent, such order shall not be published in the *Government Gazette*, nor be final or conclusive unless the consent of the Governor has been obtained to the publication of such order, nor shall such admission, agreement, or order be of any effect until such consent has been given.

Proceeding when no claim has been made.

8 (1) If no statement of claim is made to the Commissioner or District Judge pursuant to the notice mentioned in Section 7, the Commissioner or Judge shall cause to be affixed on some conspicuous place on or near such land a notice to the effect that if the persons interested in such land do not, on or before a day to be therein mentioned, appear before such Commissioner or District Judge and state the nature of their respective interests in the land and the particulars of their claims, the Commissioner or District Judge will proceed to adjudicate such land to be the property of the Crown.

(2) If on the day named no such person appears in pursuance of such notice, the Commissioner or District Judge shall adjudicate such land to be the property of the Crown, and from such adjudication there shall be no appeal.

Limitation as to claims.

Provision for such claim if preferred within time.

20 No claim to any land or to compensation or damages in respect of any land declared to be the property of the Crown under the provisions of this Ordinance shall be received after the expiration of one year from the date on which such declaration shall have been made. If within such year any claimant shall prefer a claim to such land or to compensation or damages in respect thereof before the Commissioner appointed under this Ordinance for the province in which such land is situated or in the event of no Commissioner being appointed before the District Judge of the district in which such land is situated, and shall show good and sufficient reason for not having preferred his claim to the Government Agent or Assistant Government Agent as aforesaid within the period limited under Section 1 of this Ordinance, such Commissioner or Judge shall file the claim, making the claimant plaintiff and the Government Agent or Assistant Government Agent as aforesaid defendant on behalf of the Crown in the action, and the foregoing provisions of this Ordinance shall be applicable to the investigation and trial thereof.

If claim established and land sold, possession not to be given, but compensation. [§ 7, 1 of 1899.]

21 (1) In any case in which the land has been sold, if such Commissioner or Judge shall be of opinion that the claim of the claimant is established, such Commissioner or Judge shall not award the claimant possession of the land in dispute, but shall order him to receive from the Crown, by way of compensation, a sum equal to the price at which the land was sold by public auction or *otherwise*.

If claim established and land not sold, claimant to be placed in possession.

(2) In any case in which the land shall not have been sold, but shall have been otherwise dealt with on account of the Crown, and such Commissioner or Judge shall be of opinion that the claim to such land is established, such Commissioner or Judge shall order that the claimant be placed in possession of the said land.

Award to be in full satisfaction.

(3) The amount awarded under sub-Section (1) shall be in full satisfaction of the claim of the claimant, and shall bar any future claim on his part in respect of the land claimed.

Prohibition of building, clearing, &c., pending investigation. [§ 8, 1 of 1899.]

22 (1) After the date of the *Government Gazette* containing the first publication of the notice prescribed in Section 1 it shall not be lawful for any person, without the written consent of the Government Agent, to enter on any land specified in such notice with intent to establish a right of possession or occupation of such land or to exercise rights of ownership, or to build any house or hut or to form a plantation thereon, or to make clearings, for the purpose of cultivating such land or for any other purpose, or to cut or fell any trees upon such land, or to open, work, or to use any mine thereon, until such land has been declared not to be the property of the Crown.

Ordinance No. 8 of 1927 was enacted as it was "expedient to make immediate provision to prevent improvident alienation of unsettled land and to ensure the retention by villagers and other small holders of sufficient land for the support of themselves and their families."

The important Sections of the Ordinance are as follows:—

4 (1) No alienation of unsettled land made after the appointed day shall be valid unless it is made with the written consent of the Government Agent.

Provided that such consent shall not be unreasonably withheld, and that the refusal of such consent shall be subject to appeal to the Governor in Executive Council, whose decision shall be final.

(2) Consent to an alienation made after the appointed day but before the commencement of this Ordinance may be given retrospectively.

(3) A certificate by a Government Agent that the land described therein is not unsettled land shall for the purposes of this Ordinance be conclusive evidence but shall not be construed as an admission of the alienee's title.

(4) This Section applies only to land situated in the Sabaragamuwa, North-Western, Central, and Uva Provinces, and the Magam pattu of the Southern Province: Provided that the Governor in Executive Council may by Proclamation published in the *Gazette* exempt all or any of such land as aforesaid from the provisions of this Ordinance or extend the provisions of this Section to any area specified in the Proclamation.

5 (1) If any person—

(*a*) After the appointed day, enters on any unsettled land being in excess of ten acres with

the intent to establish a right to possess or occupy the land or do acts of ownership thereon; or

(*b*) Having, whether before or after the appointed day, entered on any unsettled land being in excess of ten acres, commences or continues after the appointed day to do any acts of ownership thereon;

the Government Agent may, if he thinks fit, and if after giving the person affected an opportunity of being heard he is of opinion that the claimant has no reasonable claim to the land and has entered thereon with a view to establishing a claim thereto cause notice to be served on that person requiring him to prove his title to the land and in the meantime to desist from doing any acts of ownership thereon.

(2) If any person served with notice under this Section commences or continues to do any act of ownership on the land specified in the notice unless and until—

(*a*) The Government Agent has issued a permit authorizing such person to do such acts of ownership; or

(*b*) The Government Agent has admitted the land to be private property; or

(*c*) The District Court or, if the value of the land is less than three hundred rupees, the Court of Requests has in a suit instituted for the purpose by the claimant against the Crown adjudged the land to be private property,

he shall on summary conviction by a Police Magistrate be liable for each offence to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment, and the Police Magistrate shall, if so requested by the Government Agent, cause possession of the land to be delivered to the Government Agent or person nominated by the Government Agent on behalf of the Crown.

(3) This Section applies only to land situated in an area to which it is applied by Proclamation by the Governor in Executive Council published in the *Gazette*.

7 A prohibition or restriction on alienation contained in a Crown grant or lease, whether made before or after the commencement of this Ordinance and whether the land included therein is or is not unsettled land within the meaning of this Ordinance, is hereby declared to be valid and effective according to its purport.

2 In this Ordinance unless the context otherwise requires—

"Appointed day" means the 10th August 1927, being the day on which the draft of this Ordinance was first published in the *Gazette*.

"Alienation" includes a mortgage and any disposition and a sale by the Fiscal or by order of any court and an agreement to make an alienation, but does not include—

(*a*) A will; or

(*b*) A lease for a term not exceeding three years; or

(*c*) A disposition by any person, whether for value or not, in favour of any of his issue or in favour of any person who, if the disponer died at the date of the disposition, would be an heir-at-law of the disponer; or

(*d*) A sale under a hypothecary decree to enforce a mortgage made before the appointed day; or

(*e*) A sale by the Fiscal under a seizure in an action instituted before the commencement of this Ordinance for a debt incurred before the appointed day; or

(*f*) A disposition giving effect to a notarially executed agreement made before the appointed day; or

(*g*) A decree for partition or sale under the Partition Ordinance, No. 10 of 1863.

"Unsettled land" means land which at the commencement of this Ordinance is chena, forest, waste, unoccupied, or uncultivated land and has been neither :—

(a) Admitted to be private property by a Government Agent or other officer acting under the authority of the Government or by the Government Agent or other officer acting under Section 4 of the Waste Lands Ordinance; nor

(b) Adjudged to be private property on a reference to the Commissioner or a District Judge under the Waste Lands Ordinance or in any other legal proceedings binding the Crown; nor

(c) Included in an order under Section 2 or Section 4 of the Waste Lands Ordinance; nor

(d) Included in a Crown grant or lease. "Government Agent" includes Assistant Government Agent.

3. Land which at the commencement of this Ordinance is unsettled land for the purpose of this Ordinance does not cease to be unsettled land by reason of its being subsequently admitted or adjudged to be private property or included in an order under Section 4 of the Waste Lands Ordinance or included in a Crown grant or lease.

443. A lucid account of the working of the Ordinances relating to Crown lands was submitted by the Land Settlement Officer to the Land Commission. It explains the present land policy of the Crown and will be found helpful when considering questions as to title and land settlement.

The recommendations of the Land Commission as to what policy should be hereafter adopted, are as follow:—

For "Notes on Land Settlement Operations," see pages 338, *et seq.*

Policy of Land Settlement.

110. We are appending the Notes on Land Settlement Operations furnished by the Settlement Officer and incorporated in Chapter VII. of the Third Interim Report of the Land Commission, and we recommend our readers to make a careful study of it before proceeding further with the present report. This note contains a succinct and lucid statement of the present policy and methods of the Land Settlement Department. It is clear that the bulk of settlements now made by the Department are equitable and not legal settlements. Under the existing presumptions of the law most of the claimants in the typical village described would get nothing. Under the present policy of equitable settlement they get pieces of land settled upon payments which represent considerably less than the value of the land.

111. A further result to the claimants in many cases is that in lieu of the admission by the Crown of somewhat vague and in many cases disputed claims to undivided shares in large tracts of land they get a good individual title to one block of land which is defined by landmarks. We all recognize that this

partition and consolidation of claims is of great benefit to all classes of claimants as well as to the community as a whole. We agree that in any changes we may recommend it is essential that this feature of land settlement should be retained and if possible even extended.

112. It is clearly stated in the note that at present the power of the Settlement Officer to effect such equitable settlements and such partition and consolidation of claims depends entirely upon the presumption of the law that the Chena lands are Crown. "It is in fact," writes the Settlement Officer "in this way that the presumtion is the foundation of all land settlement." This brings us to the presumptions of the law. This constitutes the root of the whole controversy which it is our object to settle.

113. Against this presumption that chena lands are Crown, it is contended that all the chenas in a Kandyan village belong to the villagers. It is therefore manifestly unfair to presume that these chenas are Crown property. This presumption should be removed or at least a means of legally rebutting it should be provided. Proof of possession by chena cultivation for 30 years should enable the possessor to prescribe against the Crown. Again though many of the settlements at present made by the Settlement Officer are admittedly equitable and beneficial to the villagers the objection to the present system is that such settlements depend entirely upon the good-will of the Settlement Officer. There is no legal safeguard that the law will not be administered harshly. This, it is felt is an unsatisfactory state of affairs from the point of view of the claimant and tends to produce a feeling of nervousness or apprehension which detracts from the value of unsettled land and has often resulted in the villager parting with it .

114. We realise that there is a good deal of justice in these contentions and we have carefully considered how far it is possible to meet the wishes of those who desire these changes. With regard to the presumption in favour of the Crown we are of opinion that it cannot be removed. Such removal would work

far more harm than benefit to the Kandyan villagers whom we desire to help, besides great mischief to the interest of the whole community. We have carefully examined and exhaustively discussed the second proposal, viz., legal prescription by periodical chena cultivation, and our conclusion is that theoretically attractive as the proposal admittedly is, its practical results would not be of benefit to the Kandyan villager. Most of the beneficial results of the present system of settlement would be lost to him and he would be exposed to serious dangers.

115. We next considered whether there was not some other way in which the feeling of uncertainty and apprehension referred to in paragraph 113 could be removed. We have seen that under the existing system settlement rests largely on an equitable basis. Can we give greater certainty and security to this equitable basis of settlement and remove those feelings of apprehension the results of which are bad ? We believe that this can be done and that therein lies the true solution of the problem. We recommend that the Settlement Officer should be empowered and required by law to make equitable settlements. Further the general principles upon which such settlements should be made should not be left to the discretion of the individual officer but should be laid down in instructions given to him by H. E. the Governor. We recommend the following instructions be issued :—

(*a*) Whenever the Settlement Officer is satisfied that chenas are claimed on *bona fide* ancestral "village title" and periodically cultivated by the claimants such chenas or an equivalent extent shall be settled on the claimant without payment except such as represents the cost of survey and settlement, and in the case of village claimants a portion of this also shall be waived and the total charge shall ordinarily be Rs. 10 per acre, shall never exceed Rs. 15, and may be reduced below Rs. 10 or waived altogether in special cases of poverty. Provided

that the children of villagers who have left their village to improve their position by education or otherwise shall in the settlement of their family claims be treated as villagers. In interpreting the meaning the word "periodically" regard should be had to the usual cycle of chena cultivation of similar lands in the same locality.

(*b*) None of the means of proof of claims which have in the past been taken into consideration by the Settlement Officer shall be held to be excluded by reason of these instructions, and all such means shall be taken into consideration by the Settlement Officer.

(*c*) Villagers who are the legal successors of any village claimant, whether belonging to the same village or not, are to be regarded as having similar equitable rights of settlement to such claimants and to be similarly treated.

(*d*) *Bona fide* purchasers from villagers who are not themselves villagers should be regarded as having the same equitable rights to settlement as their vendors. Provided that they shall be charged the full cost of survey and settlement, the rate for any locality being fixed by the Governor in Council and due publicity given thereto. Provided further that in the settlement of such claims the Settlement Officer will do his best by the use of his powers under the Ordinance to partition, consolidate, and transfer claims, to retain whenever possible sufficient suitable lands for village needs.

Notes on Land Settlement Operations.

(1) The settlement of the land means primarily the process of deciding whether the land is Crown or private property. The Land Settlement Department consists at present of a Settlement Officer and ten Assistant Settlement Officers. Each of these eleven

officers is also a Special Officer appointed under Section 28 of the Waste Lands Ordinance and acts therefore in a dual capacity. As Special Officer he deals with land under the provisions of the Waste Lands Ordinance, and, as Settlement Officer, he is in the same position as a Government Agent or Assistant Government Agent in disposing of claims to land outside the Waste Lands Ordinance.

(2) No land can be settled without being first surveyed. As a rule a whole village is surveyed in one plan and dealt with as a unit. The Surveyor-General sends the plan to the Settlement Officer, who arranges an inspection of the village. The Settlement Officer or Assistant Settlement Officer personally inspects every lot on the plan, and notes in a field book his observations upon the nature and age of the cultivation, the buildings, if any, the names of persons who claim the lot, and any other information which he considers may be useful. This inspection is never left to be done by headmen or other subordinates. A Settlement Officer is personally acquainted with every block of land which he is called upon to settle.

(3) Usually forest is surveyed in separate lots from chena, chena from young gardens, young gardens from old gardens. Fields, deniyas, owitas, and so on are also shown separately upon the plan. After his inspection and a study of all relevant records, *e.g.*, plans previously issued for any part of the area, Kachcheri files, &c., the Settlement Officer decides what procedure he will adopt regarding each lot on the plan. Occasionally he may order an amendment of the plan or he may leave action on any lot undecided pending some special inquiry. But leaving aside these special cases, the Settlement Officer will ordinarily make one of three orders one lot on the plan.

(i.) He may forthwith order that a lot be admitted as private property. This is invariably the order made on old fields, and gardens of thirty years or more. The same order may be made as regards owitas, deniyas, and small blocks of chena adjoining fields which the Settlement Officer considers as private

lands owing to their siutation. The admission of such lands as private property is in favour of no particular party, and in such cases no inquiry is made into claims. The Crown simply disclaims title without deciding in whom title is vested. When once a lot has been thus admitted private the Settlement Officer is not further concerned with it, and it is from his point of view "settled," that is, the question whether it is Crown or private is decided, subject to the subsequent approval of Government.

(ii.) He may order a lot to be advertised for sale or settlement outside the Waste Lands Ordinance. The commonest case in which this occurs is in gardens which are between five years old and thirty years old,* but there is no Crown grant.

(iii.) The Settlement Officer may order a lot to be dealt with under the Waste Lands Ordinances. This he does in the case of forests, chenas, waste, and unoccupied lands, and also in the case of lands recently brought under cultivation, provided that the cultivation is under five years old.

(4) The Settlement Officer next makes lists of—

(1) Lots admitted private.

(2) Lots to be advertised for sale or settlement.

(3) Lots to be dealt with under the Waste Lands Ordinance.

(5) On (1) no further action is required.

(6) As regards (2) the procedure is as follows:

(i.) The lots are advertised for sale or settlement in the *Gazette* and copies of the sale notice are sent to the claimants. On the sale day the claims are considered. If the land has permanent cultivation, it will in normal cases be settled upon the planter or occupant at a reasonable figure. With villagers this is usually about Rs 20 per acre.

* And therefore not liable to be dealt with under the Waste Lands Ordinance, see Section 24 (*c*). The Settlement Officer has authority to settle these lands by sale to the claimants under G.O. 812.—L. H. E.

(ii.) Private disputes frequently arise at these sales, each of several parties claiming the land adversely to one another. The Settlement Officer hears all the parties and gives his decision, settling the land upon the persons and in the shares which seem to him right. This would be impossible were it not for the fact that land is presumed to have been Crown when planted and Crown now. If two claimants dispute a land, if the Settlement Officer thinks that Heen Banda's claim is just and Ram Banda's unjust, the only way in which he can, as a last resort, enforce his decision is by having the power to say "The land is neither Heen Banda's or Ram Banda's. It is Crown land and the Crown will now settle it on Heen Banda." It is in fact in this way that the presumption is the foundation of all land settlement.

(iii.) When lands are sold outside the Waste Lands Ordinance Crown grants are issued.

(7) Turning now to lots to be dealt with under the Waste Lands Ordinance:—

(i.) A notice under the Waste Lands Ordinance specifying all the lots and calling for claimants to submit their claims within three months is published in the *Gazette*. It is also published in certain newspapers and by beat of tom-tom in the village concerned. Copies of the notice are sent to all persons who are known to claim any of the lands.

(ii.) When three months have expired, if there are no claimants the land can be declared Crown by final order. But if there are claimants they are summoned to attend an inquiry either in the village or close to it. Evidence of claim is taken and deeds or other documents examined. After studying the evidence the Special Officer settles with each claimant individually and settlement may take various forms.

A. The Special Officer may simply admit private in favour of no particular person the lot or lots claimed. In this case all disputes among claimants *inter se* remain unsettled.

B. He may entirely reject the claim and call upon the claimants to sign a withdrawal. If the claimant is not prepared to sign this the Special Officer must refer the claim to Court.

C. He may compromise the claim by settling the whole part of the land claimed upon the claimant at a certain rate of payment per acre, or in some cases free of any payment. Such compromise is embodied in a written agreement signed by the claimant and the Special Officer. In such cases a Final Order and Title Plan are issued which confer absolute title upon the claimants, and prevent dispute *inter se*.

(8) Methods of settlement vary with the conditions of each district and with the peculiar circumstances of each case. But it may be useful to describe shortly a typical (imaginary) case of settlement in the Ratnapura District. The chenas and forest in a village are brought under the Waste Lands Ordinance. The chenas may in our imaginary case comprise a continuous tract of 400 or 500 acres of land all surveyed as one lot. Fifty or a hundred different chenas may be stated by the villagers to be comprised in this one block. The extent and situation of each chena may be given roughly by the villagers but any exact boundaries between them are wholly lacking and villagers frequently disagree as to where any particular chena is. Several hundreds of claimants may claim land within this block.

(9) Chena lands within the block have been chenaed by perhaps three or four different "panguwas" or families. Each panguwa claims by name certain chenas which may or not be contiguous. Exactly where each chena is and what its extent is can as a rule only be vaguely determined, since different claimants give different and inconsistent accounts of it.

(10) The Special Officer must first come to some conclusion as to the position and extent of lands which have been chenaed and are claimed by each panguwa. When this has been decided a pedigree of each panguwa must be made out from the evidence of the vlilagers regarding their ancestors. Such pedigree, which the

Settlement Officer has to gather as best he can from the evidence of the village elders occasionally assisted by the perusal of old deeds and other documents, often extend back 100 years or more. The object of making this pedigree is to ascertain the shares which the vilagers claim in the panguwa. Thus if Banda is shown in the podigree as having a 7/152 share of the panguwa, this means that he claims an undivided 7/152 of all the chenas which are the chenas of this panguwa.

(11) It is frequently impossible to be certain of the correct shares. Disputes arise among the claimants *inter se* regarding the pedigree. One branch of the family denies the right of another branch, because it denies the paternity of some alleged ancestor. Innumerable private disputes of this kind are encountered and have to be settled. The Special Officer has to do the best he can in coming to a decision as to what share he will credit to each claimant.

(12) He must next decide what extent of land he will divide among the panguwa. In many cases he decides to divide up the whole extent of claimed land—often several hundred acres. He may, if the extent appears excessive, decide on a smaller extent. If the extent to be divided is 300 acres and if Banda's share is 1/100, Banda will get 3 acres. The Special Officer discusses with Banda the best situation for him to have his 3 acres—perhaps adjoining his garden or his fields—and makes a sketch from the plan indicating the extent, situation, and boundaries of the 3 acres which Banda is to receive. Banda may be asked to pay for this 3 acres at, say, Rs. 20 per acre and an agreement is signed by him and by the Special Officer whereby if he pays the Rs. 60 in a certain time he will be declared by final order the purchaser of the 3 acres shown in the sketch, and whereby in consideration of receiving this divided block of 3 acres he gives up and withdraws his claim to all the rest of the land. The same procedure is adopted with each claimant. One man may get 1 acre, and another 3 acres, another 10 acres, and so on. The blocks to be thus settled upon each person are then surveyed and final orders are issued declaring various

claimants entitled to the various blocks. Thus one effect of such a settlement is to substitute individual ownership of definite surveyed separate blocks for a vague claim to a probably disputed undivided share in a large tract.

(13) Sales by the villagers to speculators cause great difficulties. In a recent case a villager's share appeared to be about 12 acres. But in 1912 he had signed a deed selling 20 acres to a speculator A. In 1914 he sold another 25 acres to B. In 1920 he sold 600 acres to C. At the settlement inquiry in 1926 A claimed 20 acres, B 25 acres, and C 600 acres. And the villager who sold came forward and claimed "Whatever is left out of my share." Such claims have to be heavily cut down.

(14) The payment may be less or may be more than Rs. 20 per acre. In the case of villagers it is practically never more, and it is often reduced to Rs. 15 or less and in some cases to nothing. Outside speculative purchasers of village title are charged higher rates, according to the circumstances of each case.

(15) In the above example of a settlement under the Waste Lands Ordinance it is assumed that the claimant produces no proof of private title. Often, however, some such evidence is produced, and the Settlement Officer makes every search for it. The effect given to such evidence may be shown by an evidence of private title is found covering 25 acres, the Special Officer would be prepared to admit 25 acres private. If Banda's share were 1/25 he would thus be entitled to 1 acre free. As a rule, however, claimants prefer to buy additional land. The Special Officer might, therefore, offer to settle on him 1/25 of 100 acres —4 acres, of which the 1 acre would be allowed free and he would pay Rs. 20 per acre for the balance 3 acres. In other words, he would pay Rs. 60 and get 4 acres.

(16) In cases where a *sannas* is produced or where a village is claimed as *nindagama*, or where any other special claim is put forward, each claim is dealt with according to the circumstances of the case.

(17) In rejecting or settling by compromise any claim under the Waste Lands Ordinances the Special Officer has no legal power to enforce his settlement. The claimant may sign the agreement offered to him if he agrees to it. If not, the Special Officer is required to refer the claim to Court. The legal presumption that waste land is Crown, unless the contrary is proved, gives the Special Officer the only actual hold he has over the settlement of claims. In the last resort if claimants refuse to settle disputes between themselves or with the Crown, this presumption can be used. Thus if Banda attempts to deprive his sisters or his dead brother's widow and children of their share-as frequently happens—and insists that the whole share belongs to himself, the Special Officer can point out that actually the land is at the disposal of the Crown. Without the presumption in favour of the Crown such settlements would not be carried out.

(18) The same applies to disputes between speculators and villagers. It frequently happens that a speculator buys up a small share and then attempts to grab the whole of the chenas and oust the villagers. The Special Officer can say to him :—"if you refuse to sign an agreement accepting your actual share your claim must be referred to Court and I shall urge the presumption that the land is at the disposal of the Crown." Without the presumption the Special Officer would be powerless in such a case, and the speculator, instead of getting some approximation to his true share, would grab a whole village.

(19) Settlements made under the Waste Lands Ordinances are carefully scrutinized in the offices of the Controller of Revenue and the Attorney-General before they are submitted to Government for approval and sanction.

(20) When every lot in the plan of a village has either been admitted private, or sold and paid for outside the Waste Lands Ordinances, or dealt with under the Waste Lands Ordinances, then settlement operations in the village are concluded and the Settlement Officer ceases to have any further control of the village, which is returned to the charge of the Revenue Officer.

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