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# The Revised Reports of Ceylon.

Edited by

**Isaac Tambyah,**

Advocate of the Supreme Court of the Island of Ceylon.

**Vol. I.**

May 8, 1820] [Ram. Rep. 1820. pp. 1.

Present: Giffard, C. J., and Byrne, J.,

No. 3390.

*Van Der Straaten* v. *De Latre.*

**Heir.—Meaning of in Civil Law and English Law—Liability of heir for ancestor's obligations—Plea of compensation—What may not be set off—Meaning of liquidated debt.**

1. By the Civil Law, the *heir* inherits all the rights and all the obligations of the testator or intestate: he is considered as one person with him and, except in contracts which can only be executed by the individuals contracting, or in cases where the obligation arises ex deticto, the heir is liable though not named in the obligation entered into by the person from whom he inherits.

2. A claim of damages and penalties is always held to be unliquidated, until settled either by a suit at law or the admission of the party.

The facts of the case appear sufficiently in the judgment.

## Judgment.

*Per*—The Supreme Court of Judicature:—

This is a suit brought by the official administrator of the estate of Kronenberg, deceased, to recover Rds. 797.2, being the balance of an account due by the defendant to the intestate Kronenberg. Interest is also demanded by the administrator.

It appears that the intestate had, in pursuance of a contract entered into by him with the defendant, as de-

puty Commissary General, furnished him with beef for the troops in Colombo, from the 31st of December, 1818, to the 24th day of January, 1819, on which day the intestate died. On that day, the accounts stood against the defendant, making him debtor in Rds. 2,297.2.

The plaintiff admits a receipt of Rds. 1500 in liquidation of this balance, on the 26th September, 1819, and he claims interest on the old balance for the interval between January and September, and on the reduced balance of Rds. 797, from September 26th 1819. This is the substance of the plaintiff's libel.

The defendant being an officer acting on behalf of His Majesty's Government, His Majesty's Advocate—Fiscal has been instructed to undertake his defence.

By that defence the ground of the demand, or the amount of beef actually furnished, is not denied, but it is insisted that the intestate having entered into a contract to furnish beef to the troops, under certain conditions of penalty, and his securities having, after his death, failed to execute the contract, the damages and penalties thereby incurred should be set against the present demand.

These damages, according to the calculation in the answer, would have amounted (for the difference between the amount of beef furnished 29th January, 1819, and that supplied from other persons) to Rds. 672; and on the same day a penalty of Rds. 5000 for breach of contract, and on 5th and 6th of February, another penalty of Rds. 5000: being in the whole, damages and penalties Rds. 10672 as against the contractor; and for not urging the demand of this sum the Advocate—Fiscal claims credit for the forbearance of Government.

The case then is that the demand made by the administrator of the intestate's estate for the principal sum of Rs. 797 with interest, is met by a counter demand—a plea of *compensation*, as the Civil Law terms it—for Rs. 12,500.

To this the plaintiff replies by insisting that the contract ceased with the life of the intestate, and that it was so considered by the defendant, who, in February, 1819, entered into a new contract with another person for supplying the troops with beef. And the plaintiff relies upon the fact that the word *heirs* not being introduced into the contract, the *heir* of the intestate is not bound by it.

But this position of the plaintiff I hold to be quite erroneous; it arising from using the word *heirs* as it is employed in the Law of England; but in the Civil Law its signification is far more extensive. By the Law of England, the *heir* is the person who succeeds as next of blood to REAL, as distinguished from PERSONAL property; such an *heir* can only be bound by such obligations as can affect the property he inherits, and then only perhaps when specifically named. By the Civil Law, the *heir* inherits all the rights and all the obligations of the testator or intestate; he is considered as one person with him, and, except in contracts which can only be executed by the individual contracting, or in cases where the obligation arises *ex delicto*, that is to say, from wrong or injury done by him, the *heir* is liable though not named, in the obligation entered into by the person from whom he inherits. Substituting the words "executor or administrator," for "*heir*," the law of England is the same. By it executors or administrators, though not named, are liable on the contracts of the deceased, so far as their assets reach. *1 Inst 209, 3Bac. Ab. 95 Off. Ex. 117.*

The principle is fully laid down by Van Leeuwen in his *Censura Forensis*, Pt. 1. 3. 1. § 1. "*Heirship*" says he, "is the succession to all the rights of the deceased, and this comprehends both his advantage and disadvantage, as well as that existing against himself and towards others: from which, however, are excepted personal *actions* and personal duties which expire with the person."

If the case stood on this ground alone, plaintiff's replication would fail. It is therefore necessary to consider the effect of the defendant's plea, which if available against the deceased must on the principle thus laid down, be available against the plaintiff, who is his heir in the sense of the Civil Law.

The plea of *compensation* is analogous in almost all respects to that of "*set off*" in the law of England. "Compensation," says the Digest, "is a mutual acquittance of the debt and credit," *L. 1. ff Compens.* It is therefore, necessary that mutual debts should exist between the plaintiff and defendant.

The debt claimed by the plaintiff is admitted as having accrued to the deceased in his life. That claimed by the defendant consists of damages and penalties not incurred during the lifetime of the deceased.

This, though the first point of difference between the claims, and certainly tending to destroy the notion of mutuality, might yet be overlooked in the consideration that the plaintiff is bound to fulfil the contracts of his intestate and is in effect in law one person with him.

But there is another principle, governing the law of compensation and adopted into the law of set-off, which requires to be attended to. The debt opposed by way of compensation must be *liquidated*. "We direct" says the law, "that compensation may be pleaded, if the cause whence it arise be liquidated, and not involved in controversy." *L. Fin sec.* 1 *Cod. de Compens, L. 4 Tit. 31. Sec. 14*—1.

We cannot say that in this case the claim of damages and penalties is, in the language of the law, *liquidated*; such a claim is always held to be unliquidated, until settled either by a suit at law or the admission of the party. And this is fully explained by Van Leeuwen, *Censura Forensis*, pt. i, 4, 36 sec. 3: "Compensation must be debt liquidated, "pure and existing." "A liquidated debt is that which is founded upon clear right," says the Institute, "as upon the confession of the opposite party or where the question is one merely of law, and the fact of a debt is not denied"—*Sec.* 30 *Instit. de action.* And the word *pure* is also explained by the Institute, where it is opposed to *conditional.—L. 3, lit, 16, de verb oblig.* "Every stipulation is either pure, or for a time certain, or under condition."

Of the claim now made, of damage for a loss sustained by the purchase of beef at an advanced price to supply the deficiency of the contractor, and of penalty for the breach of contract, it cannot be said that it is either *liquidated* or *pure*, that is to say, free of all condition,—it is on the contrary in every point of view *unliquidated*, and it depends wholly on the condition upon which it is founded, the neglect of breach of contract.

It is fortunately unnecessary in this case to advert to the inconvenience which may result from the official adminstrator being bound to continue contracts like the present entered into by intestates; the interest which the securities must feel in carrying on the contracts to save themselves, will probably prevent its becoming at any time a serious mischief: but as the law stands, and

as we must declare it, it seems a hard alternative to oblige him, the Officer of the Court, either to enter into pursuits utterly inconsistent with his other duties, or to leave the estate under his administration liable to losses, from the neglect or misconduct of those over whom he can have no control.

This is however at present out of the question. We have only to consider the effect of the plea, and upon the whole it is my opinion that the plaintiff is entitled to recover in the present suit; the plea of compensation offered by the defendant not availing in point of law.

*Judgment for the plaintiff with the interest claimed.—*

Aug. 18 and 29. 1893] [2 S.C.R.105.

Present: Lawrie, A. C. J., Withers and Browne J. J.,

D. C. Negombo, 559.

*Pulle* v. *Pulle et al.*

**Heirs.—Liability for the debts of the deceased—Heirs in possession of the estate—Taking the benefit by active steps.**

Where on the death of a debtor there are heirs left, such heirs are liable to the extent of the benefit they are entitled to when by active steps they take the benefit. The creditor must aver and prove, to make minors liable for the relations' debt, not merely relationship and presumed benefit but must prove acts of possession and enjoyment of the deceased's property.

*Wendt* for appellant.
*DeSaram* for respondents.

## Judgment.

**Browne, J.**—I regret I cannot agree in dismissing plaintiff's action. Plaintiff sues to recover Rs.284 as due to him on a notarially attested Tamil-written document stamped with a 50 cent stamp, which the plaint calls a bond. A question having been raised in argument as to whether this is a bond or the amount is otherwise now irrecoverable, I hold, in the light of the decision reported in *Wendt* 296, and 1. *C. L. R.* 40, that the instrument falls within the class specified in Section 6 of Ordinance 22 of 1871, and that the action has been instituted within time.

Plaintiff avers his obligor died about five years before action brought without paying this debt and left "as heirs in possession of his estate and effects which do not exceed Rs 400," two persons, Solome the wife of 1st defendant, and 2nd defendant who had married one Juliana, who pre-deceased the debtor, leaving her surviving her children Inacia and Lucia, the 3rd set of defendants, minors, sued by their father 2nd defendant as their guardian *ad litem*.

Plaintiff does not set out the relationship of these defendants to his debtor, but in his evidence he deposes that 1st defendant is son-in-law of the debtor, wherefrom it may be assumed to be possible that Salome and Juliana were daughters of the debtor. No doubt the heirship should have been more clearly particularized, but inasmuchas the defendants have not denied they are heirs and the usual form of decree in these cases affects only the debtor's property and not the defendants, personally, same so far as they have profitted thereby, the plaintiff should not, in my opinion, fail thereby to obtain his decree.

Paintiff further particularizes the lands to have been the property of his debtor, and says that all the defendants are in possession of them—that 2nd defendant has been appointed guardian *ad litem* over his minor children, and that the amount due to him on this bond is only Rs. 284.

Defendants filed an answer, that in my judgment discloses no defence whatever to plaintiff's claim. They do not meet plaintiff's averments, but deny the debtor "executed any bond" or died "possessed of any property of which they are now in possession as his heirs and legal representatives", and finally they aver that before his death the debtor "gifted all his lands to the defendants by deeds, and, therefore, they are not liable for his unsecured debts." To me this very admission, in so far as it negatives the existence of other property out of which the debt could be paid, confirms plaintiff's averments, and assists to show his right to maintain this action.

For, is not the question this? What is a creditor of a petty Rs. 250 debt like this to do when his debtor dies leaving Rs. 400 worth of property, and no more, and some persons, who may be his children, but are not denied to be heirs, are in possession thereof? We may excise from the judgment of this court, reported in 8.

S. C. C. 14, all that was there ruled as to necessity for administration, for since the passing of our Civil Procedure Code it would be even less necessary that this creditor should administer a Rs. 400 estate to recover Rs. 250 than that a mortgagee creditor should do so, and the latter in a case of this kind would be so excused under the provisions of section 642. There will remain then the other portions of that decision which point out that an heir is liable to the extent of the property of the deceased which has come into his possession if it be proved, what is here admitted, that the deceased died possessed of property, and that the property came into the possession of and was appropriated by the heir. I regard this case with such an ineffective answer as has been filed, as similar to 57840 District Court Colombo, *Van Der Straaten 158*, and that decree should be entered against all who are in possession in the same form as was entered in 5805 District Court Kegalla 7. S. C. C. 180, and 52983 District Court Galle Supreme Court Min. 4th March 1887 (save the last sentence therein). A minor is, I humbly conceive, as capable of receiving benefit in his every day life out of a fructuous estate as an adult, though, of course, in a lesser degree, proportionate to his younger years, and it needs he should be duly represented in order that the creditor should by appointment of a guardian *at litem* of any minor heirs obtain a valid decree, which will reach the debtor's assets in his or his guardian's hands.

Another question, however, might here arise, if defendants should properly plead that which plaintiff in 6. S. C. C. 13. admitted against himself, that they are not only heirs of the debtor but are donors from him of the lands of which they are admittedly in possession. No doubt had plaintiff been aware of those deeds he should have set them out in his plaint and challenged their efficacy to protect the donors on such grounds as he might advance, or had defendants disclosed and pleaded them with precision in their answer he might have replied thereto so as to raise the issue which Dias, J. in the decision under reference held, had not there been duly raised. As the pleadings now stand, I do not see that it would be open to defendants to lead proof of what they have not duly and fully pleaded.

While I should set aside this decree, holding that there had been sufficient proof of the debt and that decree could be entered "against the estate of the deceased" (57,840 D. C. Colombo, *ut Supra*) i. e., in the

later form of which I have referred, I would give liberty to defendants to amend the 3rd paragraph of their answer on the usual terms within a specified time and the case to proceed to trial thereon, or else that judgment be entered against the defendants for the amount claimed, such judgment to be enforceable if necessary by levy on the property of the deceased Susey Fernando Vengadashi, in the hands of the defendants, or any of them, but not otherwise.

**Lawrie, A. C. J**;—This action is instituted against five persons as "heirs in possession" of the estate of the deceased debtor of the plaintiff. It is plain from the averments, and from the evidence, that out of the five defendants, two—the two men (husbands of Salome and Juliana)—are not heirs or next of kin of the deceased. Whatever be their liabilities it is not as heirs in possession. Of the remaining three, two are stated to be minors. It is not averred in the plaint, nor was it proved at the trial, that these minors by any act of theirs had entered on the inheritance. I do not say that a minor by his duly appointed guardian, or even a minor himself when he reached years of comparative understanding, may not enter on and take possession of land or goods which belonged to a deceased ancestor, but I say, that the plaintiff in this case has neither averred nor proved any acts of the minors or by a guardian which, in law, would make them liable for the debts of the deceased relative.

The remaining defendant is Salome. What relative she is to the deceased the plaintiff does not take the trouble to tell us in his plaint nor does he aver what is the name or value of the lands Salome is in possession of.

In affirming the judgment, mainly for the reasons given by the learned District Judge, I do not feel that I am abridging the rights of creditors of small sums whose debtors die before payment. Now, as always, the law is, that the mere fact of relationship, of being the next of kin, the son, the guardian, nephew, cousin or father, or uncle, of one who dies, will not make men liable for their relations' debts. They were not liable when the debtor was alive; they are not liable when he is dead; but if, by the death one or more of the next of kin is entitled to benefit, and by active steps takes the benefit, he becomes liable to the extent of the benefit either as an *executor de son tort* or as an heir, who has

entered on the inheritance. But, to make minors liable for the relations' debts, the creditor must aver and prove something more than relationship, and even something more than presumed benefit, he must prove acts of possession and enjoyment of the deceased's property sufficient to render even minors liable.

Again (as from the pleading and proof seems to be the case here) if the deceased debtor before his death dispose *inter vivos* of all his estate by deeds of gift, the question whether the donors are by virtue of their taking benefit under their deeds liable for the donor's debts, will depend on the date of the contracting of the debt as compared with the date of the gift; it will further be complicated by consideration as the amount of property which the deceased then had and how he dealt with it. The plaint of an action directed against donors should fairly raise the issue of liability, but here the plaintiff has avoided it by ignoring the deeds of gift altogether.

The burden of proving that these defendants are liable on a contract to which they were strangers lay on the plaintiff. In my opinion, he failed and his action was properly dismissed.

**Withers** J.—I agree in affirming the judgment. I do not see how the minors can be made accountable for this debt, either in their own persons or to the extent of assets if any which have come into their hands.

July, 23, 1901] [5 N. L. R. p 230.

Present, Lawrie, A. C. J. and Moncreiff, J.,

D. C., Kandy, 12959.

*Fernando* v. *Fernando.*

**Action by creditor of deceased testator—Liability of heir or devisee of testator for his debt—Conveyance of land by his executrix to daughter in consideration of marriage——Right of creditor to follow such property.**

1 As a general rule an heir or devisee under a will is liable for the testator's debts to the extent of the share of the inheritance or estate which has come into his hands whether

by operation of law or by conveyance from the executor, and a creditor of the deceased testator is entitled to follow the property in the hands of the heir.

2 But where the property sought to be followed was settled *bona fide* on the heir of devisee in consideration of marriage it is not liable to the claims of the deceased's creditors.

In this case the plaintiff prayed for a declaration that a deed of conveyance made by Carolina Fernando executrix of her deceased husband Juanis Fernando, may be declared to have been made in fraud of the creditors of the said Juains Fernando, and that the estate called Spring Mount, sought to be conveyed thereby, may be made liable to be seized and sold in execution of a decree in favour of the plaintiff, pronounced in suit No. 11034 in the District Court of Colombo against the said executrix.

The conveyance was a deed of dowry in favour of the defendant Rosalin Fernando devisee under the will of her father. The plaintiff's action was dismissed, the learned District Judge holding that the conveyance was for valuable consideration and not in fraud of creditors within the meaning of *Brodie's Case* (Ram. Reports, for 1877, p. 89).

The plaintiff appealed.

*Seneviretna* (with him *Walter Pereira*) for appellant —The deed must be looked upon as a voluntary conveyance void as against creditors, 1 C. L. R. 101; 2 C. L. R. 72. The executrix herself pointed out the property for seizure.

*E. Jayawardene*, for respondent.

It has been proved that the conveyance was in consideration of marriage. The deed was granted on the very day of marriage. The settlement of the property on the bride need not have been made on the day of marriage except for the agreement pleaded by the defendant. Marriage is a valuable consideration, and a conveyance made for such a consideration has the same effect as a *bona fide* sale, and cannot be impeached. *Story on Eguity* Sec. 354; *1 Stephen's Commentaries*, 514. The assets of a testator granted to a legatee or heir on marriage cannot be reached by the creditors of the testator. *Dilkes* v. *Broadmead* D. F. and J. 566; *Spackman* v. *Timbrell*, 8 Sim. 253. A donation or sale cannot be set aside if the donor were solvent at the time he made it, and the donation did not cause

him to become insolvent. 3 Burge, 607; 3 N. L. R. 274 and 278; *Brodie's case*, Ram., 1877, p. 90. None of these circumstances is here present. The judgment of the Court below is well founded.

## Judgment.

**Moncrieff**, J.,—The plaintiff obtained judgment for Rs 2397.32 in an action against W. Carolina Fernando as executrix of the estate of her husband W. Juanis Fernando, who died on the 21st June, 1897. Judgment was signed on the 10th, May, 1898 and the defendant executrix pointed out for seizure a property named "Spring Mount" *alias* Seranigahavatta.

The property was seized in execution. The first defendant in this action claimed it; her claim was allowed, and the plaintiff proceeded under section 247 of the Code to have the right which he claimed to the property established.

The District Judge, however, again decided in favour of the claimants, and the plaintiff appealed to this Court.

The property in dispute had been part of the estate of Juanis Fernando. His executrix included it in the inventory of his estate, but on the 14th August, 1897,—a few weeks after his death,—she transferred it by deed to her daughter, the first defendant. On that same day (the 15th August, 1897) the daughter was married to Harry de Mel, the second defendant. No consideration for the transfer is stated in the deed but the purport of the joint will of W. Juanis Fernando and his wife is expressed, showing that the survivor was to hold the property on trust for division or conveyance (at his or her discretion) to the children of the marriage. And the transfer was made "in pursuance of the said trust." Although feeling the force of the scruples of the Chief Justice, in view of the second defendant's evidence, and the fact that the transfer was executed on the day of the marriage, I think that it was made in respect of the marriage being prompted by natural love and affection and regard for the joint will of the executrix and her husband. There was therefore valuable consideration for it.

The second issue (the only issue we need notice) was whether the land in question is liable to be sold in

execution of the decree in the plaintiff's action against the executrix.

All allegations of fraud were withdrawn, although the affirmative of the above issue would possibly impugn the transfer as bring in fraud of creditors.

The defendant Harry de Mel and his wife recite the above facts in their answer; and add that there was and is other property belonging to the estate of W. Juanis Fernando and available for seizure under the plaintiff's decree against the executrix. Their meaning is that that should be exhausted before recourse is had to the property conveyed to the first defendant. In spite of this defence the plaintiff simply put in the papers relative to the case. He called witnesses, but made no effort to contradict the statement in the answer or to show that Juanis Fernando's estate was insolvent at the date of the transfer. When the case for the defendants was closed, he proposed to call rebutting evidence, but the judge (in my opinion, properly) refused to admit it.

We were referred to both Roman-Dutch and English Law. If there had been fraud, the transfer would have been voidable under any system of law, but in most cases the Paulian Action would not lie without proof that the deceased's estate is insufficient and the transfer in fraud of creditors. There is no suggestion here of fraud on the part of the executrix or the alienee.

There are cases in which, under Roman-Dutch Law, the Paulian Action was competent, even without proof of fraud, upon the simple proof that the creditors had not got what was theirs. Voet (lib. xlii. tit. 8, Sec. 9) instances cases of legacies, donation *mortis causa*, and *fidei commissum*. He says that is so *quantenus haec non ante praestanda quam soluto prius aere alieno; sicut si jam praestita fuerint et reliqua aeri alieno haud sufficiant utilis actio danda sit.* From this it appears that even in cases which do not involve fraud, the creditors cannot follow property belonging to the estate of the deceased, which has passed from the hands of the executrix, without showing that the rest of the estate is insufficient to meet their claims. In this case it does not appear that the deceased's estate was insolvent at the date of the transfer; it does not even appear that it is insolvent now.

We were referred by Mr. Jayawardene to two English cases. In the first (*Spackman* v. *Timbrell*, 8 *Sim.* 261) Trimbrell the father by will devised leaseholds and freeholds to his son, appointing his son and the plaintiff executors. Three years after the father's death the son settled part of the property upon his wife and children in consideration of marriage. It was held that the settlement was for valuable consideration, and that the case must be governed by the decision of Lord Eldon in *Macleod* v. *Drummond* (17 Ves. 152)

In *Dilkes* v. *Broadmead* (2 D. F. and J. 576) decided in 1860, when personalty of the value of £6497 had been left by the deceased in trust, and was afterwards settled on his daughter's marriage to the separate use of the daughter, Lord Cambpell, C. J., was at considerable pains to show that the settlement was to the husband's advantage, and that marriage was a valuable consideration for it. On the case itself he said (p. 574) "*Spackman* v. *Timbrell* and the other cases relied on by the Vice-Chancellor satisfactorily establish the doctrine that assets of a deceased debtor or convenantor settled *bona fide* in consideration of marriage are no longer specifically liable to the claims of creditors. And where personal property can be identified, I do not think that in reason, or according to the authorities, any distinction can be made for this purpose between personal property and real property."

The liabilities of the deceased's estate are now charged upon both real and personal assets. But it is said (Williams, *Executors*, 9th ed., p 1560—in referrence to Lord Laydale's decision that, if the specialty creditors do not proceed against the heir or devisee the latter may alienate; and in the hands of the alienee the land is not liable, though the devisee or heir remains liable, to the extent of the value of the land alienated)—that "there does not appear to be any reason why this decision should not be applied to the construction of the statutes now in operation."

It would appear that a conveyance of real estate by an executrix *bona fide* in consideration of marriage—the estate of the deceased for example not being insolvent—cannot be set aside at the instance of creditors. From no point of view therefore does it appear that this action can succeed.

I think that the appeal should be dismissed, and the judgment appealed from is affirmed with costs.

Lawrie A. C. J.

This is an action under Sec. 247 to have it declared that the land seized is the proserty of the judgment debtor in the present case.

The judgment-debtor was the executrix of the last will of the present defendant's father. She had conveyed land to her daughter, the first defendant, in pursuance of the directions of the will. As a general rule an heir or devisee under a will is liable for the ancestor's or testator's debts to the extent of the share of the inheritance or estate which has come into his hands, whether that share has passed to the heir by operation of the law of inheritance or through the interposition of a conveyance by the executor of the deceased's will so that at first sight it appeared to me that the creditors of the deceased were entitled to disregard the conveyance and follow this property when in the hands of one of the heirs of the deceased debtor. But the defendant urges that the conveyance by the executrix to her was for valuable consideration, because the land was transferred to her on the occasion of her marriage. Certainly if land be conveyed before marriage by a bridegroom to his bride or to marriage settlement trustees, or if the parents of the bride convey land to her and to the bride-groom or to trustees in consideration of the marriage, then such conveyance would be for valuable causes.

But my difficulty here was that the conveyance says nothing about a marriage.

The executrix purports to give effect to the testator's intention. If she had executed similar deeds in favour of her other children on the same day, I think the land conveyed to them would not have been put beyond the reach of their later creditors, and I doubt whether the fact that the occasion of making this division of family estate was the approaching marriage of the daughter, and made it a conveyance for valuable consideration.

But relying on the authority of the English cases cited to us and referred to in the judgment of my brothers, I agree with him in affirming this judgment.

Present: Bonser, C. J.. and Moncreff, J.

D. C. Kandy, 13172.

*Witham* v. *Pitche Muttu.*

Action on a promissory note—Counterclaim for unliquidated damages—Civil Procedure Code. Liii

Under ch Liii of the Civil Procedure Code a claim for unliquidated damages is a defence to an action on a promissory note. *Mohammedu* v. *Lewis*, 8. S, C. C. 148 held inapplicable to existing procedure.

The learned judge of the court below, citing Byles on Bills of Exchange (15th edition, p. 150) held that unliquidated damages may be set up in a counter-claim in an action on a promissory note. But he refused defendant leave to appeal and defend. The defendant appealed.

*Browne*, for appellant.

*Morgun*, for respondent.

Judgment.

Bonser C. J.,—

In my opinion the District Judge was quite right in holding the claim for unliquidated damages was a defence to an action under Chapter Liii. of the code. The case in 8 S. C. C. 148 was decided before the new code came into operation, and is therefore no authority as to the present procedure. At the same time I think that the judge ought to have allowed the defendant to defend the action. The affidavit discloses facts which render it reasonable that the defendant should be allowed to come in and defend.

Moncreiff J.—I agree.

## NOTES.

1. The portion of the judgment relating to what may or may not be set off against a claim has to be read with the Civil Procedure Code of 1889.

Section 75. states that a claim in reconvention may be urged, but does not define what may, or what may not, be urged in reconvention.

Section 817, says that in courts of requests a claim in reconvention consists of "a cause of action for a like cause" in defendant's favour.

Section 818, (c) makes it possible for "unliquidated damages" to be claimed in reconvention.

The code does not state that sections 817, 818 apply to District Courts.

See *Whitham* v *Pichemuttu* reported above.

2. Section 3 of the Indian Civil Procedure Code has express provision as to set-off. Set-off is distinguishable from counter-claim, "The most striking difference is that the counter-claim operates not merely as a defence, as does a set-off, but in all respects as an independent action" (*Stooke* v *Taylor*, 5.Q B. D. 576) See sect. 75 Ceylon Civil Procedure Code "cross action."

3. The first three judgments may be considered as fully laying down the law on the liability of heirs for the debts of their ancestors whom they succeed in the inheritance. The principles of *VanderStraaten* v. *de Latre* on this point and *Pulle* v. *Pulle* are laid down in many other cases, the principal ones being here noted. *Heir in possession of estate liale for deceased's debts*: Morg. Dig. 267; Vand. 164. *To be liable heir must have accepted and intromitted by active steps*: Nell's Reports, 99; 6 S. C. C. 10; 2 S. C. R. 110. *The liability is to the extent of the benefit*: 3 Lorensz, 297; Jos. and Bev. 48,

The third case *Fernando* v. *Fernando* while confirming the law laid down in the first two indicates an exception to the liability of the inherited estate.

April 26, 1821] [Ram. Rep. 1820-33 p. 23.

Present: Giffard C. J., and Ottley J.

*Dormiux* v. *Krickenbeck.*

**Breach of promise of marriage—Test of damages—Injury to reputation and feelings—Plaintiff's poverty no defence—Decree to compel marriage [See note]—Damages with stay of execution—Action by girl's father.**

1. In cases of breach of promise of marriage it is not remuneration for expenses, but for injury to reputation and feelings which it is the object of the Court to secure.
2. It is no objection, under the Civil Law, to an action on a contract to marry that the plaintiff is a pauper.

## Judgment.

*Per* the Supreme Court of Judicature.—In this case the plaintiff sues, by her father and guardian, to oblige the defendant to fulfil the contract of marriage; or to pay damages for the breach thereof.

It is fully proved that such a contract was entered into; it was ratified by the consent of the parents on both sides; the parties are related to each other, so that no objection could lie on the score of family; and though it appears, by his suing in *forma pauperis*, that the father of the plaintiff has no property, that is expressly rejected by the Civil Law in the consideration of a contract of marriage.

The contract thus entered into obtained, (still further and at the repeated instance of the defendant himself), sanction of Government: a license was obtained and nothing then remained but performance of the ceremony. A time for this purpose was appointed, the defendant directed a house to be hired for the few days which it would require him to be at Jaffna, the place of the plaintiff's residence; and preparation, perhaps not very costly, but certainly some preparations, by plaintiff's father, were made for celebrating the marriage.

From whatever motive, the defendant suddenly retracted: he failed to come to Jaffna at the appointed time and on a vague intimation that he did not think he could be happy with the plaintiff, declined to fulfil his

engagement. Whether this was mere caprice, or whether the defendant has been misled by others, the Court does not enquire, he must suffer for his breach of contract.

There are two ways in which the Court might proceed: (1) it may either decree that the defendant shall carry the contract into effect by a marriage celebrated *in foro ecctesiae* on or before a day to be named, under the penalty of imprisonment for his disobedience, and until he should submit and fulfil his contract; or (2) it may award damages to the plaintiff's action with a stay of execution until a fixed period, before which time the defendant might be permitted to fulfil his contract. The first course might on many accounts seem harsh, particularly in compelling a person to a union with one, to whom he felt utterly averse. The Court would therefore desire to avoid it. With respect to the second, while it would give the defendant an opportunity to repair his error, it would eventually secure to the plaintiff some reparation for the injury, if persevered in.

It has been said that the plaintiff was put to little or no costs and sustained no injury.

As to costs it matters not: it is not remuneration for expenses, but for injury to reputation and feelings, which it is the object of the Court to secure. And there can be no more severe wound to the feelings of a modest and reputable woman than this capricious rejection of her after a solemn undertaking to make her his wife.

To secure these objects we think that one thousand Rixdollars are not too large a sum; that sum we award to the plaintiff with costs, and stay of execution until the first day of July next.

June 15, 1871] [Vand. Rep. ii. pp. 177. 178.

Present: Creasy, C. J., Temple and Lawson, J. J.

D. C. Negombo, 4471.

**Breach of promise of marriage—Father of bride sued by bridegroom to enforce marriage or pay damages—Marriage**

**contract subject to implied condition that bride has no rea sonable objection—Daughter's reasons avilable to fathe as defence—Bridegroom keeping a mistress—Bride awar of concubinage after marriage agreement.**

1. A marriage agreement between a man and the fathe of the girl proposed in marriage is subject to the implied condition that the daughter should not raise any reasonable objection to the consummation of marriage.

2. That the man proposing to marry a girl is an evil-liver, keeping a mistress up to a short time before the date of marriage, is a reasonable objection to the marriage.

3. Whatever defence is available to the girl, had she directly contracted with a man, is available to the father of the girl in an action for breach of promise of marriae.

The plaintiff was keeping a mistress. The fact was not known to the girl with whose father he had entered into a marriage agreement. Sometime before the day of marriage the mistress was discarded and she went before the parish priest and objected to the marriage. Thereupon the girl proposed in marriage to plaintiff refused to marry him. The plaintiff sued the father for damages for breach of contract. The plaintiff succeeded, but in appeal by the defendant the case was dismissed.

## Judgment.

**Per Curiam.**— The defendant in this case has proved a reasonable and sufficient excuse for not giving his daughter in marriage to the plaintiff. The contract was subject to the implied condition that the daughter should not raise any reasonable objection to its performance, and any defence of this nature, which would have been available, if the promise had proceeded directly from her, will also be available to the father in an action like the present. Now it is a reasonable objection on the part of the daughter that the plaintiff up to a short time before the marriage contract had a woman of disreputable character living with him as his concubine by whom he had two natural children; and that the daughter only became aware of the fact after the contract was entered into. Though this fact, as the District Judge conjectures, may have been notorious in the village, and may thus possibly have come to the father's knowledge, there is no reason to believe that it had ever come to the ears of the intended bride until the dismissed concubine came before the priest, and raised objections to the marriage. Actions against

a father for breach of a promise to give the daughter in marriage would induce great abuses if the plaintiff could enforce damages against the parent, however reasonably reluctant the daughter might be, and thus make it to the father's pecuniary interest to exercise the paternal authority harshly or tyranically. Set aside and plaintiff nonsuited with costs.

Nov. 6, 1899.] [4. N. L. R. 285, Koch. 58.

Present: Bonser, C. J., and Withers, J.

*Fernando* v. *Fernando.*

D. C., Negombo, 2933.

**Contract of marriage between bridegroom and father of bride—Breach by bridegroom—Action by father and daughter—Damages—Penalty.**

1. It is competent to a daughter, on whose behalf her father had entered into a contract with a defendant that the defendant should marry her, to adopt the contract made for her benefit, and conjointly with her father sue the defendant for a breach of it.

2. A Court may award as damages the amount of the penalty stipulated between the parties, if it is not too excessive or disproportionate to the circumstances of the case.

It was alleged in the plaint that the defendant by his deed dated 10th August, 1896, entered into a contract with the first plaintiff that he would marry the first plaintiff's daughter, the second plaintiff, within three months of the date thereof, according to the rites of the Roman Catholic religion, and that in the event of either party failing to fulfil the contract a sum of Rs. 2,000 should be paid as "estimated damages;" that the second plaintiff was always ready and willing to marry the defendant, but that defendant committed a breach of the contract by marrying another woman on the 12th August, 1896. Plaintiff therefore claimed the sum of Rs. 2,000 mentioned in the deed.

Defendant pleaded, *inter alia*, that second plaintiff being a minor was imcompetent to maintain the present action; that no cause of action acorued to the second plaintiff against the defendant; that there was no consideration for the promise made by defendant to the first plaintiff; that he signed the deed by coercion

and compulsion on the part of the first plaintiff and his son; and that first plaintiff had suffered no damages.

The District Judge found that there was no compulsion; and that defendant had seduced the second plaintiff and signed the agreement to marry her with the intention of making reparation; that his parents objected to the marriage and persuaded him to marry another woman, that the damages consequent on the breach should be the sum fixed by the parties, which was not excessive; that that amount should be paid into Court for the sole use of the second plaintiff, who upon attaining her majority should get it.

Defendant appealed.
*Sampayo*, for appellant.
*Bawa*, for respondents.

Judgment.

**Per Bonser C. J.**,—In this case the father of an unmarried girl under age entered, on her behalf, into a notarial contract with an unmarried young man, providing that he would give her in marriage to this young man. The young man on his part agreed to marry her within a stipulated time, and the parties agreed that in case either of them should break the contract—the father or the intended bridegroom—the person in default should pay to the other Rs. 2,000 as penalty. The father purported to enter into this contract on behalf of his daughter. The intended bridegroom broke the contract by marrying another lady. The father and daughter thereupon commenced this action to recover the stipulated penalty of Rs. 2,000.

The defendant raises certain objections of law and of fact. He objected that it was not competent for the daughter to sue, as she was not a party to the contract. He objected that the contract was against public policy, and could not therefore be enforced, and he stated that he was made to enter into the contract by force and was not a free agent. All these objections were overruled at the trial. The judge found that the contract was not made under coercion, and it has not been sought in the appeal to induce us to reverse that finding.

Mr. Sampayo argued the objection of law that the daughter could not sue, not having been a party to the contract. It seems to me that it was quiet competent for her to adopt a contract made for her benefit, and I see no reason why a contract of this kind should be held

by this Court to be against public policy. The parties are Sinhalese, and such a contract is one entirely in accordance with Sinhalese customs and feelings.

Then Mr. Sampayo contended that the sum of Rs. 2000 was a penalty, and that no damage having been proved the utmost that could be given was nominal damages.

Now these stipulations for penalties originated in the difficulty of proving damages. Voet (xlv., 1, 13) states that where damages had to be determined by a Court there was considerable difficulty in the way of the plaintiff, owing to the natural difficulty of proof and also to the rule of practice which required the judge, in cases of doubt, to give the benefit of the doubt to the defendent. He states that in consequence of these difficulties the practice arose of the parties agreeing to a fixed penalty which would obviate the necessity of the Court entering into an inquiry as to the *quantum* of damages. Justinian, in his *Institutes*, recommends the parties to the agreement to this course (iii., 15, 7): *Non solum res in stipulatum deduci possunt, sed etiam facta: ut si stipulemur fieri aliquid vel non fieri. Et in hujusmodi stipulationibus optimum erit poenam subjicere, ne quantitas stipulationis in incerto sit ac necesse sit actori probare quid ejus intersit. Itaque si quis, ut fiat aliquid, stipuletur ita adjici poena debet: "Si ita factum non erit, tum pœnae nomine decem aureos dare spondes ?"* But Voet, in the same title to which I have referred, states this: *Denique moribus hodiernis volunt, ingente pœna conventioni apposita, non totam poenam adjudicandam esse, sed magis arbitrio judicis eam ita oportere mitigari ut ad id prope reducatur ac restringatur, quanti probabiliter actoris interesse potest.* (xlv. 1, 13.)

In other words, where the amount of the penalty is out of all proportion to the damages likely to be caused by the breach of the contract, in such a case the equitable course is not to give judgment for the whole amount of the penalty, but to reduce the amount to something more like the real loss incurred by the parties. That, however, is no authority for the proposition that, wherever a penalty is fixed, it is the duty of the Court to enter into the question of the *quantum* of the damages. It must be shown that the *poena* is, as Voet describes it, *ingens*, or, as other writers call it, *inmanis* or *immensis*.

In this case I see no reason for thinking that the penalty agreed upon by the parties comes under any of these categories, or that it is so disproportionate to the circumstances that it would be inequitable for the Court to enforce this claim.

**Withers J.**—I agree. As to the objection raised to this contract—in the first instance that the young lady had no right to sue, and in the next place, that the contract is a contract *contra bonos mores*,—I am unable to see any force in these objections.

As to the question of reducing the damages, I agree in all that has fallen from the Chief Justice.

I have gone at length in a former judgment into the question of penal stipulation, and I cited the passage from Justinian referred to by my Lord. The word "penal" has not the force in Roman-Dutch Law in this connection as it has in English Law.

There is nothing in the use of the word "penal" in contracts governed by the Roman-Dutch Law to prevent the stipulation being enforced.

**Dec. 21, 1866.]** **[Ram. Rep. 1863-68, p. 226.**

**Present, Temple and Thomson, J. J.**

D. C. Ratnapura, 8613.

*Appuhamy* v. *Mudalihamy.*

**Marriage—Gifts in contemplation of marriage—Refusal to marry—Right to demand restitution of gifts.—**

Gifts received in contemplation of marriage are liable to be restored by the recipient if such recipient rescinds the agreement.

This was an action to recover certain jewels and presents, or their value, given by plaintiff to defendant, in contemplation of a marriage, which the defendant refused to carry out. The district judge nonsuited the plaintiff with costs on the ground that "there was nothing to shew that any agreement for restitution was made with plaintiff, in the event of the marriage not taking place, and the trinkets can only be looked upon as gifts resulting from, perhaps, misplaced affection."

*Ferdinands* for appellant.

*Lonenz* for respondent.

**Judgment.**

**Per Curiam**—It is clear that a marriage having been arranged between the plaintiff and the third defendant, with the consent of her parents the first and second defendants, the plaintiff went and presented the third defendant with certain jewels according to the custom of the country; the third defendant now refuses to marry the plaintiff, and has married another man. The plaintiff therefore has a right to recover back the jewels or their value, which has been proved to be £ 14. See *Grotius* p. 288.

**Sep. 23, 1896]** **[2. N. L. R. 173.**

**Bonser, C. J., and Withers, J.**

*Levo Nono* v. *Elenis.*

D. C. Galle, 2135.

**Action for seduction—The Roman-Dutch Law and the English Law as to damages for seduction. Ordinance No. 6 of 1747, S. 30.—Ord. No. 2 of 1895, Sec. 21.**

By the Roman-Dutch Law, if a girl of previous good character was seduced by a man, she had the right to sue him, and to require that he must do one of two things—either marry her, or provide her with a dowry suitable to her condition in life, while under the English Law the girl could not bring an action, but it was open to her father or guardian to sue the seducer for damages for loss of her services by reason of the seduction.

*Sadrishamy* v. *Subehamy* (5 S. C. C. 38), in which it was held that the Roman-Dutch Law action for seduction was not taken away by section 30 of Ordinance No. 6 of 1847, followed.

In this case the plaintiff sued the defendant for damages and breach of promise of marriage and seduction. The District Judge held that no promise to marry was proved, but condemned the defendant in Rs. 250 as damages for seduction. The defendant appealed.

*Sampayo*, for appellant.
*Dornhorst*, for defendant.

## Judgment.

Bonser C. J.—This is an action for seduction under the Roman-Dutch Law, which in this respect is, to my mind, superior to the English Law. By the Roman-Dutch Law, if a girl of previous good character is seduced by a man, she has the right to sue him, and require that he must do one of two things—either marry her, or, if unwilling or unable to do that, provide her with a dowry suitable to her condition in life. The object of this is, that the woman may not be turned out on the streets penniless to swell the ranks of prostitutes, but that some provision may be made for her in order that she may either support herself or induce some other man to marry her, As I have already observed, the English Law in this respect affords a much less satisfactory remedy for the injury done to the girl. The English Law does not look to the interests of the girl. The girl herself cannot bring an action. It is the father or the master who does that. The right to bring an action is based on the fiction that he has lost the value of her services. The interests of the girl are not regarded, for the parent or master may recover heavy damages against the seducer and then turn the girl on the streets.

It has been suggested by two eminent judges of this Court—Chief Justice Phear and Chief Justice Burnside —that this action was abolished by section 30 of Ordinance No. 6 of 1847. If it were so it would be a most unfortunate thing. Bnt in my opinion, as at present advised, it is not necessary to come to that conclusion; and even if I were of that opinion, I am bound by the decision of this Court in the case of *Sadrishamy* v. *Subehamy*, reported 5 S. C. C. p. 38, where the matter was fully argued, and it was held that this action still existed. In the present case the action was brought on the promise to marry, but the seduction was alleged and damages were claimed, so that it was a two-fold action.

The District Judge has found the promise not proved, but he has given Rs. 250 damages for the seduction. The defendant swore that he had made provision for the plaintiff by giving her a sum of Rs. 240, and it was proved that he had deposited this sum in the Post Office Savings Bank in the name of her younger brother, and that he had subsequently withdrawn it. He alleges that he paid it to the plaintiff. The plaintiff gave no evidence at all on this point—she was asked no question about it. The District Judge said

that he was not satisfied that the plaintiff ever had the money. The defendant's statement was clear. It was not a vague general statement that he had given her money, but it was a precise statement that he had given her a particular sum. The fact of the deposit in the Savings Bank corroborated to a certain extent the defendant's statement.

Again the authorities lay down that the damages are to be computed in the nature of a *dos*, and are to be proportioned to the social status of the woman, Now, the District Judge had no evidence before him of the social status of the plaintiff to determine what would be a proper dowry to give to a girl of her station in life. Therefore the case should go back in order that further inquiry may be made on those two points viz:—

1. What sum would be an adequate provision by way of dowry for a girl in the station in life of the plaintiff?

2. Whether the defendant has already made any adequate provision for the girl?

Withers J., concured.

May, 12. 1882] [5 S. C. C. 38.

Present: Clarence, A. C. J., and Dias, J.,

D. C. Galle, 47150.

*Sadrishamy* v. *Subehamy*.

**Seduction—Damages—Ord. No. 67 of 1847, sec. 30—[Ord. No. 2 of 1895 sec. 21]—Roman-Dutch Law—2 S. C. C. 91 disapproved.—Damges in the nature of dowry.**

The Ord. No. 6 of 1847 did not take away the Roman-Dutch Law action for seduction.

Plaintiff, a woman, sued defendant, claiming damages in one count for the breach of promise of marriage, and in another count for seduction. The count for seduction simply averred the seduction, and prayed that defendant be condemned in damages.

The District Judge held the promise to marry not proved, but found the seduction proved, and awarded plaintiff on that count Rs. 300 damages and costs.

Defendant appealed.

*Browne* for defendant—appellant.

We do not press this appeal with respect to the finding of fact, but upon the question—whether such an action is maintainable at all.

In *Karalinahami* v. *Levinis Saram*, 2. S. C. C., 91, Sir J. B. Phear, C. J., intimated a strong opinion that since the Ordinance No. 6 of 1847 (which *quoad hoc* is incorporated in Ordinance No. 13 of 1863), such an action is not maintainable. It must be admitted that since the Ordinance of 1847, this Court has allowed plaintiffs judgment in such actions; the point, however, was definitely considered in the case decided by Phear, C. J.

*Withers* for plaintiff respondent, *contra*.

## Judgment.

Clarence A.C.J.— In this action plaintiff, a woman, sues defendant, who is her cousin, claiming damages for a breach of promise of marriage, and for seduction. Plaintiff adduced some evidence at the trial to prove both the promise and its breach, and also the seduction. Defendant adduced no evidence, and did not himself attend the trial. The district judge was not satisfied with the evidence as to the promise of marriage, but upon the issue as to the seduction, found that plaintiff, being a young woman of honesty and respectablity, had been seduced by defendant: and therefore awarded plaintiff Rs. 300 damages. Against that judgment defendant appeals.

The only argument adduced to us in appeal was an argument that an action for seduction does not now lie, since actions to compel celebration of marriage are forbidden by section 30 of Ordinance No. 6 of 1847. This contention was supported by, or rather grounded upon, some observations made by Sir J. B. Phear, C. J., in D. C. Kandy, 78019, 2 S. C. C. 91. These observations are indeed *obiter dicta*, but they comprise a distinct expression of opinion that since the passing of the Ordinance of 1847 the action no longer lies and, like everything thrown out by that very able judge, they are entitled to high respect and our best consideration.

I see no reason to disapprove of the District Judge's finding as to facts and, consequently, we have to consider the question—whether the action lies at all? There was indeed no demurrer filed by defendant to plaintiff's libel, but to judge from the District Judge's note, the point seems to have been made at the trial, and if the plaintiff's libel discloses no cause of action *quoad* seduction, the verdict in plaintiffs favour of course cannot stand.

Sir J. Phear, in the case cited, pointed out that the woman's right in these matters is *petitio alternativa*, that the seducer be compelled either to marry her, or, in his election to give her a dowry ("*aut ducere teneatur aut dotare*",) and that her remedy altogether fell to the ground if she deprived him of the option. And this is borne out by the passages cited from Voet (xxxvii. 15, 3 and 4). According to Voet the action which the Roman-Dutch Law allowed to the woman was not as an action in which she might obtain a decree that he should do one of two things, either marry her or give her a dowry, it being in his election to choose either alternative. The election seems to have lain with the man who had *facultas eligendi ex alternativis*. And see also Vanderlinden, 251. But with unfeigned respect for the dictum of C. J. Sir J. B. Phear and my brother Dias in the case cited, I cannot regard the Ordinance of 1847 as having the effect there attributed to it. The Ordinance forbids or took away all suit or proceeding whatever to compel celebration of marriage by reason of any promise or of seduction, or any other cause. Now, it seems to me that the Roman-Dutch action of seduction was hardly an action to compel celebration of marriage, since the man was allowed his choice between marriage and payment of damages; and I fail to see how this action can be taken away by an enactment which provided merely that no one should be compelled by suit or process to marry. But whether or not *petitio alternativa ut aut ducere teneatur aut dotare* be now the proper form of action, the ordinance at any rate by its thirtieth section expressly declares that "nothing therein contained shall prevent any person aggrieved from at any time suing or recovering damages in any court where damages are lawfully recoverable for seduction." It seems, therefore, to me that the action is not wholly taken away.

No question has been raised about the form of action. The plaintiff's libel simply avers the seduction and prays for damages. If the old *petitio alternativa* be still the proper form of action, defendant has taken no objection in that behalf, and no suggestion has been offered that he desires to elect to marry the plaintiff. No process can issue to enforce payment of damages. Therefore, even if plaintiff's action ought to have followed the old form, defendant, in the events which have happened, has been rightly cast in damages. On the other hand, if the proper form of action, since the

Ordinance of 1847 is a simple action for damages, plaintiff has followed that form.

I am disposed, however, to think that the amount which the District Judge has awarded as damages is rather too much, considering what would seem to be the social position of the plaintiff. According to Voet, the damages are to be computed as in the nature of a *dos*, proportioned to the social status of the woman. *Estque in dotis constituendae quantitate habenda ratio non bonorum aut conditionis stupratoris sed potius ipsius puellae stupratae.* Nor do there appear in the case any extraordinary circumstances of aggravation. The District Judge has awarded Rs. 300, which seems to me somewhat too large an award, considering that the plaintiff seems to have been humbly engaged in selling coffee and hoppers. I think Rs. 200 would suffice, and would vary the judgment accordingly. Defendant to pay all costs in both courts.

Dias, J.—concurred.

## Notes.

1. By Ordinance No. 2. of 1895, Sec. 21, "no suit or action shall lie in any Court to compel the solemnization of any marriage by reason of any promise or contract of marriage, or by reason of the seduction of any female, or by reason of any cause whatsoever." In the Transvaal also, marriage cannot be compelled by judicial sentence, (Pereira's *Institutes*, II. 647).

2. By Sec. 21 of Ordinance No. 2 of 1895, "no action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been made in writing."

3. The recovery of gifts given in contemplation of marriage is allowed by the Roman-Dutch Law. (Maasdorp's *Grotius* p. 463. See *Digest*, 12. 4. 8.)

The gift was known to the Romans as *Arrhae Sponsalitiae*, and was made subject to condition of being returned by defaulting party. (Hunter's *Roman Law*, p. 696, quoting *Codex* 5, 1, 3). The principle of the man's immorality being a reason for the woman's avoiding the contract was recognised even among the Romans, whose rules of obedience to parents were rigorous (*Digest*, 23, 1, 12, 1. Hunter's *Roman Law*, p. 695).

5. Attempting a woman's chastity is an actionable injury, and even persistently and annoyingly following about a young girl or a respectable woman is an injuria (*Justinian*, 4: 4. 1. *Gaius*, 3. 220. *Grotius*, 3. 35 8. *Digest*, 47. 10. 15. 22. *Voet*, 47. 10. 7. Pereira's *Institutes*, II, 646.647. 660. 661). On the action arising out of seducing a female Van DerLinden) *Juta's edition* pp. 152. 153.) says, "On this account an action lies for her to compel marriage [Not in Ceylon, see above note 1] or for a reparation of her honor in money ..... for the payment of the lying-in expenses, and in the case of the death of the child,

for the payment of the funeral expenses . . . . . for the payment of a reasonable maintenance for the benefit of the child." So *Grotius*, Maasdorp's edition, p 489. The Roman-Dutch Law allowed no compensation if the girl, before connection, had stipulated for or received money or she knew that the man was married (Maasdorp's *Grotius*, p. 489, note 17). Van DerLinden says ( 1. 16. 4) that this action is not open to a married woman, that is the action arising out of deflowering. But an adulteror commits an actionable wrong (Maasdorp's *Grotius* p. 490).

6. By sec. 3 of Ord. No. 19 of 1889 a man is liable to maintain his illegitimate child. It is doubtful if a man after paying for maintenance of child under the action abovenamed, will also be liable under the *Maintenance Ordinance* of 1889 especially if the liability to maintain is a civil one.

7. In *Nagel* v. *Qnaker* Ram. Rep. 1820—33 p. 52, the Supreme Court considering the poverty of the defendant awarded damages conditionably by a *locus poenitentiae* being allowed him to atone for his misconduct by marrying the plaintiff, should she accept him, with two months, and execution was stayed for that period. It does not appear what happened later. Under *Appuhamy* v. *Mudalihamy*, Ram. Rep. 1863—1868, p. 226, given above, may be noted *Sinno* v, *Harmanis*, 2 S. C. C. 136 where the bride and her father were ordered to restore to the bridegroom the presents made by him or their value.

Jan. 19, 1822.] [Ram. Rep. 1820—'33, p. 33.

Per Hardinge Giffard. C. J.

Nos. 5629, 5790 of Galle Provincial Court.

*Dona Clara* v. *Dona Maria.*

*Annona* v. *Dona Maria.*

**Intestate Succession—Common Law of Ceylon—Extent of Roman-Dutch Law—Aasdomsch Law—Schependomsch Law—Charter of Dutch East India Company—Placard of 1599—Statutes of Batavia—Indian Law of succession—Introduction of administration into Ceylon—Weeskamer.**

1. The law of succession in Ceylon depends upon a Resolution of the local Government, dated December 20, 1758, promulgating the Placard of 1599, which adopted the Aasdomsch Code as the law prevailing in North Holland, and according to which the rule of inheritance was the same as in English law, viz: that the nearest in blood should succeed

whether the kindered were on the mother's or father's side.
2. The Governor of Ceylon, by publishing Placard of 1599 for the guidance and due observation of the Courts, did design to promulgate the Placard as Law.

## Judgment.

These cases are intimately connected with each other, the same person is defendant in both, they relate to claims upon the same property, and the grounds upon which my opinion is founded go to decide both. It was my wish in the first instance to have avoided the consideration of these cases, as I had been formerly an Advocate in behalf of the original respondent, but I find myself obliged, by the Charter of 1802 § 188, to act, the value of the property in question exceeding 2000 Rds. in value.

The consideration of these cases has given me more trouble than I remember to have found in any matter which has ever yet come under my view, and after all, I do not perhaps feel that the conclusion at which I have arrived will be satisfactory to all.

The respondent, Dona Clara, brought her suit in the Provincial Court of Galle against the appellant, Dona Maria, who had obtained administration as next of kin to Don Simon De Silva, a person who died without a will and possessed of considerable property, Dona Clara asserting herself to be nearer of kin and therefore entitled to the administration, which had been obtained by a contrary representation of the appellant.

The first observation, which the case presents, arises out of the application of that part of the English law, by which administration is granted to persons and property otherwise governed by the Dutch-Roman Law, to which the proceeding is wholly unknown. How the practice of granting administration by the Provincial Courts first obtained in this Island is by no means clear. I find no Regulation of Government to authorize it with respect to these Courts. The Charter of 1801 gives the power to the Supreme Court, and I suppose that it was, on the suppression or discontinance of the *Weeskamers*, found necessary in the inferior jurisdictions to appoint some ostensible person as the trustee of intestate estates, for which purpose the process of administration appeared to be, and was, adopted as the most convenient.

It has now however been established, and must be taken to be a part of the settled law that administra-

tion may be thus granted, and though there be no direct enactment on the subject we must also suppose these administrations to be subject to the same rules, in granting and repealing them, as prevail in the Law of England. By that law, it is certain that an administration, obtained by a mis-statement, may be repealed, and letters of admininistration may be granted to the next of kin, upon proof of proximity of kindred. *Harrison* v. *Weldon* Str. 911; Com. Dig. *adm.* (B. 8.)

By her libel, the respondent stated herself to be next of kin to the deceased, and in the course of the proproceedings, she is stated to be the daughter of Daniel de Silva, the brother of the intestate's father, or in other words his first cousin by the father's side or in the words of the law, related to him in the third degree. Those who join her in the suit stand in the same degree of relation to the deceased, and have a like interest with her.

The appellant does not deny this kindred of the respondent; on the contrary, it is admitted by her throughout. But the appellant, stating herself to be next of kin to the deceased on the side of his mother, insists that, by the law of succession in this Island, the property of the deceased ought to be divided into two equal shares, the one to go to his next of kin by the father, the other to his next of kin by the mother, and although she herself stands no nearer in relationship than as fourth cousin, or in the fifth degree, being the great-grand-daughter of his *great-great*-grand-father by the mother's side, she is entitled to that half share. And for this she relies upon the Law of Holland as prevailing in Ceylon. It is therefore necessary to look into that law, and to see to what extent it operates with respect to succession in this Island.

When a number of small states were combined into one Federal Republic and formed the United States of Holland, every one of them adhered most pertinaciously to its own particular institutes, and almost as many different laws and customs prevailed as there were towns and villages in the new Republic. This produced very sensible inconvenience, and attempts were made, not always successfully, by the Sovereign authority of the United States, to produce something like a unformity of laws in some respects; but in others they totally failed, and up to our time, very striking differences existed in the jurispru-

dence of districts lying almost interwoven and entangled into each other. But it was with respect to the law of succession that the greatest struggle was made, for with respect to that law the most remarkable distinctions existed.

By the Code called the *Aasdomsch Law*, which prevailed in North Holland, the rule of inheritance was the same with that of the English Law, that the nearest in blood succeeded, whether the kindred were on the father's or mother's side. The *Schependomsch Law*, which prevailed in South Holland, assumed it as a rule, that the property had descended equally from father and mother, and therefore required that the property of the deceased should be divided, one half to be inherited by the next of kin on the part of each parent, although it should be to a first cousin by the father, and a tenth by the mother.

The Rule of the Schependomsch law was expressed in an axiom: *goods return whence they come*; and the Aasdomsch by another: *the next of blood takes the goods.*

Two rules so conflicting, and operating upon a people, becoming every day more wealthy and more intimately connected with each other, produced extreme inconvenience, and became, with other discordances in the laws, the subject of a Political Ordinance, issued by the States of Holland in the year 1580, by which a kind of compromise was attempted, though the prevailing principle adopted was the rule of the Schependomsch law, the division of the inheritance.

Against this, however, there was no inconsiderable struggle, and an interpretation was added in 1584, by which it was designed to render it more palatable to to the dissentients, but this did not avail and in 1599, a Placard was issued, by which in effect the Aasdomsch principle was adopted in favor of the greater part of North Holland and some very considerable districts of the other States.

The Political Ordinance of 1580, with the Interpretation of 1584, is stated by Van Leeuwen *(Dutch-Roman Law*, lib. 3 Cap. 12 § 8.) to prevail in those parts of the East Indies, under the direction of the Dutch East India Company, and he particularly states that the Placard of 1599 is not to be extended to any place but those expressed in it by name. This would seem to have established the Political Ordinance, with its

Interpretation, as the Law to be observed in the East India settlements of Holland, or in other words, the Schependomsch Code. But from some cause or other, we have no proof that it was generally acknowledged, whether it was that the law was not promulgated, or that the constant usage of making wills rendered it unnecessary to call it into operation. We have had great difficulty in discovering any precedent to prove what law was pursued. One precedent only has been discovered, and at first it appeared calculated to remove the doubts entertained on this subject: it was the case of *Van Cleef* in the year 1777.

In that case the succession to the deceased's property was claimed by his widow and fifteen relations. The right of the widow could not have been in question: it was secured and established by the *Communio Bonorum*; and the fifteen relations appear, on examination of the record, to have been all on the father's side; but the Weesskamer having requested generally directions as to the law of succession, Judges were appointed to examine and report upon it, and they found that the law of succession in Ceylon depended upon the Charter granted to the Dutch East India Company in 1661, the Political Ordinance of 1580, the Interpretation of 1584 and the Placard of 1599, promulgating the Aasdomsch law of succession of North Holland. And for the authority of this decision, the Judges referred to a Resolution of the Government of Ceylon of December 20th, 1758.

That Resolution, which bears the appearance of a legislative act, and is thus recognized as such, recites the existence of the very doubts now under consideration. It recites that the Governor had referred to the Great Placard Book for the Charter on the subject granted to the East India Company in 1661, and had sumbitted that Charter, *with the Documents relative thereto*, to the members of Council, to declare whether they knew of any subsequent law respecting successions. To this they replied in the negative, upon which he, the Governor, had resolved to insert the said Letters Patent with the *Documents relative thereto*, viz: the 59th Act of Orders dated 13th October 1621, the 52nd dated 23rd August 1636, the Political Ordinance of April 1580, the Intepretation of 1584, and finally, the Placard of the *same date* (evidently referring to that of 1599, which is accordingly given at full

length); and the Resolution goes on to say that exemplification of the Letters Patent and of other recited documents should be issued to the Court of Justice, the Civil Courts &c. of Ceylon, *for their guidance and due observation;* and, as I have before observed, the Placard is one of these documents.

The Placard is totally at variance with, and, where it operates, in fact repeals, the Political Ordinance and the Interpretation, for after making a few regulations for cases of parents and children of the half-blood, it goes on to declare in the fourteenth section that all other succession provided for here above, shall be regulated according to the true written law, meaning the Imperial Civil Law.

It is however observable that the Charter of the East India Company does not include this Placard in its recital. At first I thought this might be a clerical omission in our copies, but upon reference to the Great Placard Book, I find that it was not contained in the original

The authority of the Placard, as the Law of Ceylon, depends then totally on the Resolution of Council in 1758, and the expression of sending it to the Courts for their guidance.

We have no assistance whatever from anything in the report of *Van Cleef's case*: the distribution there made would seen to follow the Placard, but then there do not appear to have been any claimants but those on the side of his father, so that it does not indicate a preference of the one law to the other.

The quotation from *Van Vorm* of a decision made in 1733, by which the property of an intestate in the East Indies was distributed according to the Political Ordinance is by no means inconsistent with the establishment of the Placard in Ceylon in 1758, if we suppose that the Resolution of Council of that year was intended to have the effect of a Legislative Act, as in *Van Cleef's case* it appears to have been considered.

In *Van Cleef's case*, as reported from the Records of the Dutch Court of Justice, there is a reference to the old Statutes of Batavia, as corresponding with the Law of North Holland. In looking into that collection, I find it so exactly corresponding, that the Placard of 1599 is literally copied in it as the Law of Succession

in India. This collection is a digest, and apparently a very excellent one, of the laws by which the Indian Settlements, under the general superintendence of the Council of Ba tavia, were to be governed, and its authority seems to be recognized by this decision of 1773. It is however in point of date anterior to the Letters Patent of 1661, and here the difficulty again arises from these Letters Patent.

It would have been satisfactory to my mind, and perhaps have thrown some light upon this subject, had I been able to discover the mode of adoption of the statutes of Batavia as the Law of Ceylon, or the nature of the authority of the Council of Batavia in legislating for this Island; but on directing the Keeper of the Dutch Records to search the Secretary's Office for information on this subject, he reported that the clerks of the office had informed that the like inquiry had been made, by direction of my predecessor, Sir Alexander Johnston, but without any success.

The endeavour to discover, from the records of the Inferior Courts or the recollections of the practitioners, what was the prevailing law upon this point in Ceylon, has been equally unsuccessful: the records offer no such case, and even where the question has not been wholly misunderstood, the answers of those practitioners have been vague and unsatisfactory.

Little reliance is, I know, to be placed upon the evidence of many of those who have deposed in the cause [courts]below as to the kind of law which has prevailed in thisIsland, but it is remarkable that the practitioners examined on oath at Galle were unanimous, and that not one swears to the prevalence of any other rule of succession than that which agrees with the Placard. Neither has any precedent of a contrary mode of succession been adduced. That which has been produced only shews a mode of division common to both laws.

In the absence of fuller information, we are therefore called upon to decide upon the narrow ground of whether, by publishing the Placard for the guidance and due observation of the Courts, the Governor of Ceylon did design to promulgate the Placard as law, and finding as I do no proof to the contrary, in any precedent of a proceeding or decision on the subject, but meeting with its recognition in direct terms in the only case which has been discovered, and collecting, as far as we have been able, the general sense of the

persons conversant in law matters in accord with the opinion, I conceive that we are safest in declaring that Placard to be the law of the Island. In doing so too, we will have the satisfaction of establishing the similarity of the law of succession to our own; we shall not disturb any decision or proceeding hitherto had, and what is most gratifying of all amidst these difficulties, it is a case in which the parties may have the judgment of another tribunal to correct, if necessary, that which is pronounced here.—(Per the High Court of Appeal.)

Sep. 11. 1867] [Ram. Rep. 1863-'68, p. 279.

Present: Temple J.

C. R. Panadure, 8208.

*Fernando* v. *Fernando.*

**Intestate succession—what law prevails.**

**Judgment.**

The law of North Holland prevails in Ceylon and not the law of South Holland; and by the former, Bastian was heir to his son Hendrick, and Bastian being dead his heirs are entitled to the land. See [Ceylon Edition of] Van Leeuwen, 239. 298; [Henry's] VanDer Linden i. sec. 2, ch. 3; Grotius, p. 186; VanDer Keessel, 113.

June 13. 1881] [Vand. Rep, ii. 172.

Present; Creasy C. J., Lawson and Temple J, J.,

C. R. Colombo. 76626.

**Intestate succession in Ceylon—Political ordinance of 1580—Modfied by Placard of 1594—Introduced by Letters Patent of States of Holland, of 1661—Letters Patent of 1661 decreed authoritative by Government of Ceylon 1758—Was Placard of 1599 annexed to Resolution of 1758 by mistake for Placard of 1594?—Thompson, Vol. ii 250—**

1. The Political Ordinance of 1580, interpreted by the Placard of 1594 touching the South Holland Law of succession, was ratified by the Letters Patent dated 1661 of the States General of Holland, and the Ceylon Government by its Resolution of 1758 declared the Letters Patent to be of sovereign

athority and to be observed, and the South Holland Law so promulgated by the Letters Patent of 1661 would be law of Ceylon but for the omission, intentional or erroneous, to annex to the Ceylon Government Resolution of 1758, the Placard of 1594 and putting in its stead the Placard of 1599 of the North Holland Law.

2. Ceylon Government Resolution of 1758 promulgating the Placard of 1599, and introducing the North Holland Law, is a legislative enactment, not repealed or varied by any subsequent legislative enactment, and it ought not to be altered except on the clearest proof of error.

3. The Placard of 1599, dealing with North Holland Law, if not specially introduced into this coloney by imperial or colonial authority, can have no force *propria virtute*, because it is by its terms confined to certain specified towns and districts in Holland.

## Judgment.

The proceedings in this case having been read, it is considered and adjudged that the judgment of the Court of Requests of Colombo of the 29th day of March 1871 be set aside and that the claim of the plaintiff be dismissed with costs. The facts upon which this case has been decided are to be gathered from the admissions made by the counsel at the trial and may be stated as follows. A child who had succeeded to the mother's proporty, which was by antenuptial contract exempt from the community, died leaving surviving her a father and relatives on the mother's side. The Court of Requests of Colombo has decided that the property should be divided between the father's and the mother's kin in equal moieties; against this decision the father appeals claiming the whole. The decision of the Court of Requests is founded on the principle that the law of succession of the States of South Holland, as defined by the Political Ordinance of the 1st April, 1850, prevails in this country, and that by that law the estate of a person dying and leaving one surviving parent, but neither children nor brothers nor sisters, must be divided equally between the surviving parent and relatives of the deceased parent; and this principle is supported by reference to the *Institutes of the Laws of Ceylon* of Mr. Justice Thomson vol. ii. p. 253. Now, on reference to the section of "the Institutes" which treats of the law of succession *ab intestato*, we find that it quite bears out the assertion of the Commissioner that the law of South Holland and the Ordinance of 1850 are of force in Ceylon—and that Ordinance would seem to bear out the conclusion of the Commissioner. The point however

is not explicity dicided in the Ordinance, and it will be seen as we proceed that it is not necessary for us to discuss the question as to what the law would be if the Ordinance were to be adopted in its intergrity. The law on the express point now before the Court is stated diffierently by Mr. Justice Thomson in the passage referred to, where he lays it down that a surviving parent (where there are no brothers or brother's children on the side of the deceased parent) succeeds to the whole estate; and in support of this position he refers to Burge iv. 53, Vanderlinden 159, and Vanderkeessel. Now on reference to Burge we find that the Ordinance of 1580 was adopted in the East Indies, but with a modification expressly relative to the point now before the Court; the law as laid in this modification is to the effect stated above in "the Institutes". The Commissioner therefore would appear to have accepted the dictum of his author that the law of South Holland was the law by which succession is governed, without noticing the single exception which touches the very point before his Court. In the passage of Burge referred to in "the Institutes" it is stated that the Political Ordinance of 1580 was adopted in the Dutch East Indies under the decree of the 13th May, 1594, but with the modification above referred to. But the decree of the 13th May, 1594 contains no reference to the Dutch East Indies, indeed could hsve contained no such reference, as the trade of Holland with the East Indies commenced only following year. The Ordinance of 1580 thus altered was introduced into the Dutch East Indies Colonies by Letters Patent from the States of Holland dated 10th January, 1661, which Letters Patent were promulgated and declared to be of authority by the Governor in Council of Ceylon in a Resolution dated 20th December, 1758. These Letters Patent are in the name of the States General of Holland, and recite that the Directors of the East India Company had presented a memorial praying for the introduction of a fixed law on the subject of succession *ab intestato* of those dying in the East Indies, and they proceed to grant the prayer of the memorialists by directing that the Political Oordinance of 1580, as explained by the Interpretation of 1594, should be observed in the East Indies, subject to the modifications which are referred to in Burge and adopted in "the Institutes." This law, thus enacted by the States of Holland and promulgated by the local Government of Ceylon, has not been repealed or

varied by any subsequent Legislative enactment, and if there were no previous decision on the subject we should be justified in concluding that the law as laid down in "the Institutes" is correct, and requires only an explanation as to the origin of the exception to the general applicability of the law of South Holland in the case of succession in the ascending line which has so direct a bearing on the present case. But we have a decision of the High Court of appeal, (Provincial Court of Galle, No. 5629) founded upon the Letters Patent referred to above and the Resolution of the Ceylon Government of January, 1758, laying down the principle that the law of North Holland, as set out in a Placard of 1599, is the law governing questions of succesion *ab intestato* in the Colony. This decision was given by Sir Hardinge Giffard and is entitled to all the weight due to his respected name. That weight however is much diminished by the fact that the learned judge himself prefaces his argument with the remark that, after long consideration, he did not feel that the conclution at which he had arrived would be satisfactory; and on reference to the reasoning by which that conclusion is supported it appears to us to stand on a very questionable foundation. The learned Judge admits that the Latters Patent of 1661 contain no reference whatsoever to the Placard of 1599, but on the contrary introduce the eutirely inconsistent system of the Political Ordinance of 1580, and the whole weight of the argument is rested upon the Rosolution of the Local Government of January, 1758. This Resolution however distinctly declares that the Letters Patent of 1661 are of sovereign authority, have not been altered or added to, and ought to be observed; and the Resolution also contains, in the form in which it has came down to us, no reference to the Placard of 1599, but directs that certain documents, viz. the Political ordinance of 1580—the Interpretation of 1594— and the Placard of the same date, that is 1594, together with certain other legislative enactments relating to the West Indian Colonies should be published with the Resolution and Letters Patent and distributed to different Courts in the Island for their guidance. In point of fact the Placard of 1599 was annexed to the Resolution instead of a Placard of 1594, and hence the High Court of Appeal concluded, (1) that it was the intention of the Governor and Council to refer to this Placard, and that the reference as it actually stands is a clerical error, and (2) that the

Governor and Council intended by such annexation to make the Placard of 1599 the Law of the Colony. It seems rather probable that the mistake, for one undoubtedly exists, was made by the Executive Officer of the Council in annexing the wrong document to the Resolution. If this be a legislative enactment its words ought not to be altered except on the clearest proof of error. In the present case it is impossible to believe that the Council intended to send to the Courts of law two inconsistent systems of law for their guidance and observation. And further the Resolution declares that the Letters Patent are of sovereign authority, and the Letters Patent are not only silent as to the Placard but introduce an inconsistent system. Again the practice existing in the year 1822, as set out by the Judges of the various Provincial Courts in reply to questions proposed by the High Court of Appeal, is uniformly founded upon the South Holland Law. The Placard of 1599, if not specially introduced into this Colony by Imperial or Colonial authority, can have no force *propria virtute*, because it is by its terms confined to certain specified towns and districts in Holland. When we find that the law as stated both by Burge and by the author of "the Institutes" in a manner entirely different from the above decision we can scarcely believe that the law as there stated has been generally acquiesced in since its promulgation. The decision in the present case will be the same whichever law we take; but if we set aside the judgment of the Court of Requests, we must state whether we do so in compliance with the Letters Patent of 1661 or in compliance with the Placard of 1599. And in discharging this duty we have to express our opinion that the decision of the Commissioner of the Court of Requests is erroneous because it is based on the Political Ordinance of 1580, without noticing alterations introduced into the system propounded in that ordinance by the Letters Patent of 1661 of the States of Holland.

## Notes.

1. See Walter Pereira's *Institutes of the Laws of Ceylon*, vol. ii. pp. 371—382, where the rules of succession are given according to both the North Holland and South Holland laws.

2. Thomson in his *Institutes*, Vol. ii. 250, says that the Law of South Holland prevails in Ceylon, and Thomson's opinion was considered by the collective court in 1871 in the case given above from . *anderstraaten*, p. 172, and the collective Court would have accepted Thomson's view but for the

decision in *Dona Maria's* cases, reported above. The case in *Ramanathan*, 1863-1868 p. 279 has been overlooked.

3. As seen from Appendix A. to *Vanderstraaten's Reports* 1871 there seems to have been much doubt in those days as to the Law of Succession prevailing on Ceylon and there was a tendency in favour of the South Holland Law. The question is now of purely academic interest, it being settled law that the North Holland System was introduced into Ceylon and prevails. Ord. No. 15. of 1876, sec. 40, provides for the North Holland Law being resorted to in case of the ordinance being silent.

May 6. 1822] [Ram. Rep. 1820-33, p. 53.

Present: Giffard, C. J., & Ottley, J.,

*Executors of Tolfrey* v. *Bennet* .

**Wager—Betting distinguished from gambling—Legality**

1. By the Civil Law a bet, depending upon a future event, is acknowledged as a binding obligation, nor is it illegal by the Roman-Dutch Law, but gambling is.

2. Voet is a better authority than Van Leeuwen.

The action was on a bill of exchange endorsed to plaintiff, the defence was that the note was in consideration of a wager. Those parts of the judgment finding fault with the pleadings, the application to examine witnesses in Europe and Africa and with the ungrammatical combination "gambling transaction" are omitted here. Even in the original report a portion of the judgment is wanting.

**Judgment.**

[Comments on facts]

The bill is admitted but impeached as founded at least in part on a bet. We will suppose for a moment that the defendant was saved the necessity of proving this by the admission of the plaintiff. We do not know that a bet, as such, is illegal. If we look to the law of England, we know that it is not illegal, in fact it is part of the law, unless it be on the event of a game by the Statue of Anne which, in the pleadings, it does not appear to have been. By the Civil Law even, in the *Institutes*, a bet, depending upon a future event, is acknowledged as a binding obligation *ut si aliquid factum fuerit vel non fuerit, veluti si Titius consul fuerit factus quinque aureas dare spondes*, Inst. 3. 15. 4, and this is recognized in the Pandects, 45. 1. 115.

If then by the general Civil Law, a bet is not illegal, neither is it by the Dutch-Roman Law. Van Leeuwen in his *Censura Forensis* says upon the subject of the general law, *sponsiones nostratibus Weddengen quae quatenus sub conditione casuali vel pendente a fortuna et dubio eventu factae sunt, nullo jure prohibitoe censentur*, pt. 1. lib 4. c. 14. § 11, and he quotes, in support of his assertion, the case in Sande, in which the Court determined in favour of a wager, to recover the amount of which an action had been brought. Van Leeuwen then goes on to state that by the laws of France, wagers, unless where a deposit was made, were void, but he adds *quod de moribus nostris affirmare non ausim.*

The same author, in his Dutch-Roman Law, evidently confounds betting with gambling in general, and denies the right of the winner to recover the amount, and even shows, from some local statutes, that in some parts of the United Provinces, bonds, of which bets formed part of the consideration, would be void.

To this it is to be answered that in the present instance, the action is brought on a bill of exchange *eo nomine*, and not for the amount of a bet, and with respect to the latter, that the local statutes referred to cannot control the proceedings of this court.

But Voet, who is always clear and, as later in time, a better authority, gives the distinction justly, and it is that which English statutes have adopted: *etsi enim circa ludos inquibus de virtute certamen est, sponsionem facere liceat; in aliis tamen, ubi pro virtute certamen non fit, non licet Ad. Pand.* 11. 5. 8. and in another place, he is explicit as to the distinction, and the ground of it, *pericli pretium constitui ibidem permittitur si modo in aliae speciem non cadat*, ib.

## Notes.

1. See Anson's *Law of Contracts* pp. 186—195 thus summarised in Tambyah's *Digest of the Law of Contract*, p. 78:

(*a*) A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event.

(*b*) Wagers are void (8 and 9 Vict. c. 198. Sec. 18) and money won upon a wager cannot be recovered either from the loser or from a stake-holder, but wagers are not absolutely illegal.

(*c*) A man may make a wager without violating any law and, if he loses, pay the money or give a note for the amount. Consideration for a note so given is not an illegal consideration but no consideration at all.

(*d*) Money lent to a loser in a wager is recoverable at Common Law but irrecoverable by Gaming Act, 1892.

2. See *Anson* on the following points.

(*a*) Marine insurance is a wager.
(*b*) Life insurance is a wager.
(*c*) Stock exchange transactions.
(*d*) History of Common Law as to wager.

3. By Ord. No. 8. of 1844, Sec. 1., "All lotteries and all undertakings in the nature of lotteries, under whatsoever denomination or pretence they have been set up carried on or kept, shall be deemed and are hereby declared to be common nuisances and against law." Ord. No. 17 of 1889 purports to be designed for the "suppression of *unlawful* gaming" which is defined in sec. 3. to include:

(1) Cock-fighting whether for a stake or not, and whether practised publicly or privately.

(2) The act of *betting*, or of playing a game for a stake, when practised in or upon any path, street, road or place to which the public have access whether as of right or not; in any premises licensed for any intoxicant; and in or at any common gaming place, that is, including any place kept for *betting* and to which the public may have access with or without payment.

By sec. 18 the games of billiard. bagatelle or "any gain which is also an athletic exercise" may be played for stake.

By these ordinances *betting* is not *per se* illegal, in the sense of being an offence, but it must not be done in public. So Withers, J., said in *Jayawardana* v. *Thomas*, Nov. 5, 1895, 1 N. L. R. 216. "The real essense of the offence is the publicity which attracts idlers of all sorts to various forms of public nuisance." [The cases on *Unlawful Gaming* will be noted later on in these Reports.]

4. "A doubt arises here whether wagers, that is, promises under condition, where there is no indication of an intention of a gift, and when they do not accompany some other contract, are valid or not, Although this subject is regarded as a disputed point in law, it has been decided with us for the general good that such wagers are invalid, unless there is an obligation on both sides, and unless the contracting parties have an interest in the consideration, as is the case with an insurance; otherwise, whatever has been given or paid may be recovered." Grotius [Maasdorp's edition], 3.3. 48. Grotius notes the following authorities as holding a contrary opinion: *Sande*, 1. 3. 9; *Straccha de Sponsionibus* part 4; *Christin.* Vol.2. decis. 199; *the Jurists* on *Digest* 45. 1. 108; *Autumn. Confer de droict on Digest* 19. 5. 5; *Gomez, resol.*2. 11. 4; *Covar in cap. peccatum*, 2. 4. 2; *Mant de Ambig. Com.* 1. 14. 12. n. 24. Even Van Den Keessel (*Thesis*, 214) does not lay down anything decisive, "Although it cannot be proved from the General Laws, which are enumerated by *Groenewegen* in his notes on this section, and by the Jurists *De Richtsgeleerde Observation*, that all wagers are prohibited by the Common Law of Holland, yet it would appear from *Van Alphen* and *Bynkershoek* that causes are vary rarely decided upon such wagers." This note of Van Der Keessel is upon Grotius 3. 3. 48, par-

ticularly on the latter part dealing with an old practice in Holland "for one suitor judicially to offer to the other a wager as to his indebtedness or non-indebtedness."

May 8, 1820] [Ram. Rep. 1820—'33 p. 4.

Present Giffard C. J. and Byrne J.

*Gambs* v. *Krickenbeck.*

**Professional man—Liability for neglect, ignorance mistake—Notary—Velleianum Renunciation clause—Advocates—Civil Law—English Law—Proctors—**

1. Where a professional man neither errs through neglect nor corruption but from the general mistake in the profession, e. g. a notary as to the practice of inserting the clause of renouncing S. C. Velleianum, he is not liable in damages.

2. An Attorney is liable for the outcome of gross neglect, mismanagement, ignorance, corruption and in all cases where he ought to know his duty, but not in case of an undesigned mistake in a new point of practice.

3. An Advocate is not answerable for mistakes due to ignorance of the law.

## Judgment.

This is a suit brought to recover damages against the defendant, an acting Notary Public, for drawing a bond, without the clause renouncing the benefit of the S. C. Velleianum, whereby the plaintiff lost his remedy against the sureties (who were women) "owing to which gross neglect or wilfull omission" as the libel alleges," the plaintiff lost his debt of Rs. 444, which he demands with interest, and Rds. 166-2 being subsistence paid to principal debtor from 1st. 1819."

It appears in the very title of the case that the defendant is not a regularly bred Notary Public, but what is called an acting one. But as such he was employed by the plaintiff, and it is in evidence that he received his fee from the plaintiff for drawing the bond in question, which he was therefore bound to draw to the best of his skill and knowledge. There does not appear any reason to impute wilful omission to the defendant, this must therefore be discharged from our consideration of the case.

There can be no doubt that by the law of England, which on these subjects derives most of its prin-

ciples from the Civil law, gross neglect, mismanagement, ignorance, or corruption may be the foundation of an action against an Attorney. *Russel* v. *Palmer* 2 Wils 325, and a Notary Public is at least as responsible. It is equally certain that an Attorney is not answerable for any loss his client may sustain, on account of a mere involuntary undesigned mistake in a nice point of practice. *Russel* v. *Palmer* 4. Burr 2063, 2 Wils 325. But he is liable when he ought to know his duty, as for drawing a bond on a wrong stamp a matter supposed to be directly within his means of knowledge. *Pitt* v. *Yelden* 4 Burr 2091, *Gulliam* v. *Barnett*, 2 Smith 156.

In this case, as I have already suggested the defendant is not a regularly bred Notary Public. The circumstances of this Island have long prevented our receiving any accession of practioners in any branch of the Roman-Dutch Law from the country in which it was cultivated as the Municipal Code. The consequence has been that Notaries Public, Proctors, and Advocates of the several courts in this Island have for a considerable time, been necessarily persons not regularly educated to these several pursiuts. For such persons great allowances must be made, and if it appears that the mistake of the defendant is one which any other practitioner would have been at the time equally liable to, we would go very far indeed were we to charge him with gross neglect. For error in judgment and most particularly in the practice of law, very great tenderness is shown—and, indeed, when all from the judge to the writing clerk, are equally exposed to the danger, it would be exacting too much from human frailty to look for total exemption.

And on this point Van Leewen in his *Censura Forensis* speaks fully and feelingly:

> In like manner (he has been speaking of judges) neither is an Advocate answerable, who falls into mistake through ignorance of the law. For though it be disgraceful to a Doctor and one professing the laws to be ignorant of the *very law* itself, yet would it be very unjust and hard measure to them if, in so diffuse and difficult a science as law and practice—amidst such a variety of opinions and in such a crowd and procrastination of causes very often not allowing full time for deliberation—that they should themselves beheld liable to the hazard of every suit, in case anything fell out either through their imprudence or want of experience.

It seems not to be denied that this omission of the defendant was the cause of the plaintiff's failure before the Sitting Magistrate's Court. But there has been no

appeal, and to decide against the defendant would be for this Court to decide in effect implicitly according to the decision of the Sitting Magistrate.

Putting this, however, out of sight for the present, however difficult it might be for the Court to pass over the objection, we shall suppose that the plaintiff has suffered the loss inevitably in consequence of the error of the defendant. It is certain from the evidence of *Mr. Van Dort*, that previous to the British occupation of this Island, he and other regular Notaries Public were accustomed to insert the renunciation of the S. C. *Velleianum*, where *women* were *sureties*.

But it should seem that this practice, after that period, (for some reason not explained) fell into disuse, and he has produced many bonds from 1803 downwards in which it is omitted, though *women* were sureties; though it is to be observed that these were mortgage bonds in which the hypothec might have been held sufficient, and the sureties considered as mere matter of form—this I say is a possible, though by no means a sufficient, reason for the omission.

The practice says *Mr. Van Dort* fell into disuse and was revived about three years ago. It is within all our recollections that the case which gave occasion to its revival, that of *Phebus's* surety *Mrs. Pegalotti*, excited no small surprise at the time; and I will venture to say that the Judges themselves were as little acquainted with the existence of the S. C. Velleianum as any Notary in the Island could have been.

It has however been carefully attended to ever since.

But in fact from 1803 to 1816, not a bond containing the *renunciat* has been produced. How then can a general and a prevalent misconception, for such, from the evidence of *Mr. Morgan* and *Mr. Van Dort*, we cannot but believe to have prevailed,—how can it be visited particularly on the defendant, if he erred? And that he did so, we have only the Sitting Magistrate's decision before us to prove. He did so neither from neglect nor corruption, but from the general mistake prevailing throughout the profession.

As however the plaintiff has been unfortunately a sufferer, his suit is dismissed *without* costs.

June 15. 1904] [1 Bal. Rep. 3, 7 N. L. R. 25]

Present: Wendt & Middleton, J. J.

*Perera* v. *Chinniah.*

C. R. Colombo, 22779.

**Professional man—Liability for unskilfulness—English Law—Roman-Dutch Law—Surgeon—Liability for opinion—Negligence—Incompetence—Opinion given in good faith—Lex Aquilia—Animus injuriandi—**

1. The liability of a professional man in Ceylon for unskilfulness or negligence in pronouncing an opinion is governed by the Roman-Dutch Law.

2. By the Roman-Dutch Law, as under the Roman, a surgeon is liable in damages for unskilfulness or negligence.

3. It is on the party, seeking to fix liability on a professional man, to prove that such professional man's opinion, whereby the party has been injured, arose from gross incompetence or ignorance, or from gross negligence, but mere difference of opinion among professional men does not make the opinion of one of them due to ignorance, incompetence or recklessness.

4. *Per Middleton J.*,—Where a professional man's advice in a matter of business is sought, and it is given in absolute and unheeding ignorance of the subject upon which it is asked, it is doubtful if so entire a disregard for professional obligation may amount to such complete recklessness, as to whether he injures or not, as to imply an intention to injure.

One Mr. C. A. Perera purchased a horse on the opinion of one Mr. Chinniah (a veterinary surgeon) that it was sound in limb. Another veterinary surgeon, Mr. Sturgess, pronounced the horse to be defective and it was sold at a loss. Mr. Perera brought an action against Mr. Chinniah for damages and the Commissioner gave judgment for plaintiff for Rs. 250 and costs. Defendant appealed and Grenier, A. P. J., reserved the point to be argued before two judges, whether a professional man is liable in damages for the expression of an opinion on which a person acts.

*Dornhorst, K. C.* (*with him Elliott*) for defendant-appellant submitted that good faith on part of defendant should be presumed and cited,

Ramanathan's Reports 1820-'33, 4.
10 D. C. Colombo 15506 (20-11-03)
Van Leeuwen (ii) 323.

For an honest error in opinion a professional man is not responsible.

Beven's *Negligence in Law*, ii, 4224. *Swinfen* v. *Chelmsford* 5 Hurls and Norm 916.

Pollock on Torts 479. 3. Br. 127.

Voet says that professional men are responsible only for negligence.

*Walter Pereira* (*with him F. J. de Saram Jr.*) for respondent. The evidence pointed to dishonesty, unskilfulness or negligence. Negligence must be inferred from reasonable care not having been exercised. Professional men in England have been condemned for wrong opinions (Ruling Cases xviii. 636). The Roman-Dutch Law is applicable to this case and by the Roman-Dutch Law a professional man is liable for negligence or ignorance:—

Grotius iii. Chap. 33, § 5.

Voet. ix. 2. 23.

*Dornhorst* K. C. in reply.

Judgment.

**Wendt, J.**, Under the *Lex Aquilia* a surgeon was liable in damages for unskilfulness or negligence (Institutes iv. 3. 6 and 7; Dig. ix. 2. 7. 8) and the principle was well recognized in the Roman-Dutch Law (Voet. ix. 2. 23) being founded on the maxim that "one ought to know that his want of skill or strength would be injurious to another." If then a physician or surgeon is liable for unskilfulness or negligence in prescribing for or operating upon a patient, I do not see why in principle he should not be equally liable for unskilfulness or negligence in pronouncing as to the soundness of a horse which he is retained to examine and report upon in order that his opinion may form the basis of a purchase by his employer. In the present case the defendant's skilfulness is not impugned; he is a duly qualified veterinary surgeon. But the learned Commissioner has found him guilty of negligence of not duly exercising the professional skill he possessed. His honesty and good faith are not questioned. For the reasons given at length by my brother Middleton I agree with him in holding that plaintiff has failed to prove the negligence alleged, the proof establishing that defendant made a careful examination of the horse before forming his opinion as to its soundness. Mr. Sturgess' evidence, based on a subsequent examination, is not conclusive proof that there must have been negligence on defendant's part. The decree appealed from will therefore be reversed and the action dismissed. I agree with my brother in his order as to costs.

**Middleton, J.**, This was an appeal against a judgment, ordering the defendant, a veterinary sur-

geon, to pay Rs. 250 damages and costs to the plaintiff, a proctor, for alleged negligence and incompetence on the part of defendant in giving his opinion for reward as to the soundness of a horse, by which the plaintiff was induced to purchase the horse. It is a curious fact in this case that the defendant's certificate is as to a black horse 8 years old while Mr. Sturgess refers to a brown horse 7 years old. Neither counsel for appellant nor for respondent was able to produce any authority bearing on the question as to whether, and to what extent, a properly qualified veterinary surgeon was liable for the consequences of an opinion given *bona fide* and after careful diagnosis. The learned Commissioner who heard the case held that the defendant when he gave his certificate was honestly of opinion that the horse was sound, but his failure to note lameness at any time, his omission to refer in his certificate to the defects which he says he observed at the time, his imputing peculiarity of gait first to the hardness of the skin at the fetlock and afterwards to bad training forced him to the conclusion that the opinion of the defendant honest as it was, was not founded on a due exercise of reasonable and proper skill and found him guilty of and responsible for negligence. It is difficult to see how the defendant has been negligent, except as regards his diagnosis, but it is proved he examined the horse carefully, He states that he observed both the splint and the growth of the lower jaw and noticed no lameness but an awkward hind gait and he does not regard any of these symptoms as indicative of unsoundness. He also looked at the back and loins which he says are not weak. If anything is to be charged against the defendant it must be ignorance or incompetence. It is submitted to us by respondent's counsel that even if the evidence of Walles and de Silva is not taken into consideration, the evidence of Mr. Sturgess shows that the defendant displayed gross ignorance and incompetence. I feel that I cannot accede to this, as even if I prefer the opinion of Mr. Sturgess to that of the defendant, I am not prepared to say upon it, that defendant has no knowledge of his profession. There does not appear to be authority in the Roman-Dutch Law bearing on the question that the learned counsel for appellant can point out to us, but he has called our attention to p. 102 of M. DeVilliers' Translation and Annotations of Book 47 of Voet. The observations there set out appear to apply to the case of an injury arising from a statement made

by a doctor as regards a patient's condition or health in respect to its defamatory character. The first requisite under the Roman-Dutch Law appears to be the *animus injuriandi* which apparently may be either expressed or implied, but if that is so where is that element to be found in this case? Can it be held if a professional man is consulted by one of the public who tells him he purposes to act on the advice given in a matter of business, and the advice is given in absolute and unheeding ignorance of the subject upon which it is asked, that so entire a disregard of professional obligation may amount to such complete recklessness as to whether he injures or not, as to imply an intention to injure? I doubt it. It would be extending the doctrine of implied intention too far. The Roman-Dutch Law which I presume should govern this case seems to be against the Commissioner's ruling. I will now examine the English cases to which our attention has been called. Tindal, C. J., in *Lamphier* v. *Phipos* (1838) 8 C. and P. 479, which was an action against a surgeon for negligent and unskilful treatment lays it down that every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill, he does not undertake to use the highest degree of skill. Lord Campbell in Purves v. *Landell* (1845) 12 Cl & Fin 97, apprehending that there is no distinction between the law in Scotland and that in England says "professional adviser has never been supposed to guarantee the soundness of his advice;" and Lord Brougham in the same case, which was an action in the Scotch Courts against a writer to the Signet for compensation for mismanagement of a case held that the very essence of the action was that there should be negligence of a gross description or gross ignorance. A veterinary surgeon of the present day, if not strictly a member of the learned professions, so called, is at least a member of a profession which requires considerable learning and attainments to acquire its higher professional qualifications and it is admitted that Mr. Chinniah has acquitted them at the Government Veterinary College at Bombay which Mr. Sturgess admits is one of the best in the East. Mr. Sturgess' opinion as to the unsoundness of of the horse in question is supported by Mr. Walles and a farrier, and weight of opinion is distictly in favour of the opinion that the horse was unsound, Mr. Sturgess saw it and gave his certificate on on the 8th January, 1903. The evidence that I think is required under the English Law to make the defendant responsible is to the effect that it would be im-

possible for one professing to be veterinary surgeon to say in that capacity that he considered the horse was sound unless he were quite ignorant of his A. B. C. of his profession and that a man would be quite ignorant of his profession if he did not know the difference between a swelling on a bone and osteoporosis, or between injurious and a harmless splint. I think it would be on plaintiff to demonstrate that the defendant's opinion arises from gross incompetence or ignorance or from crass negligence in his diagnosis and examination of the horse. As the case at present stands there is one qualified person's opinion against another's coupled with the opinion of two practical men. It is notorious that doctors, lawyers and experts of every kind are constantly differing in opinion on the same facts, and also as a matter of opinion a reasonable man would prefer to accept what appears to be the weightiest and most valuable, yet the acceptance does not of necessity imply that the opinion of the defendant is the outcome of gross ignorance or crass negligence which I think alone would be good ground for holding him responsible to the plaintiff. I feel therefore that I cannot hold the defendant responsible in this case either under the Roman-Dutch or English Law. I am of opinion that the appeal must be allowed with costs but I think the parties should pay their own costs in the court of requests.

July 17, 1830.] [Ram. Rep. 1820—'33 p. 153.

Present: Marshall, J.,

No. 5380.

*King* v. *De Bedier et al*

Pledge—Civil Law—Security deposited at H. M. Customs—Sale in default of redemption—Preference—Crown and private creditors—[Regulation No. 9 of 1825, See Notes]—Creditors right against debtor's property before security—Insolvent estate.

1. A security connot be sold without order of court or consent of debtor.

2. Security deposited with H. M. Customs may be sold or otherwise according to Customs Rules.

3. A creditor need not stand or fall by his security, but have recourse against debtor's other property.

4. The crown as creditor of an insolvant estate has a preferential right over other creditors in respect of debts due as taxes, duties or tribute.

Judgment.

*Per* **Marshall, J.**—This action has been instituted on behalf of Government to recover the sum of £228. 5. 11½ being the balance alleged and proved to be due for duties on goods imported at different times by defendants. It appears that a portion of the goods thus imported was deposited at the Custom House according to the provisions of Regulation No. 9 of 1825 Sec. 11, as security for the duties due on the whole importation; that the goods so deposited, consisting chiefly, if not wholly, of French wines, were considered at the time sufficient to answer the amount for which they were so deposited; that they would have sufficed for that purpose, if they had realized the common market price of similar goods, but that, owing to an unusual depreciation in value, they fell short of the amounts due by the sum which is the subject of the present action.

No defence is attempted to be made on the part of the defendants. who, it is admitted are insolvent. But an intervention has been filed on the part of Messrs. Gibson & Co. of Galle, as attorneys of a house at Bombay, on whose behalf the intervenients had already obtained a judgment against the defendants, and who are therefore interested in defeating the claims of third parties on the property which will ultimately be divided among the creditors, more especially if such claims, when substantiated, should confer a right of preference over the rest.

The intervenients, in the first place, dispute the right of the Crown to recover at all in this action; and they make their objection on two grounds:—

First. That the Crown must be considered in this instance, as a pawnee, with respect to the property deposited as security, and that as such, its officers had no right to sell the pledge without a decree or some authority of a Court of Justice, or the consent of the defendants, or as they are in a state of declared insolvency, of the other creditors. This, it is contended, is the general law on the subject, and as such, cannot be controlled by implication, and, is not controlled in express terms by the Regulation; that therefore, as this property was sold without such authority, the Crown was a wrong-doer, and cannot now recover the deficiency.

Secondly. That, as the Collector of Customs had a discretionary power, (for this was stated by the gentleman holding that office, in his evidence), as to the quantity and value of the goods received as security,

Government must abide by the security as taken, and cannot, if that fall short of the amount due, have recourse to the general property of the importer; that no such deficiency was contemplated by the Regulation, and that the Government by not taking care that the deposit was sufficient to cover the amount of the duties, had in effect, deceived the public, who would take it for granted that the crown had secured its own interests. With respect to the first point, it is unnecessary for me, as far as the decision of the case is concerned, to consider the general question of the right of a creditor to sell the pledge which he has received as a security. I shall make some general observations on that question presently, but it is sufficient for the present purpose to say that, in my opinion, the general law is controlled by the Regulation in question. The eleventh section directs "that no articles imported shall be allowed to pass the Custom House till the established duties are paid, or security by deposit or otherwise shall be lodged to the full amount. If the deposits be not redeemed within six months, they shall be sold for the satisfaction of the claims of Government, the duties and charges deducted from the amount and the balance of money, if any, paid to the owner." [See Notes].

Not only therefore is the officer of the Customs not precluded by this provision from selling the deposit, but he is actually enjoined to do so at the expiration of six months without payment. And if he were to neglect so to do; and any loss were sustained in consequence of such neglect, it might be a question whether he would or would not be responsible for the danger. It is admitted in the present case that six months had expired.

On the second ground, I am of opinion that the intervenients have equally failed to support their opposition to this action. I see no reason why the crown should be considered less favourably in this instance than any mortgagee would be. When a man lends his money on the security of a pledge or mortgage, he usually requires that the security should be such as in common probability would cover principal, interest and costs, if ultimately he should be driven to compulsory measures to procure repayment. It must, however sometimes happen, and the deterioration of property in this Island unfortunately makes it a matter of frequent occurence here, that the property hypothecated falls short of the demand. Yet I never heard it contended that the creditor must stand or fall by the security, and could not have recourse against the other property of his debtor for the defi-

ciency. The only difference between the two cases, is that the person who lends his money usually has in view the profit to be derived from the transaction in the shape of interest, whereas the receiving the deposit, in cases like the present is purely a matter of indulgence for the accomodation of the importer. And to be sure, if the court could allow itself to be influenced by argument of expediency, it is evident that, if the opposition of the intervenients were allowed to prevail on this ground, there would be an end of the alternative at present allowed, and the collector would take care that not a single bale of goods should pass the Custom House till the duty had been paid upon it in cash.

Again, there would be no mutuality between the parties, if this argument of the intervenients were to prevail. The Regulation directs that on the sale of the deposit, the balance, if any, is to be paid to the owner. Whereas if the Crown is to run the risk of the deficiency in case of failure to redeem the pledge, it would be but equitable that it should have the advantage of any surplus which might remain. If the deposit were to be considered to be an exact and absolute equivalent for the duties intended to be secured, it ought, as soon as the six months had expired, to vest absolutely in the Crown.

It has been urged, and very properly, by His Majesty's Advocate Fiscal, that this was a contract between the Government and the defeudant, with which the intervenients had no concern and these latter parties could not stand in a better situation than the defendants themselves could have done. It is unnecessary however for me, after the opinion I have given as to the validity of the objections themselves abstractly considered, to enquire whether, supposing them to have been entitled to weight, it would have been competent for the interminents to avail themselves of them. I have stated that the terms of the Regulation make it unnecessary, as far as the decision of the Court is concerned on the present occasion, to decide the more general question as to the right of the pawnee to sell the property pledged with him. But I am unwilling to pass that point over in silence, first, lest any inference should be drawn from the present decision in favour of such general right; and secondly, because I wish to acknowledge the numerous authorities which the industry, exerted on both sides, has supplied to the Court, and which may be of use to future suitors in cases similarly situated.

M. Pothier in his edition of the *Pandects*, bk. 1. tit. 5. sec. 18. and 19, says "if the creditor be in possession of the pledge, he may sell it" (supposing the debtor to have made default) "without any judicial authority. All that is required is *that he give his creditor notice*. and that he conduct the matter fairly." Again "if a creditor wish to sell a pledge, which has been deposited with him unconditionally as to the time of its redemption, he should give his debtor notice three times to redeem it, otherwise that it will be sold." At the end of the section, indeed, Pothier observes that it had been decreed by Justinian that "where the mode of selling the pledge is agreed upon, that mode shall be pursued: otherwise, it shall be lawful for the creditor after notice (*ex denuntiatione*) or by a judge's decree, to sell it at the expiration of two years from such notice or decree": he adds in a note that *Donellus* (*de pignoribus*) endeavours to prove the intervention of the two years was only applicable to the case of a creditor, wishing to be declared the owner of the pledge, that is, that the property, on the default of redemption, has vested in himself the the creditor. And Voet lib, 20 tit. 5, *de distractione pignorum et hypothecarum*, seems to agree with this opinion of Donellus. In Wilmot's treatise on the English Law of Mortgages, it is said by the Civil law in case of delay of payment, the creditor had power to sell the pledge, allowing his debtor two years after notice given to redeem it. However this may be, Voet distinctly says (sect. 1.) that one or more notices (using again the word *denuntiatio*) should be given to the debtor before proceeding to the sale, which he observes afterwards (sect. 5.) should be conducted in a formal manner, and by public auction, particularly if it be of real property; and he carries this principle of publicity so far that he goes on to say (sect. 6,) that the mode of selling pledges which has been established by the law of the place, or by ancient custom, shall be observed and shall not be departed from by private contracts between debtor and creditor. So that even a stipulation that a creditor shall be allowed to sell by his own private authority, shall not do away with the necessity of a public sale, for which position be cites a case from *Neostadt* p. 245, which has been also relied upon in this case by the intervenients. *Ayliffe* p. 534, limits his previous more general doctrine to the right of the creditor to sell, and says that this should be done by virtue of a judge's decree. So *Domat* bk 3, tit. 1, sect. 3 par. 9, thus explains the creditor's power of selling. "We do

not say in this article that *the creditor may sell* the pledge, but only that the pledge *may be sold*. For by our usage, the creditor cannot of his own authority sell the thing he has in pawn or mortgage as he might have done by the Roman Law. But the thing must be sold either with the debtor's consent or by authority of justice."

The English authorities, of which I am only aware of two which bear immediately on this point, are more favourable to the right of the creditor to sell. In Jacob's *Law Dictionary* title *Pawn*, it is said, that if goods are redeemable at a day certain, it must be strictly observed: and the pawnee, in case of failure of payment at the day, may sue them, and cites 1 Roll Rep. 181,215. A later dictionary of Tomlins' adds: "But still the right owner has his redemption in equity as in case of mortgage," citing 1 Inst. 205. I have looked at the authority last mentioned and certainly find nothing to warrant the addition of Tomlins. At all events the right of redemption, as the Advocate Fiscal has observed, must be examined before the pledge has actually been sold.

The other English authority is the case of *Pothonier* v. *Dawson*, Holt's Rep. 385, in which Lord C. J. Gibbs, is reported to have said that "when goods are deposited by way of security to indemnify a party against a loan of money, the lender's rights are more extensive than such as accrue under an ordinary lieu in the way of trade. It may be inferred that the contract was this: If I, the borrower, repay the money, you, the lender, must redeliver the goods, but if I fail to repay it you may use the security I have left to repay yourself. I think, therefore, the defendant, the pawnee, had a right to sell."

The authorities to which I have alluded and the greater part of which were cited at the bar, are not, it must confessed, so conclusive or so consistent with each other as might have been wished. But thus much may, I think, be inferred from them, that though the lapse of two years may not at this day be required to intervene between default of payment and the sale, yet that it would be much more prudent, as Vander Linden in his *Institutes* p. 180 observes, for the creditor to obtain the authorization of a court previous to proceeding to a sale. That some sort of notice is necessary to be given to the debtors, appears to be agreed by all the authorities from the Civil Law.

And from the use of the word *denuntiatio*, I should say that there should be something more than a mere intimation in the ordinary sense of the word. A citation to the court having jurisdiction, answering to the English term "*rule to show cause*," would, as it appears to me, be the mode which would most satisfy the force and meaning of the Latin expression,

To return however to the case immediately before me: the judgment of the Court is that the opposition of the intervenients be dismissed and that the Government do recover against the defendants the sum of £ 228. 5. 11¼ which has been proved to be still due for the duties.

Judgment having been thus given for the Crown, the question arises as to the right of preference over other creditors, the Advocate Fiscal insisting on the general rule, that the Crown is entitled to a preference till the subject's execution is complete; Mr. Staples, on behalf of the intervenients, contending that no such preference exists in the present instance, from the defendants being insolvent.

The principal, indeed I may say, the only authority cited on the part of the intervenients, which goes the length of supporting this denial of the ordinary rule of preference, is the following passage in Vander Linden's Institutes, lib. i ch. 12. sec. 2. p. 174, according to the English translation lately published by Mr. Henry. After stating (among other instances in which the law gives a tacit right of mortgage to the Crown on the goods of those who are in any way employed in the collection of the Revenue), the author is made to continue thus:—

"In other cases, when the Crown is a creditor with others of an insolvent estate, it has no further right than other creditors." for which latter position is cited a Resolution of the States of Holland of 25th February 1678 in the Groot Placard Book 3. D. p. 591. That resolution has, I am assured, been faithfully translated, and as far as I am able to understand the purport of it, by no means supports the dictum which Vander Linden, or the translator, has pronounced on its authority. It appears from the preliminary matter which forms the much greater part of the instrument, the Resolution itself being very short, that a question had arisen whether the management of a certain insolvent estate should remain with the *Scheepen*, the Court of ordinary jurisdiction, or should

devolve on certain commissioned judges who claimed the right of superintendence. It was a question of jurisdiction rather than of preference, which latter point indeed was left to be decided by whoever should have the management of the estate. Accordingly, the Resolution decrees "that in case of insolvency of any estate, of which the states might be one among other creditors, in such a case the said states cannot be considered otherwise than in *privatorum loco* in all judicial acts done with respect to the said estate; and therefore the ordinary judge of the place must, with the concurrence of the creditors, allow the appointment of a curator, for the administration and sale of the property, the depositing of money, the proceeding about the right of preference etc.

All that appears to be decided by the Resolution is, that Government shall not sit as judge in its own cause; that if it have a right of preference (a point not decided by the Resolution), it must be content to receive that privilege as awarded to it by the ordinary tribunal. It is remarkable that the words in Vander Linden, "in other cases" are put in contradiction to the cases contemplated in the preceeding passage: namely, cases of claims against persons employed in the collection of the revenue. The passage, therefore, which is supposed to rest on the authority of the Resolution, must be intended to apply to claims against *others* than those employed in the collection of the revenue; whereas the estate in question in the Resolution is expressly declared to be that of a late Collector of the Revenue.

With the exception then of this doubtful authority from Vander Linden, the writers on the Civil Law, which have been cited and whom I have consulted, agree with the rule of preference as it exists in England. And I shall simply content myself therfore, with referring to the respective authors:—

*Potheir* lib. 49, *Pandectarum*, tit. 14, *de jure fisci* sec. 39, 40. *Voet ad Pandectas*, 20, 2, 8 *et seq.* *Heinecii Elem Jur. Civilis* 47, 14, 290. *Groot's Inleiding*, 2, 48, 15. *Vander Kessel ad Grotium*, 2, 48, 455 and 456. *Domat*, bk. 3, tit. 1, S, 5, par 18 *et seq.* Wood's *Civil Law*, p. 220. *Van Leeuwen*, p. 358—360.

It is therefore, decreed that the present claim be satisfied out of the property of the defendant in preference to other creditors.—(Per the Supreme Court of Judicature).

July 6, 1822.] [Ram. Rep. 1820,—'33, p. .55

## High Court of Appeal

### Provincial Court of Kolpentyn No. 2364.

*Rosayro* v. *Casie C etty.*

*Prescription—Trust property—Is surviving parent in possession of what was once communal property trustee for children?—Disability—Ability to sue.*

1. That no limitation will run against trust is a rule of English equity, against the justice or propriety of which it is impossible to state an objection.

2. Prescription runs against a succession, though vacant, abandoned and without a curator, or administration, and those to whom the estate is due cannot plead disability.

3. That an estate is not administered is no bar to the running of prescription.

4. Prescription begins to run the moment that the party to whom a right accrues is able to sue.

### Judgment

There are many points offered for the consideration of the Court in this case, but that which is first to be considered (for on its decision will depend the necessity of going into others), is the plea of prescription offered by the appellant, Rosayro. He pleaded this in reply to a demand made upon him as executor to his father. The demand is of the maternal share due to the wife of the respondent Casie Chetty, as daughter of the testator's first wife who died in 1802.

The suit is brought in 1821, nineteen years after, and on the first view appears to be barred by the lapse of time. But it is replied that, on various grounds, the limitation should not apply in this case. These are, as I collect them the three following:—(1) That this is a case of trust, against which, by the Equity of England, no limitation will occur. (2) That the testator and his children must be considered as tenants-in-common of the property of his wife and their mother, and that his possession therefore could not be taken to be adverse to theirs, so as to support a title by prescription. (3) That as the testator did not take out administration to his deceased wife until 1818, the respondent could not have brought his suit earlier.

That no limitation will run against a trust is a rule of English equity, against the justice or propriety of which it is impossible to state an objection; and though it is not specifically recognized in the Dutch Roman Law, I should feel very strongly inclined to support it where the case seemed to call for its operation. But how can this be called a trust? It is clear that there is no document by which it is so described, and I know of no construction of law, from which it can be inferred that the testator was a trustee. The property of the mother after her death was by the Dutch Roman Law vested in her children so far as their portion went, and not in him, and his possession of it could by no construction of law of which I am aware, be called that of a trustee.

And this is proved the more strongly when we come to consider the second objection, that the testator and his children must be considered as tenants-in-common of the property of the mother. There is no principle more firmly established in the Dutch Roman Law than that the death of either party totally extinguishes the *communio bonorum* between married people: *Omnis societas* (says Sande) *morte alterius sociorum finitur nec ad haeredem socii transit etiam ex pacto*, lib. 2 tit. def. 9. "All partnership is concluded by the death of one partner nor can it pass to the heir of the deceased even by agreement," see also Van Leeuwen's *Dutch Roman Law* 4 23 sec. 7, p. 413. If then the community of property expired with the mother, the possession of the testator was not the possession of the children, and this principle, brought by the way from the English law, and founded upon another principle of that law, which disables one tenant-in-common from suing another, cannot avail in the present case. I am not even prepared to say that it would in any other, as the fundamental principle does not appear to be recognized by the Roman Dutch Law.

But it is decisive of this point that the very kind of claim in question of the deceased is by the Civil Law limited to five years after the right has accrued: that right accrued by the death of Martha.: *at ultra quinquennium post additionem numerandum separatio non postuletur*. Dig. 42. 6. 1. sec. 13.

The third objection is founded upon the alleged incapacity of the respondent to sue, as the testator did not take out letters of administration to Martha until 1818, and for illustration the case of *Joliffe and*

*Pitt* and others in 2 Vernon 694 is cited. There both parties were absent from England when the debt was contracted; on the plaintiff's return to England in 1702, he commenced proceedings against the absent defendant which were regularly continued to 1706. The defendant died abroad in 1706, and his executor came to England in 1710 and proved his will in chancery against the executor and some other creditors who opposed his claim. It is quite clear that until the executor came to England, the plaintiff could not carry on his suit, because there was no one within the jurisdiction whom he could sue, but the case was by no means supports the general position drawn from it; for had the executor been in England before he proved the will, he might have been sued, if it could be shown that he had intermeddled with the property of the deceased.

But the Civil Law gives the true rule by which prescription is governed, and it is perfectly consistent with what I have just stated. *In primis exigendum est ut sit facultas agendi* Dig. 44. 3 sec. 1: it is necessary in the first place, that the plaintiff should have a power of bringing his action; and from this follows directly the rule of practice, *contra non valentem agere* non currit proescriptio—"against him who is disabled from suing, prescription does not run."

To apply this rule here, let us see whether the respondent was disabled from suing for the maternal inheritance of his wife, from his marriage in 1805 to 1821.

It is very clear to me that he lay under no disability; he was in the language of the law *valens agere*; the property was in the hands of Simon de Rosayro, holding it certainly not in any privity of title with his children, at any period from 1802, when her right accrued, to 1805 when she married. The respondent's wife might have, if she found it necessary, demanded her maternal share; after that period her husband had the same full power; there was no absence of either party, no disability of either to commence or defend a suit. It was at all times in their power, if the form of the Dutch-Roman Law were to be followed, to apply to have a curator appointed to the property of Martha; or if the newly introduced form of administeration were looked to, they might have obtained it as creditors of that property; or if, what appears to have been the true legal condition of the parties, Simon was in adverse possession of the property, they might have sued him

without any further form, he was always forthcoming.

"The term of prescription" says Pothier, "runs against a suggession, though vacant, abandoned, and without a curator, for the creditors of such succession, who are persons having an interest in the preservation of the rights of succession, may procure the appointment of a curator: threfore they cannot avail themselves of the rule, *non contra valentem agere*, non currit proescriptio. Evan's Potheir *On Oblig* p. 454 sec. 650.

It is indeed further urged in this case that Simon de Rosayro, in taking out administration in 1818, called upon persons having demands upon the estate, to make their claims, and that this waived the prescription. Had he specifically called upon the heirs to come in and take their maternal inheritance, it might have had this effect; on the contrary, his account directly states him to have discharged their claims, and at all events, so vague an invitation cannot raise up a new right in the respondent, if it had been, as I concieve, utterly extinguished by prescription in 1807 or 1810.

And taking out of administration to Martha seems to have created much of the difficulty of this case and the difficulty shows how very cautiously a branch of a totally different system should be transferred to any code of laws. The Dutch Roman Law (notwithstanding what the Provincial Judge has been pleased to propound) knows nothing whatever of administrations, which are derived wholly from the English Code. How an administration to Simon could operate at all upon the rights of the respondent and his wife, vested absolutely by the death of Martha, I can in no wise conceive; or why it should have been thought necessary by Simon to take it out—indeed the whole subject of these administrations in the subordinate Court is involved in a perplexity, which it would be a matter of public utility to have explained by competent authorities.

Thinking, as I do, that this suit is barred by prescription of five years, I do not think it necessary to go further, but I feel that by this opinion, the substantial justice of the case will be met. It is perfectly clear to me that the respondent supposed himself to have given up all demand to the maternal share by accepting the dowry, for he did so at a time when the *Thesavalamai* was believed to be the law of Calpentyn —and by that law he would have been barred. A

subsequent discovery that this code did not prevail there, and a subsequent quarrel which cut him off from the favour of his father-in-law are in my mind, the real grounds of this suit, and the claim after having been utterly extinguished by the law of prescription, has been revived in consequence.—(Per *The High Court of Appeal.*)

**No date]** **[Ram. Rep. 1820—'33. p. 128.**

**No name of Judge.**

*Selvnan Appu* v. *Hopman.*

*Joint will—When binding on survivor—Roman-Dutch-Law—Fidei commissum—Joint property—Remainder.*

The survivor is bound by the joint will when one of the persons named, with the consent of the other, or both with reciprocal consent, make the other named person heir of the estate by way of fidei commissum, substitution or usufruct.

**Judgment.**

*Per* the Supreme Court of Judicature. This case comes before the court on a plea by the defendant to save property from an execution issued out of this Court *de bonis propriis* on the suggestion of a *devastavit.* She pleads that the property is secured to herself and her children by a deed entail, called a *fidei commissum* The Dutch Law on the subject of *fidei commissum* between husband and wife, in those cases wherein they jointly execute a will disposing of the joint property, has been variously interpreted; and I find that so reputable an author as Grotius, in his *Inleiding,* bk. 2. ch. 15. sec. 9. has stated the law erroneously. He has however been corrected by Voet, and Van Leeuwen in his *Censura Forensis,* in which latter authority, the distinction is precisely drawn, where the joint will binds the survivor and where the survivor is at liberty to make a distribution of the property contrary to the terms of the will. It appears in the *Censura Forensis* pt. 1. bk. 3 ch. 11. sec. 7, that the survivor is bound by the joint will only in one case, namely, the case in which one of the persons named, with the consent of the other, or both with reciprocal consent, makes the other named person heir of the estate, by way of *fidei commissum,* substitution, or usufruct. In this case, as each partner is benefited by the will thus

made, it would be very unjust that the survivor should have the power of depriving the persons entitled in remainder of that advantage for which the testator has paid a sufficient consideration.

In this case, however, the survivor does not come under either form or the spirit of the law. She would be at liberty to frustrate the intention of the testator, and her creditors have a right to the same benefit to which she is herself entitled.

Therefore this execution must be against the moiety of the joint profits. Moiety of each house to be sold.

July 30. 1821] [Ram. Rep. 1820-'33. p. 27

Present Giffard, C. J., and Ottley, J.,

*Giffening* v. *VanDerstraaten, No. 2017*

*The King* v. *De Heer and VanDerstraaten, No. 3171*

*The King* v. *De Heer and Vanderstraaten, No. 3172.*

*Fraud—Preference—Crown a creditor—*

A judgment confessed to the Crown evidently without consideration, by a debtor, in fraud of his other (real) creditors, is valid as between himself and the Crown, but invalid as against his other (real) creditors.

In these cases, the first of which has been eight years depending in this Court, it is now our duty to pronounce judgment.

All the interests concerned seem now to be fully before the court and all the facts fully within its cognizance.

The first suit in point of order is that brought by the administrator of Mr. B. A. Giffening to recover from Mr. P. V. Vanderstraaten a sum of upwards of 26,000 Rixdollars due to the intestate. This suit was instituted April 20th 1813, and after an ineffectual attempt of the defendant to delay it by a plea of a pending petition for Cessio Bonorum, judgment was on the 7th July given for 21,971 Rixdollars and execution awarded. The petition for Cessio Bonorum still however depending, the plaintiff was prevented from deriving any advantage from his judgment, until the prayer for the Cessio was withdrawn in June 1814. The execution

however was carried into effect and the sum of 4559.7.3 paid into Court.

This prayer of Cessio was filed by the defendant on the 7th of July 1813, the very day on which the judgment was pronounced against him. In the meantime, and before the prayer was withdrawn, an information was filed, November 10th, 1813, at the suit of the Crown against the defendant, as security for the arrack rent of Negombo for the year 1811—12, claiming the sum of 4,737 Rds 11 fs.

The agreement of the arrack renter with Government was produced, by which it appeared that two other persons, Vandenbosch and Pieris, were securities to Government, but a paper was filed December 20th, bearing date May 4th, 1811, by which the defendant engaged to answer for any arrears to Government. To this information the defendant gave no opposition whatever, and judgment was given for the Crown for 6,011 Rds., on which execution was awarded, and there appears appended to the proceedings the order of this Court to pay the sum of Rds. 4,747, levied by that execution, to Government for the use of His Majesty, and the receipts of the Collector shew that this was done.

By these means, the estate of Giffening was prevented from reaping any advantage from the judgment delivered in its favour in 1813 until January 1817, and in that month when (the Crown being apparently satisfied), Mr. Giffening might have hoped for execution, a new delay was interposed by the guardian of Mr. Vanderstraaten's children coming forward to claim their maternal share of inheritance. This claim Mr. Giffening opposed by intervention, and demanded an investigation as to the state of the defendant's property at the time of his wife's death, an investigation which occupied a considerable period of time.

Before the report of the commissioners appointed to this investigation was made, two new suits were instituted by the Crown against the estate of the defendant, one for a balance said to be due on the execution in the former case, and the other for arrears of rent of the year preceding that for which the former suit was brought.

In these cases it is stated, and not denied, that Mr. Giffening desired leave to intervene for his interest,

that the presiding Judge was new to the business of this Court, and unfortunately permitted himself to be misinformed by an officer of the Court as to the practice, and that Mr Giffening was deprived of the opportunity of shewing that the Crown had no real demand on the property of the defendant.

Judgment was accordingly pronounced for the Crown and execution awarded, 30th June 1819; upon this execution, a motion was made, 22nd July 1819, stating that the sum of Rs. 9311. 4. 2 remained in the Treasury, the balance of the former execution. Soon after Oct. 1819, the guardian of Mr. Vanderstraaten's children and Mr. Giffening intervened for the several interests.

In April last, 6th April 1821, the commissioners made the reports as to the state of Mr. Peter Vanderstraaten's property at the time of his wife's death. By that report, the balance to his credit on the 31st January 1805 stood at Rds. 693.7 3. of which a portion belonged to himself, and the material share of the children is diminished to Rds. 277,52 instead of Rds. 4807 claimed by the guardian, on the foot of an account filed by Mr. P. Vanderstraaten in 1807.

This is a chronological statement of the progress of these several cases, from which we observe that the administrator of Giffening, who had in 1813 established a demand and obtained judgment for Rds. 21971, has by suit after suit successively arising been prevented from receiving any advantage from that judgment for 8 years.

The question for the Court is in the first instance the claims of the intervening parties.

That of the administrator of Giffening is founded upon an unimpeached judgment of this Court given 8 years ago: that of the guardian of Mr. Vanderstraaten's children, upon an account furnished by Mr. P. Vanderstraaten himself, two years after his wife's death, and stating the sum of Rds. 12019 to be the amount of his property on the 31st January 1805, to 480 Rds. of which his children would be entitled.

This claim we have directed commissioners, totally unconnected with the parties, to examine. They have done so minutely: they have examined the book, account and papers, as furnished by Mr. Vanderstraaten himself, and they have carefully balanced all his seve-

ral concerns; the result is that instead of 12019 Rds. his whole credit on that day did not exceed Rds. 693. 7. of which it should seem that he himself would be entitled to 416. 2. 1. and his children to 277. 5. 2.

To this report objections have been made of a very extraordinary nature, that the commissioners, having made some allowances of items only supported by the defendant's own assertion, were bound to admit all his assertions; but it is obvious that many items might be such as to be in themselves indisputable, to contrast or investigate which would be idle or unnecessary, while others supported by bare assertion would require some strength of proof to give them credit. If every item of the account, referred to proper and uninfluenced persons for examination, is to be disputed and investigated afresh at the bar, this litigation, scandalously protracted as it has been, would be only now in its commencement.

It is our decided opinion that the report of the commissioners is that upon which we should act; the only proof offered in the case is the assertion of the defendant, and every item allowed is almost gratuitous on the part of the Court, and in fact only admitted by the Court in favor of the children, in the absence of better evidence. We can therefore only pronounce the guardian to be entitled to the sum of Rds. 277.52, with an equal sum for interest from the 31st January 1805. This sum we conceive to have a preference to the debt to Giffening's estate, and to be payable in full so far as respects that estate.

Having thus settled the question as to the children, we come to the judgments on behalf of the Crown.

It has already been stated that the administrator of Giffening was prevented, by misinformation given to the judge, from intervening in the cases which led to these judgments, and it is asserted by Mr. Giffening that his object was to show that the whole proceedings were founded in a fraud of Mr. Peter Vanderstraaten, who, by confessing these debts to the Crown, sought at once to deprive him of the fruit of his judgment of 1813, and to screen at the same time a friend of his own, the real debtor to the Crown.

It was a question of some difficulty with us whether, as these judgments had been given for the Crown by a competent Court, we had power to inquire into the consideration upon which they were founded, or to

entertain the question whether they were tainted with *fraud.*

We have considered this question anxiously, and we find ourselves supported by authorities in the conclusion to which we have come, that, although, as between the Crown and Mr. P. Vanderstraaten, these judgments must be and always continue to be valid, yet that as against third persons, creditors of Mr. Peter Vanderstraaten, they cannot avail, if they appear to have been founded in fraud. And in our view of the case we are forced to believe that every step of Mr. P. Vanderstraaten's proceedings, as towards the estate of Giffening, has been marked by the *most scandalous* fraud.

The first attempt at fraud was the interposition of a petition for a Cessio Bonorum, to delay the suit brought by Mr. Giffening to recover the amount due to the intestate's estate, and this in the teeth of his own account signed by himself and filed by the plaintiff. Defeated in this, and execution awarded against him, he (1813) interposed a petition to stay the execution, on the ground of the depending Cessio. Before the Cessio is abandoned, he comes forward to admit a debt claimed by the Crown, of which no evidence whatever was given but a short note written by himself and produced after Giffening had judgment, by which of course his property was bound, and it is remarkable that this note is filed on the very day, 20th December 1813, on which he also filed his account as required in the process of Cessio Bonorum.

I make this remark, because, in looking through his first accounts filed on lodging the petition, I discover no acknowledgment of any debt or security to the Crown, although in the account filed on the 20th of Dec. 1813, there is a sort of casual notice at the foot of the account stating his liability to those demands.

It is further remarkable that his name does not appear to any formal instrument as security for the rent claimed; on the contrary the contract with the renter states two other persons to be the security but Mr. P. Vanderstraaten says he was counter security for these persons.

Whether he was so or not, it is quite clear that he has interposed to favor those persons, at the expense of the creditor who had judgment against him, for although he might have demanded (if he were security)

the privileges given by the law to a security of requiring the discussion of the principals he has not done so, but immediately passed himself into their places by this admission; whether this admission, if then contested, would have been held valid against his other creditors, it is not necessary to inquire. The suit terminated in judgment and execution, and it appers by the records of this Court. that the execution was satisfied.

We now come to the suits, still depending. One of them is for a balance of the very execution thus recorded to be satisfied: this too without any hesitation is admitted by Mr. Vanderstraaten. As against him, this admission is valid; as against his creditors, we are of opinion that it is fraudulent and unavailing and evidence of gross fraud in the defendant.

The second Crown case now depending is, as I have stated, for the rent of a year previous to that decided in 1813: how this has happened it is not for us to inquire: the officer of the Crown does his duty according to his direction; but here again we have to lament that the plaintiff was not allowed to intervene. There is not a shadow of evidence in the case that the defendant was security excepting his own admission, upon which little reliance can be had, and a letter of his own writing eight years after the transaction and five years after Mr. Giffening's judgment, containing a similar admission; and so far from Mr. P. Vanderstraaten appearing by any other evidence to be security for this rent, the proceedings of the Provincial Court of Colombo have been given in evidence, by which it appears that two other persons are at this moment actually sued by Government in that jurisdiction, as securities for the very rent in question.

If to all these acts of Mr. Vanderstraaten were added the striking fact of his endeavouring by a mis-statement to secure the sum of Rds. 4,807 for his own family, to the injury of his creditors, we complete the picture of complicated fraud which the cases present on every side.

There is one circumstance to which, for the sake of an individual holding a very confidential office in this Court, we must advert. When these cases first commenced, and strong imputations of frand were made, as they were from the beginning made, against Mr. P. Vanerstraaten, it was the positive direction of the late

Chief Justice, that the Registrar, Mr. Vanderstraaten's brother, should abstain from acting officially in any instance where Mr. P. Vanderstraaten was concerned. The caution became the wisdom of the excellent judge and we are happy to believe has been rigorously observed by the Registrar, throughout the whole transaction. As guardian of his brother'e children, he could not help allowing his name to be used, but any further we are convinced that he has not interfered. In the instance of misinformation given to the judge, it was by another officer, and we rather attribute it to ignorance than design.

In making this decision it should be clearly understood that it does in no wise invalidate the judgements obtained by the Crown against Mr. P. Vanderstraaten; as against him they are in full force, but the utmost length to which we go is to declare that Mr. P. Vanderstraaten could not by a fraudulent confession of a debt to the Crown in 1818, take from the administrator of Giffening the fruit of his judgment obtained in 1813, on which execution has been had and the money levied, and since that time detained in Court, merely to answer the demand of Mr. Vanderstraaten's children.

It is our decision therefore that of the amount now in the Treasury, the sum of Rds. 277 - 5 - 2 (doubled for interest) be paid in full to the guardian, his debt having preference, and the balance to the administrator of Giffening's estate, with their costs. (Per the Supreme Court of Judicature)

Jan. 13, 1823.] [Ram. Rep. 1820-'33, p. 59.

Present Giffard, C. J., and Ottley, J.,

*Pietersz* v. *Carr.*

No. 3983.

*Warranty of title—Eviction—Caveat Emptor—Roman-Dutch Law—Notice—Citation—Slaves—Implied warranty.*

1. By the English Law *caveat emptor*, the seller not being bound by any other than an expressed warranty, but not so by the Roman-Dutch Law.

2. The purchaser, if the property be claimed by another person, is bound to give the seller notice, and under such notice, the seller may come in and put himself in the place of the purchaser to defend the suit in the first instance.

3. Such notice must be by citation obtained on petition from the court during the pending of which the principal suit is suspended and it must be before *litis contestatio* in order that the seller may judge how he ought to plead [See Notes.]

**Judgment.**

In this case the plaintiff sues for the price of some persons purchased by him from the defendant as slaves, the title to whom was afterwards evicted upon trial in this court. It is not alleged that the defendant was aware of any defect in his title, or practised any fraud to mislead the plaintiff. This suit is brought against him on the general principle, that the vendor of any property conveys a direct warranty to the purchaser, even though it be not expressed.

There is certainly this remarkable difference between the Dutch-Roman Law and that of England. By the English law the principle of *caveat emptor* is enforced, the purchaser runs all risks, and unles the nature of the sales implies a warranty, the seller is not bound by any other them a warranty directly expressed. But at the same time that the Roman-Dutch Law imposes this consequence upon the seller, it furnishes him the means of protection. The purchaser, if the propety be claimed by any other person, is bound to give the seller notice, and under that notice, the seller may come in and put himself in the place of thepurchaser to defend the suit in the first instance, instead of leaving his interest to the negligent, or perhaps to the fraudulent, management of another. To enable him to do so, the law points out the mode and the time in which the purchaser must give him notice: It must be by a citation obtained on petition from the court, during the pending of which the principal suit is suspended, and it must be before *litis contestatio* in order that the seller may judge how he ought to plead. On these conditions only can the purchaser, if evicted, assert his claim of guarantee against the seller.

What I have just said as to the time and manner will appear from *Dampkouder*, p. 303 P. C. 131 and *Van Alphen* in the seventh chapter of the *Papegaij* where the form of a petition is fully set forth. In the Placard Book, III. p. 790 in the Instructions to the Courts of Holland pp. 115, 116, 117, 233 et seq. will be found the same, as we have just stated it.

In this case the plaintiff insists that the defendant had all necessary notice. In this we cannot agree with him. The law points out a regular legal course, and by no other course can a plaintiff obtain the advantage of a guarantee. Nor can the plaintiff complain: if the law gives an advantage, it gives it only

upon terms which must be complied with. The principle of guarantee is an advantage which the law of England does not give, and to obtain the advantage on that principle, the proper course must be pursued. In this particular case, it may be said that the land was generally known to be as it really is. For this we know no remedy: it probably has become forgotten from no case of guarantee having been brought before this court.

Decree for defendant, without costs.—(Per the Supreme Court of Judicature)

## Notes.

1. Note on *The King* v. *DeBedier*, p. 52.

The Customs Regulation No. 9. of 1825 has been repealed, its place being taken by subsequent legal enactments. See Ord. No. 17 of 1869.

2. Note on *Rosairo* v. *Casie Chetty*, p. 60.

The Prescription Ord. No. 22 of 1871 does not make any exemptions in favour of trusts while Sec. 16, enacts certain exemptions but it is good law (in England) and in Ceylon (by this Judgment) that a trust is exempted from prescription. By 9. S. C. C, 81 it would seem that prescription does not run against a pledge so long as money is due on it. So Lorenz's *Civil Practice* p. 82 citing Dutch Jurists.

3. Note on *Giffening* v. *VanDerstraaten* etc. etc. p. 65 and *The King* v. *DeBedier*, p. 52.

The privileges of the Crown as a creditor in Ceylon are greater than in England. In England the Crown has no priority (Manson's *Bankruptcy Law*, ed. 1904, p. 177). In Ceylon it is otherwise.

The subject is dealt with briefly in Pereira's *Institutes of the Laws of Ceylon*, vol. I, pp. 20, 21, 41. The following may be noted as bearing on the point:—

Ord. No. 14 of 1843, Sec. 5.
Marshall's *Judgments*, 532.
Austin's *Reports* 28.
Morgan's *Digest*, 56.
VanDerstraaten's *Reports*, 89.
Creasy's *Reports*, 136.
3 Lorenz's *Reports*, 319.
Joseph and Beven's *Reports*, 61.
Grenier's *Reports*, for 1873, p. 26
6 S. C. C. 46
7 S. C. C. 139
9 S. C. C. 78.

Some of these cases will appear in full in subsequent pages of these *Revised Reports*.

4. Note on *Pieterz* v. *Carr*, p. 71.

On the subject of eviction, warranty of title etc., see Voet 22, 2, also Berwick's *Translation* and Notes pp. 494-520 and pp. 476-494. See also Maasdorp's *Grotius* pp. 362, 363, 364, 377-381; *Opinions of Grotius* pp. 566-634; Kotze's *Van Leeuwen* vol. ii pp. 142-144.

The following cases may be noted here, reserving full reports of the principal of them in these *Reports*:

7 S. C. C. 60. Warranty of a horse.

1 S. C. C. 25. Private purchaser bidding at Crown sale of same land cannot complain of eviction.

1 S. C. C. 54. Where vendor fails to give possession to vendee, action lies only for damages or specific performance- (See 3 S. C. C. 61)

2 S. C. C. 158. No warranty of title passes at a fiscal's sale.
7 S. C. C. 129. Cause of action occurs when purchaser fails to get possession.

7 S. C. C. 197. Summoning vendee as a witness is not notice to warrant and defend.

1 S. C. C. 101. Vendee has no right to compel vendor to intervene in a suit as a party.

5. N. L. R. 184. In doubtful cases the intendment of a deed must be construed against the vendor.

2. N. L. R. 309. Notice not necessary if vendee could prove that vendor had no manner of title.

1 Bal. Rep. 8. Cause of action of purchaser in possession different from that of one not in posssession. (See 1 C. L. R. 29., 1. S. C. C. 54.)

Ram. Rep. '77, p. 317. Crown not bound to warrant and defend title.

Austin 203-205. Warranty is implied, no clause in deed necessary. See 2 Lorenz 120. Notice may go even after issues joined. (But. see 2. C. L. R. 79). See 2 Lorenz 121 on notice after issue joined.

3. Lorensz 281. Warranty of horse

Ram. Rep. 1863—68, pp. 136, 244, 289, defect.

See. Perera's *Institutes* ii. pp. 576, 577.

5. Note on *Selman Appu* v. *Hopman*, p. 64.

The question of joint-wills, their effect &c., will be fully discussed later on under another case. For the present the following references will suffice:—

Kotze's *Van Leeuwen* i. 318,334.
Van Der Keessel, 94,298.
Thompson ii. 206.

Hunter's *Roman Law*, 828.
VanDerstraaten's *Reports*, ii. 208.
Ram. Rep. 1872-'76, 28.
Vand. Rep. i. 97. 112.
Ram. Rep. 1863—'68, 104.
2. S. C. C. 14.
2. S. C. C. 194.
5. S. C. C. 82.
9. S. C. C. 101.
2. Browne's Rep. 10
5. N.L.R. 317.

Some of these cases will appear in full later on in these Revised Reports.

April 29, 1822. | [Ram. Rep. 1820-'33, p. 51.

Present Giffard, C. J., and Ottley, J.

Raymond v. VanDer Laan.

*Prescription-Lapse of Time.—Object of prescription.*

The object of prescription is not that a man forfeits his right by the lapse of time, but that as all human testimony and documents are subject to death and decay, that testimony and those documents which existed at an earlier period may in the course of years have been lost, and the defendant is protected against the chance incident to our nature by the law of prescription.

Judgment.

This suit is brought upon two bonds, originally passed by the defendants in July and August 1793, to the late Mr. Hendriksz, for the sum of Rds. 3,000 for which at the same time a garden and certain slave titles were hypothecated. The present plaintiff is the heir, and in making his demand gives credit to the defendant for payments to the amount of Rds. 1250, since the death of the testator, reducing his claim to Rds. 1750.

The defendant by his answer admits the bonds, but asserts generally that he has discharged them, and, in the loose way in which pleading has been permitted in this court, he was allowed at the bar to insist upon a prescription in his favour from length of time, a bond being prescribed by 10 years of non-claim. By this the opposite party and court were, I must say, misled into a question which, upon the slightest consideration, will appear to have nothing to do with the case, and evidence was sought and a

good deal of difficulty experienced in the attempt to take the claim out of the prescription, by proving payments within the legal period. But when the full nature of a prescription is considered with reference to this kind of suit, it will be found, even had it been regularly pleaded, to be unavailable in this case.

Prescription is intended as a protection to property, by an enactment that, after certain time has elapsed without a claim having been made, it shall be supposed that the claim has been satisfied, although the evidence cannot be then produced which could have proved it, while memory of the transaction was fresh. It is not that a man forfeits his right by the lapse of time, but that as all human testimony and document are subject to death and decay, that testimony and those documents which existed at an earlier period may in the course of years have been lost, and the defendant is protected against the chance incident to our nature by the law of prescription. But here the evidence is remaining and enduring, not only to shew that the debt did exist, but that it has not been discharged,—the hypothec in the hands of the plaintiff. In this there can be no mistake, and this is a case in which no prescription could avail, or indeed appear allowable, had not the law for giving security to property extended its protection even to such a case and permitted 30 years possession to extinguish an hypothecary claim.

This term has not run against this claim, and there must be decree for the plaintiff with interest and costs.— (Per *The Supreme Court of Judicature*).

Dec. 1826] [Ram. Rep. 1820-'33, p. 80

## Present Giffard C. J. and Ottley J.

*Extent of Roman-Dutch Law in Ceylon in 1826 — Habeas Corpus — Arrest for debt — English and Roman Dutch Laws of Contract.*

1. The Laws of Contract, except in a few matters, are the same in principle in both the English and the Dutch Laws, and it is therefore that English decisions are cited in Ceylon Courts.

2. Arrest for debt is not encouraged by the law. It is rather an exercise of private, than a vindication of public justice.

3. The Supreme Court may go behind the return to a writ of Habeas Corpus.

### Judgment.

* * * It has been always understood, and this Court has always acted on the understanding that the basis of law in this Island, is the Roman-Dutch Law, as administered at the period of the Conquest in 1796, "with such deviations, expedients and useful alterations," as, in the words of the Charter, "shall be either absolutely necessary and unavoidable, or evidently beneficial and desirable."

Such deviations, expedients and useful alterations have been introduced in a variety of ways, some by regulations of Government, some by this Charter itself and the two later Charters. Some have become absolutely necessary and unavoidable, and others have been so evidently beneficial and desirable as to have been adopted as a matter of course.

Of those which have been affected by Regulations, it is not necessary to speak. Of the total change in the course and practice of pleading both civil and criminal cases, the Charter itself is the foundation and directory. The introduction of trial by jury in the Charter of 1810 was necessarily followed in practice by the adoption of the only law of evidence which could consist with that mode of trial, the English Law and thus, the whole cumbrous code of proofs, full, half, and quarter, probabilities and presumptions, framed by the metaphysicial doctors in the closets, was of necessity swept away, and finally, and not the least beneficial or desirable deviations was a constant reference to English authorities for the practical application and explanation of legal principles common to both laws.

In doing this the Court has found little difficulty. The Laws of contract,—except in a few unimportant points, such as warranty, communio bonorum, S. C. Velleianum &c. and these have been always reverently observed,—are the same in principle in both the English and Dutch Law, and as all property in the country fall under one description, nearly the same law of contract or possession applies equally to a bale of goods or to property in land, so that we can safely adapt all our decisions, as well with respect to landed property as what in England would be called chattels, to the same law of contract and thus avail ourselves of the latest English decisions on this law, instead of resorting to the conflicting opinions of doctors who in the repose of their closets never can be supposed to elucidate legal principles with the same success as must attend the vivid discussions of an enlightened bar, and the sound learning and calm investigation of judges, reasoning in public and whose high character are a stake for the purity of their decisions.

For testamentary law, the Charter has made ample provision and given such precise direction as to the law to be observed, respecting every class, as no Court can mistake.

The only great branch of jurisprudence remaining is the criminal law [see notes] and in this as I have observed, the Charters have enacted such extreme deviations from the Roman-Dutch Law, that excepting a few technical phrases, scarcely any of this law remains. The laws supplying its place is that set forth in the Charter of 1801. The manner of pleading and the whole course of proceeding are so accurately fixed as to render mistakes nearly imposible. The Charter of 1810 is equally precise as to its object. The establishment of trial by jury, and the introduction of the English law of evidence has been admitted on all hands to have been absolutely necessary.

Having thus, I apprehend, vindicated the Court from the imputation, which has thus been hazarded, I shall proceed, to the particular case before us. The prisoner is brought up by Habeas Corpus, and I am happy to find that the power of issuing that writ is no longer denied [see notes] Had it not been vested in this Court, the King's subjects in Ceylon would have been without a shadow of remedy against any oppression which might be exercised. It is by the general spirit

of clause 82 of the Charter of 1801, that this power was asserted and exercised. By that Charter, the Court is empowered to exercise a general superintendence and control in all matters of criminal jurisdiction, and it is obvious that, without the power of issuing this writ, every attempt to exercise this superintendence and control would have been utterly vain and powerless.

In the writ of *habeas corpus* it is returned that the prisoner has been arrested on a warrant in a civil suit issued from the Provincial Court of Colombo and we are told that we are so far concluded by the return that, as we cannot look into the validity of the proceedings of that court [see notes], we can inquire no further. This is, however, so utterly contrary to the practice of the court from which we drew this writ [see notes]—and it will not be denied that in deciding upon the manner of such a proceding we may look to the practice of the court from which it has been adopted—it is contrary, I say, to this practice that it is not necessary to say more than that, in all things not inconsistent with the facts stated in the return, the court may receive such explanations as may seem to show that it ought to interfere, even admitting the truth of that return * * * *. Arrest for debt is (if I may say so) not encouraged by the law; it is rather an exercise of private, than a vindication of public justice, and is therefore not so rigorously aided and enforced as arrest in criminal matters. Hence arise the numerous privileged exemptions * *

[*Note*—In the original judgment as reported by Mr. Ramanathan the first part is wanting. The portions here omitted from *Ramanathan's Reports* deal with the privileges of debtors against arrest. See notes.]

Jan. 28, 1822] [Ram. Rep. 1820-'33, p. 39.

Present Giffard, C. J., and Ottley J.

*Huxham* v. *de Wass.*

No. 3845.

*Nudum pactum—want of mutuality—Penal obligation—damages—Account stated—Fraud—opening up of accounts—*

1. An engagement without mutuality is a *nudum pactum.*

2. In penal obligations Courts of Justice are by law empowered to apportion the penalty to the amount of the damage actually incurred. [See notes.]

3. An account stated, though otherwise conclusive, may be opened up on the ground of fraud or usurious dealings. [See notes.]

Judgment.

This suit is brought for the sum of Rds. 36,938.7 with interest at 12 per cent from the 15th September 1821, being the balance of an account current between the plaintiff and the defendants, struck on that day.

To the libel is annexed the account referred to, signed by the defendants, who had admitted their signatures. Their answer denied being indebted in the balance stated, but admits a balance of Rds. 16, 142.11 as stated in an account filed by them. The replication of the plaintiff denies the accuracy of the account furnished by defendant and insists on the balance admitted by them on the 15th September. The replication then goes into a statement of the plaintiff's case. By that statement, it is charged that the defendants were originally indebted on a notarial bond, dated 3rd March 1820, for the sum of Rds. 64,000, in discharge of which, they had, from time to time, paid Rds. 27,061.5, having a balance of the Rds. 36, 938.7 claimed in the libel. The replication then adverts to a charge of Rs. 13,127.6 made by defendants for teak sent to the Cape of Good Hope, which it alleges to have been a transaction in which the plaintiff had no concern, further than recommending the defendant to the agent; and to a charge of Rds. 100 per mensem for godown hire, which he states to have been settled, and acknowledged by defendants to have been satisfied, by a nominal payment of one Rix dollar per

month, and what is most material to this present case, the plaintiff annexes to the replication monthly statements of the account and balances signed by the defendant from 1st of July 1820 to 1st of January 1821. These monthly accounts are marked from F to K inclusive. There has also been put in by each party a copy of an account commencing December 3rd 1818, and ending June 30th 1820, which appears to contain the dealings between the plaintiff and the defendants to that date, when the balance is taken up and carried on in letter F and the subsequent monthly accounts. And there are two papers put in by plaintiff, the one an undertaking of the first defendant, to furnish oil, and the other to furnish coffee to the plaintiff. This and some parol evidence as to the value of the godown rent, and the prices of oil and coffee in 1820, form the whole of the pleadings in this case.

On the part of the plaintiff, it has been strongly urged that the account of the 15th September 1821, signed by the defendants, is conclusive against them, and that, upon this point, he ought to have judgment, inasmuch as an account stated cannot be opened or impeached.

It is certain that, for the general security of persons in trade, an account thus stated and acknowledged would be considered conclusive, unless strong grounds were laid to induce a Court to innestigate the items. These grounds may be a suggestion of fraud, satisfactorily supported and not sufficiently denied, or an imputation of usurious dealings, similary made: in either case the Court would be bound to an examination of particulars. But we are, in this case, relieved from the necessity of entertaining such imputations against the account, by the plaintiff himself having produced and filed the whole series of account from 3rd December, 1818, and thus subjected the items to the consideration of the Court. The foundation of the account then appears, not to have been the alleged bond for Rds. 64,000, but a series of transactions commencing at that date.

It appears that on the 3rd of March, 1820, after their dealings had gone on for one year and a quarter, the defendants were induced to execute a bond for Rds. 64.000, as for so much money borrowed from the plaintiff, at an interest of 12 per cent; and on the 30th June following to which the account goes on with other charges and discharges, the actual

balance stated against the defendants, appears to have been Rds. 55,226.

In fixing the sum of Rds. 64,000, it does not appear that the parties made any reference to the account. No such balance appears in any stage of it, and the bond would, therefore, appear to have been intended, rather as a collateral security for any balance of account than an actual contract for the discharge of Rds. 64,000, borrowed by the defendants. This furnishes us with another inducement to examine the particulars of this account.

In looking into it, we are first struck with two items of Rds. 15,000, and Rds. 4,000 respectively, being penalties for the non-performance of contracts. This, so far as the sum of Rs. 19,000 directly contradicts the assertion of the bond, that this sum was lent, to the defendants by the plaintiff. We will notcall this an actual fraud, but it is such a mis-statement as must alarm us in the outset of the proceeding.

We are then indeed to look at the alleged contracts upon which penalties, so very severe, have been exacted: they are marked N. and O. We shall first consider N. It is an undertaking of the two defendants to furnish 60 leaguers of cocoanut oil to the plaintiff at Rds. 180 the leaguer, before the 31st December, 1819, under a penalty of Rds. 4,000: and this is dated July 1, 1819, and signed by the defendants only.

It will be observed that this paper is only the act of one party, the defendants; the plaintiff is not in the slightest degree bound by it, he is no party to it. No consideration whatever is stated. Had oil fallen to half the price, the defendants could not have obliged the plaintiff to pay at the rate of Rds. 180. There is nothing mutual in the contract: it is utterly nudum pactum: and being on that ground void in law, the penalty must be void, which is founded on the breach of it. This item of Rds. 4,000 must, therefore, as we conceive, be struck out of the accounts.

We now come to the paper O. It is dated the 24th of March 1819, and executed by the first defendant and the plaintiff: So that it stands differently circumstanced from N. It is a contract on the part of the defendant to furnish 5,000 parrahs of coffee at 9 Rds. the parrah, before the 31st December 1819. It recites the advance of money by the plaintiff for

the purpose, and is executed, as I have said, by both parties, and penalty on failure, it states at Rds. 15,000. It appears on a reference to the accounts that none of the coffee was furnished within the time specified, nor was the whole ever delivered, but a part is entered as having been received in May 1820 and is credited to the defendants by the plaintiff at the contract-price, while, according to the parol evidence given in Court, was from Rds 3 to 4½ under the market price. From this, it is clear, that, so far as the delivery went, the plaintiff considered the contract as still binding, and it is quite certain that so far as this amount of 879 parrahs, the penalty is by his own act remitted. It ought to be perfectly understood that in considering penal obligations like the present, Court of justice are by law empowered to apportion the penalty to the amount of damage actually incurred. The plaintiff having by his own act adopted the delivery of 879 parrahs, as having taken place under the contract, he only crediting the contract price, the court cannot consider him as entitled to any remuneration for damage to that amount. From the balance of the penalty, we go perhaps further than the strict law of the case might warrant us in saying, that it may be allowed to the plaintiff.

We come next, to the consideration, which may be of much importance to the parties, the question of interest. The penalties having been made principal, together with the advances made by plaintiff, the monthly accounts furnished to us exhibit constant balances against the defendants, to which balances the accruing interest being constantly added, and no credit for interest being given to the defendants for any payments made by them, the effect is that they are charged with interest upon interest, contrary to every principle of law.

This is our general view of the case on the accounts and documents furnished by the plaintiff himself. On the part of the defendant, a claim is made for the amount of teak wood sent to the Cape of Good Hope, Rds. 13,127. 6. We have already suggested that this charge against the plaintiff is untenable. It is clear from paper E that the exportation of this timber was on account of the defendants only. Equally untenable is the amount for godown rent, which do not appear to have ever been suggested, until it was offered as a set off against the present de-

mand. The nominal rent is distinctly stated in the several accounts signed by defendants and it is easy to conceive how it might have been an advantageous arrangement for the defendants. The claim cannot be supported

Our judgment therefore is, that the accounts be referred to the officer of the Court, with directions to frame an account between the parties, upon the footing of those marked L and M, and in charging the defendants, the penalty of Rds. 4,000 on paper N be entirely struck out, that from the penalty of Rds. 15,000 a sum of about Rds. 2347 be deducted being in the proportion of Rds. 879 to 5,000 parrahs being the amount furnished deducted from the amount contracted to be delivered, that the claim of defendant to credit for teak wood and godown rent be disallowed, and that the account be made up, charging interest, on both sides, until a balance shall be struck.

(Per The Supreme Court of Judicature)

## Notes Under pp. 77-80

*Extent of Roman-Dutch Law—on Habeas Corpus—Arrest for debt—Penal obligation—and Usury.*

1. In no earlier case than the anonymous one at p. 77 has it been explicitly held that the Roman-Dutch Law is the basis of all law in Ceylon. In Jayawardene's *Roman-Dutch Law* pp. 18-29 an almost exhaustive list is given of the various alterations of the Common Law by Proclamations, Charters, Regulations, Ordinances and Case-Law in respect of Persons Property, Contract, Procedure, Evidence and the Criminal Law.

2. The English Law prevails in Ceylon in respect of all matters referred to in Ord. No. 5 of 1852, Ord. No. 5 of 1834, Ord. No. 14 of 1895 and Ord. No. 15 of 1898 sec. 6, principally, that is as regards mercantile matters, agency partnership, and *casus omissi* in Criminal Procedure, and administration. See Pereira's *Institutes* vol. i. pp. 1-9.

3. Sec. 3 of the Penal Code abrogates the Roman-Dutch Criminal Law.

4. From Mr. Jayawardene's book the following account of the *gradual* passing away of many items of the Roman-Dutch Law is taken :

## 1. The Law of Persons.

a. The Sinhalese to be governed by their own laws, and not by the Roman-Dutch Law, (Charter 1801 Sec. 32.)
b. The Mussalmans to be governed by their own laws. (Charter 1801 Sec. 32.)

c. The Ecclesiastical Law as used and exercised in the Diocese of London to regulate the matrimonial and testamentary causes of British and European subjects not Burghers. (Charter 1801 Sec. 53.)

d. Justices of the Peace to supersede the Fiscals of the Roman-Dutch Law. (Proc. 25 Jan. 1802.)

e. All matrimonial causes among natives to be decided according to the laws and customs of each nation or sect, and not by the Roman-Dutch Law. (Proc. 10 Nov. 1802.)

f. The intestate succession among natives to be decided according to their laws and usages. (Proc. 30 Dec. 1802 Sec. 5,)

g. Native Boedel Kamers to be discontinued. (Proc. 30 Dec. 1802 Sec. 29)

h. All disabilities and restraints imposed on Catholics by the Dutch removed. (Reg. 4 of 1806.)
i. The Dutch Law of Bankruptcy altered. (Reg. 4 of 1806 Sec. 15.)

j. Natives, other than Christians, not bound to observe the degrees of relationship within which marriage may not be contracted according to the Roman-Dutch Law. (Reg. 9 of 1822.)

k. Moors and Malabars to be allowed to hold houses and gronnds in the Fort and Pettah· (Reg. 2 of 2832.)

l. The Charter ot 1801 repealed, and the Sinhalese and Mussalmans to cease to be governed by their own laws and come under the Roman-Dutch Law. (Charter of 1833 )

m. The Charter of 1801 repealed and the Ecclesiastical Law of the Diocese of London to cease to be applicable to the Britishers and Europeans in matrimonial and testamentary causes and the Roman-Dutch Law re-established. (Charter of 1833.)

n. The *querela testamenti inofficiosi* abolished. (Ord. 21 of 1844 Sec. 1.)

o. The age at which a person can make a will under the Roman-Dutch Law altered. (Ord. 21 of 1844 Sec. 2.)

p. The age of consent for marriage altered. (Ord. 6 of 1847 Sec. 1.)

q. Incurable impotency added to the grounds of divorce. (Ord. 6 of 1847 Sec. 29.)

r. Suit to compel marriages not to be allowed. (Ord. 6 of 1847. Sec.. 30.)

s. The legal age of majority changed from twenty-five for males and twenty for females to twenty-one for all persons. (Ord. 7 of 1865 Sec. 1.)

t. The matrimonial rights of husband and wife completely altered. (Ord. : 15 of 1876.)

## 2. The Law of Property.

a. Title deeds mortgages assignments, and all other deeds affecting land or immovable property to be drawn up by the Presidents and acting Presidents of the Civil and Landraads, and not by Notaries. (Proc. March, 1801.)

b. The Roman-Dutch Law of prescription annulled. (Reg. 13 of 1822.)

c. The mode of making wills and deeds altered. (Ord. 7 of 1840.)

d. The legitimate portion need not be reserved. (Ord. 21 of 1844. Sec. 1.)

e. Law of survivorship as to property held in common altered. (Ord. 21 of 1844. Sec. 20.)

f. *Cessio bonorum* abolished. (Ord. 7 of 1853. Sec. 3.)

g. Fraudulent preferences to be governed by the English law. (Ord. 7 of 1853. Sec. 58.)

h. Joint tenancy in Ceylon to be of the same nature as joint tenancy under the English Law. (Ord. 7 of 1871 Sec. 3.)

i. Conventional general mortgages declared invalid. (Ord. 8 of 1871. Sec. 2.)

j. Law of *fidei commissum* altered, and prohibition against alenation limited to existing lives or lives of persons *en ventre sa mere*. (Ord. 11 of 1876. Sec. 2.)

k. Entail property allowed to be sold in certain cases (Ord. 11 of 1876 . Sec. 4.

l. Community of property abolished (Ord : 15 of 1876. Sec.8,)

m. i. Immovable property, wages, earnings, jewels, wearing apparel, and implements, of trade trade of the wife to belong to her separate estate.

ii. All other movable property of the wife to vest in her husband.

iii. Husband and wife allowed to gift property to each other.

iv. Wife allowed to sue alone in court.

v. Husband not be liable for the antenuptial debts of his wife. (Ord : 15 of 1886.)

n. Placard, or edict of the Emperor Charles v. dated 4 Oct: 1540, relating to marriage settlements, to have no force or operation in Ceylon. Ord : 15 of 1896.

## 3. The Law of Contract.

The English law to be administered in this colony in respect of all contracts or questions relating to ships and to the property therein, to the owners thereof, the behaviour of the mas-

ter and mariners, and their respective rights and duties and liabilities relating to the carriage, freight, demurrage, insurance, salvage, average, collision between ships, to bills of lading, and generally to all maritime matters. (Ord : 5 of 1852 Sec. 1.)

a. The English Law to be administered in this Colony in respect of all contracts and questions relating to bills of exchange, promissory notes, and cheques. (Ord : 5 of 1852 Sec.2).

b. The Law of England to apply to—

i. Partnerships;

ii. Joint Stock Companies;

iii. Corporations;

iv. Banks and Banking;

v. The relations between principal and agent;

vi. The liabilities of carriers by land, and

vii. Matters relating to insurance;

c. The Roman-Dutch Law of sale and purchase of goods superseded by Ord : 11 of 1856 and hereafter the rules of English Law including, the Law of Merchant, to apply to contracts for the sale of goods. (Ord : 11 of 1796.)

## 4. The Law of Procedure.

a. The ancient forms of procedure used in these settlements under the Dutch Government to be discontinued. (Proc. 22 Jan. 1801.)

b. Under the Dutch it was usual and necessary to apply for and obtain the permission of the president of the Courts or of the Governor before an action can be commenced. No such permission is henceforth necessary. (Proc. 22 Jan. 1801.)

c. Landraads adolished. (Proc. 20 Aug. 1801.

d. Dutch language superseded by the English language in the Courts of Law. (Proc. 20 Aug. 1801.)

e. Trial by jury introduced. (Charter 1810.)

f. Edictile citations declared unnecessary, except in certain cases. (Reg. 5 of 1819)

g. Edictile citations discontinued. (Ord. 7 of 1835.)

h. Namptissement abolished. (Ord. 2 of 1899.)

## 5. The Law of Evidence.

a. Thombo registers not to be accepted as evidence from 1806. (Proc. March 1801.)

b. The English law of evidence to be the law of this Island, both in criminal and civil cases. (Ord. 6 of 1804.)

c. Every provision of the Roman-Dutch Law by which the law or any rule or question of evidence touching any matter or thing whatsoever shall or have been or may now

be regulated, prescribed, or determined shall be and the same are hereby abrogated, and repealed. (Ord. 3 of 1846 Sec. 1.

## 6. The Criminal Law.

a. Punishments for criminals to be regulated by the Common Law of England. (Proc. 30th January 1800.)

b. Dutch Criminal Law amended and attempts to commit offences made punishable. (Ord. 12 of 1852.)

c. "So much of the criminal law heretofore administered in this colony as is known as the Criminal Law of the United Provinces or as the Roman-Dutch Law hereby abolished." (Ord. 2 of 1883. Sec. 3.

## 7. Case Law: Changes in the Law of Persons.

a. The Mukkuwars to be governed by their own customs and laws, (Morgan's Digest, p. 382.)

b. The law of North Holland, not of South Holland, prevails in Ceylon. (Ramanathan, 1863-1868, p. 279.)

c. The Thesawaleme obtains in Mannar. (1 s.c.c. p. 9.)

d. The law which governs the power of an administrator to deal with his deceased's property, is the English Law, not the Roman-Dutch Law. (2 s.c.c. p. 2.)

e. The rule of the Roman-Dutch Law which makes the heir personally liable for the debts of the deceased over and above what he received from the estate has not been acted upon in Ceylon. (6 s.c.c. p. 13.)

f. As the English Law of administrators and executors has been introduced into Ceylon, the acts 3 and 4 William IV. C. 42 is law in Ceylon. The law in Ceylon in regard to the liabilily of the legal representative of a deceased for any wrong committed by him in his life-time is the English Law. (2 s.c.c. p. 69.)

## 8. Case Law: Changes in the Law of Property.

a. The Dutch Laws restricting donations *ad pios usus* do not appear to have been acted on or enforced by the British Government. (Ramanathan, 1845-1855, p. 132., Godinho v. Koening, Vanderstraaten's Report.)

b. The Law of forfeiture as between tenant and landlord has not been shown to apply to Ceylon. (3 Lorenz p. 2.)

c. The law applicable in the case of fraudulent preferences is the English Law, and not Raman Law or the Roman-Dutch Law. (Ramanathan 1877 p. 69.)

d. Upon a question of damages for breaches of contract the measure of damages must be estimated according to English principles and authorities. (4 S. C. C. p. 2.)

e. The Dutch Laws of usury are not in force here. (4 S. C. C. p. 28.)

f. The Roman-Dutch Law limiting the rate of interest does not obtain in Ceylon. (7 S. C. C. p. 182.)

g. The tacit hypothec which was given to the children of the first marriage on the property of the parent who married a second time is not given in Ceylon. (2 C. L. R., p. 59.)

h. The regulation No. 13 of 1822, and Ordinances Nos. 8 of 34 and 22 of 71 have swept away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription except as regards the property of the Crown. (1 N. L. R. p. 200.)

5. In *Karonchihamy* v. *Angohamy* of 1904. (8 N. L. R. p. 1) the Supreme Court has discused at great length the extent of applicability of the Roman-Dutch Law as to the validity of marriage of parties who had committed adultery. Two judges have held against a third that the law in Voet 23. 2. 27 was never acted upon in Ceylon.

6. *Habeas Corpus.* See Pereira's *Institutes* Vol. i, pp. 126. 170-174.

7. *Arrest for debt.* See Civil Procedure Code secs. 299-312. Sec. 1 N. L. R. 371, "The policy of the law now is to discourage the incarcerating of honest debtors."

8. *Penal Obligations.* Sec 4 N. L. R. 285, 1 S. C. R. 233, 8 S. C. C. 84, Pereira's *Institutes*, ii, 519-521.

9. *Usury in Ceylon* Transactions are not void in Ceylon by reason of usuriousness. See Ram. Rep. 1872-1876, p. 189, 7 S. C. C. 182,4 S. C. C. 28, but compound interest is not allowed (Vand Rep. 57) nor enhanced rate for default, (2 Browne's Rep, 87.) In India unconscionable bargains are not allowed. See an account of the laws in India and Ceylon on the subject in the *Ceylon Law Review* vol. ii. 128

# Ram. Reports 1820-33.

## Cases omitted from the Revised Reports.

1.

Ram.Rep. 1820-33, p. 7.] *In the Goods of Holman.* [May 12, 1820.

*Per* Giffard, C. J. and Byrne, J.

1. Widow may administer the estate of her husband though her right to these is not absolute. [See Civil Procedure Code, sec. 523 ]

2. Administration unknown to the Roman Dutch Law.

2.

Ram. Rep. 1820-33, p. 10] *Verploeg* v. *McKern.* [Aug, 28, 1820.

*Per* Giffard, C. J., and Byrne, J.

According to Dutch Mercantile Law an agent is not liable to pay interest or a balance in his hands unless he wilfully delayed paying it or employed it to his advantage.

[See Ord. No. 22 of 1866 introducing the English Law into Ceylon in matters of agency].

3

Ram. Rep. 1820-33, p, 13.] *Ondaatjee* v. *Hooper* [Jan. 22. 1821

*Per* Giffard, C. J., and Byrne. J.,

1. Matters relating to an arrack renter being prevented by the Government from receiving certain duties to which he was entitled, do not exclude the Supreme Court from exercising jurisdiction.

2. A plea to Jurisdiction ought to be taken before evidence is gone into.

4.

Ram. Rep. 1820-33, p. 17. Indian Judgment.

5.

Ram. Rep. 1820-33, p. 24.] *Boyd* v. *Bennett,* [July 23, 1821.

*Per* Giffard, C. J., and Ottley, J.

1. A defendant is not necessarily concluded by the oath of the plaintiff.

2. Notice of dishonour of a bill, [See *Bills of Exchange Act* introduced into Ceylon by Ord. No. 5 of 1852.]

6

Ram.Rep.1820-33,p.26.] *Gibson* v. *Executors of Fretz* [July 23, 1821.

*Per* Giffard, C. J., and Ottley, J.

Executors entitled to fees and commission. [See Civil Procedure Code. sec 551]

7

Ram, Rep. 1820-33, p. 60] *King* v. *King.* [Jan. 24, 1823.

*Per* Giffard, C. J., and Ottley, J.,

1. Divorce cannot be granted on confession, consent, condonation, counter-charge. [See Civil Procedure Code sec. 600-602].

2. Eloping wife loses alimony. See Civil Procedure Code. Sec. 615. "conduct of parties."

8

Ram.Rep.1820-'33,p,66.] *Executors Alvis* v. *Gerhard*. [April 28, 1823.

*Per* Giffard, C. J.,

1. Reception of dead witness's former evidence. [See. secs. 32, 33 Ceylon Evidence Act. No. 14 of 1895].

2. Rights of holder and acceptor of a bill. [See *Bills of Exchange Act*].

3. When a Judge may administer decisory oath to a witness. [See Oaths Ordinance No. 9 of 1895, Sec 9 (1).]

9

Ram. Rep. 1820-'33, p. 70.] *Rabinel* v. *Smyth*. [Aug. 13, 1823.

Per Giffard, C. J.,

A debtor agreeing to pay in one currency or another within a year forfeits the option of the alternative by default.

10

Ram. Rep. 1820-'33, p. 72.] *Arkadie* v. *Mulder*. [Jan. 9, 1826.

*Per* Giffard, C. J., and Ottley, J.,

1. Special hypothec preferred to general. [See Ord. No. 8 of 1871.]

2. Domat and the laws of France of no force in Ceylon.

11

Ram. Rep. 1820-'33, p. 73] *Staples* v. *Boyd*. [Jan. 23, 1826.

*Per* Giffard, C. J., and Ottley, J.,

On mercantile custom of percentage recoverable by agents from principals on judgments obtained.

12

Ram. Rep. 1820-'33, p. 76] *Beaufrot* v. *Forbes*. [Jan. 26, 1826.

*Per* Giffard C. J., and Ottley, J.

Sale and possession of a ship.

13

Ram. Rep. 1320-'33, p. 62.] *Rex* v. *Vander Straaten*. [Jan. 27, 1826.

*Per* Giffard, C. J., and Ottley, J.,

Right of redemption by the Crown of land transferred by a grant. [See 7 S. C. C. 171, no such right].

14

Ram. Rep. 1820-'33, p. 78] *Holland* v. *Winter*. [July 24, 1826.

*Per* Giffard, C. J., and Ottley, J.,

Acceptance of foreign bill, course of exchange.

15

Ram. Rep. 1820-'33, p. 89.] *Pooniam* v. *Abdulcader* [March 21, 1827.

*Per* Ottley, J.

Evidence of partnership, participation in profits.

[See Ord. No. 22 of 1866 introducing into Ceylon English Law as to partnership matters. See Pollock's *Partnership*. sec. 2.

16

Ram. Rep. 1820-'33, p. 92.] *In Re Goods of Naina Maricar.* [April 10, 1827.

*Per* Ottley, J.,

Widow's right to administration. See above (1).

17

Ram. Rep. 1820-'33, p. 95 & 107.] *Busche* v. *Young.* [April 28, 1827.

Evidently *Indian* judgment on bankruptcy and assignees. At p. 95. Mr. Ramanathan's footnote shews the judgments to be *Indian.*

18

Ram. Rep. 1820-'33, p. 112] *In Re Baker's will* [June 28, 1827.

*Per* Ottley, J,

Parol evidence to make clear insufficient description of executor in a last will. (See Evidence Act, 1895, Sec. 95, 96)

19

Ram. Rep. 1820-'33, p. 116.] *Arcotty* v. *Baboo.* [Oct. 25, 1827.

*Per* Ottley, C. J., and Matthews, J.,

On the ground that appeal stays execution the respondent-plaintiff was given injunction against appellant-defendant to prevent intermeddling pending appeal decision. (But See Sec. 761-764 Civil Proc. Code, and Sec. 756. The defendant-appellant has to give security for appeal, and appeal does not *per se* suspend execution.)

20

Ram. Rep. 1820-'33, p. 118.] *Natchia* v. *Marikar.* [Nov. 7, 1827.

*Per* Ottley, C. J., and Matthews, J.

Civil Jurisdiction of Supreme Court. (See Courts Ordinance, No. 1 of 1899.)

See also case in Ram. Rep. 1820-'33 p. 119.

21

Ram. Rep. 1820-'33, p. 126.] *Garstin* v. *Winter.* [Nov. 14, 1827.

*Per* Ottley, C. J., and Matthews, J.

On the nature of a letter of credit. (See Chalmers' "Bills of Exchange," *Sub Voce.*)

22

Ram. Rep. 1820-'33, p. 128] *Moir* v. *Garstin.* [No date.

Tax payable by tenant unless otherwise agreed upon.

23

Ram. Rep. 1820-'33, p. 130] *Fernando* v. *Layard.* [July 21, 1828.

*Per* Ottley. C. J., and Marshall, J.

When the plaintiff was found maliciously disposed and his witnesses liars, damages claimed reduced to one farthing. (No principle of law laid down.)

24

Ram. Rep. 1820-'33, p, 133] *Rabinell* v. *Gibson*. [March 26, 1827.
*Per* Ottley, O. J.,

Bills of Exchange.

25

Ram. Rep. 1820-'33, p. 135] *Walbeoff* v. *Mitchell*. [Sep. 28, 1829
*Per* Ottley, C. J.,

Facts from which adultery was held proved and comments on the loose character of the adultress. (No principle of Law.)

26

Ram. Rep. 1820-'33, p.'143] *Gibson* v. *De Bedier*. [Oct. 16, 1829.
*Per* Ottley, C. J., and Marshall, J.,

On kinds of partnership, who is a partner?
[See note under No. 15 above.]

27

Ram. Rep. 1820-'33, p. 150.] *Gibson* v. *De Bedier*. [July 11, 1830.
*Per* Marshall, J.,

The plea of *non numeratae pecuniae*, and the time within which it must be availed of.

(The plea is renounced in notarial bonds and such renunciation is always an estoppel against pleading want of consideration. The Roman-Dutch rule that want of consideration must be proved within two years of the bond and that the burden of proof is on the creditor is not in force now. 2 *Lorenz's Reports*, p.6; 4 S. C. C. 85. The recital of receipt of money does not estop obligor from pleading want of consideration, Ram. Rep. 1863-'68, p. 1. See *Nell* 250, *Ram. Rep.* 1843-'55, p. 161. *Ceylon Evidence Act*, Secs 91, 92.)

28

Ram. Rep. 1820-'33 p. 160] *Gibson* v. *Rodney* [Nov. 10, 1830.
*Per* Marshall, J.

On Namptissement.

[Namptissement abolished by Ord. No. 2 of 1889.]

29

Ram. Rep. 1820-'33 p. 164] *Gibson* v. *Ackland* [Ap. 16, 1832.
*Per* Rough, J.

1. Deed insufficiently stamped [See Ord. No. 3 of 1890]
2. Need Mortgages of movables be notarial?

[Ord. No. 7 of 1840 requires them to be notarial.]

30

Ram. Rep. 1820-'33 p. 170] *Patmenacha* v. *Tanga Umma*
*Per* Rough, J. [Aug. 4, 1832.

Jurisdiction of Supreme Court.

31

Ram. Rep. 1820-'33 p. 171] *Cuylenburg* v. *Deton* [Aug. 4, 1832.

*Per* Rough, J.

Construction of a deed.

32

Ram. Rep. 1820-'33 p. 173] *Marshall* v. *Executors of Walbeoff* [Aug. 4, 1832.

*Per* Rough, J.

On alimony.

[Civil Procedure Code, Secs. 614-616]

33

Ram. Rep. 1820-'33, p. 175] *Moore* v. *Wolffe* [March 6, 1833.

*Per* Marchall, C. J., and Rough, J.

1. Proof of a marriage in action for damages for seduction [see Ord. No. 2 of 1895.]
2. Amount of damages depends on facts.
3. Admission in evidence of letters written before adulterous intercourse.

34

Ram. Rep. 1820-'33 p. 84[ *Sivapoonian's case* [1826.

*Per* Giffard C. J., and Ottley, J.,

Exemption from civil arrest of witness or party.

[see Civil Procedure Code Secs. 142, 834.]

April 2, 1834] [Morg. Dig.* sec. 66.

## Marshall, C. J., Rough & Norris, J. J.

## D. C. Galle, 14025.

*Extinctive Prescription—Foundation of plea—Payment.*

1. From lapse of time law raises presumption of payment.

2. This presumption is the foundation of prescription

3. It is rebuttable by evidence of acts inconsistent with the idea of payment.

### Judgment.

**Marshall C. J.** The foundation of the plea of prescription as regards alleged debts is the presumption of payment which the law raises after a certain lapse of time, and which presumption is subject to be repelled by any promise of payment or other act by the defendant inconsistent with the idea of payment, within the time prescribed.

### Notes.

*Extinctive Prescription.*

For a short account of the history, legal effects and general principles of extinctive prescription see SenathiRajah's *Compendium of the Law of Prescription in Ceylon* pp. 42—65; see *Revised Reports* vol. i. p. 75. In *D. C. Kaltura 1117*, Dec. 2. 1835 (noted in *Marshall's Judgments* pp. 530, 531) the Supreme Court directed the court below to act on the presumption of payment raised by lapse of time: "If the length of time which has been allowed to elapse, without any steps being taken to enforce this agreement—being nine years since the alleged payment of interest was made—be sufficient to convince the Court that nothing remained to be done or paid upon this agreement, it is still open to the Court to declare that opinion."

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*The following facts deserve notice about the collection of cases known as Morgan's Digest:

1. It is a "digest of the decisions of the Supreme court since the promulgation of the charter of 1833." Being a digest it for the most part contains summaries or abridgments of decisions, but sometimes full judgments or extracts from judgments. This difference is indicated in the following pages by the headings "text of degest" and "judgment" the latter standing for full text or extract.

2. The book is divided into sections and it is quoted in the following pages by section.

3. Two or three judges are noted as present on the date of judgment while the judgment itself, probably delivery of it, is ascribed to one judge, sometimes to no judge; while a collective decision is expressly indicated as such. In the following pages this distinction is preserved—the judge or judges present being noted at the top of the report and the judge to whom (probably delivery only of) a judgment is ascribed being noted over against such judgment; and a collective court finding is expressly stated so. (Editor, Rev. Rep.)

Oct 15. 1834] [Morg. Dig. sec. 115.

Marshall C. J., Rough & Norris J. J.

D. C. Jaffna 2089.

*Thesavalame -Dowry property -Liability for husband's debts.*

According to the Thesavalame he dowry property is not liable for the husband's debts.

Text of Digest.

Marshall C. J. By the customary law of the Malabar Districts dowry property and the rents and profits [see note] arising therefrom are not answerable for the husband's debts and need not therefore be included in the statement or schedule given in by the insolvent husband.

Dec. 8 1828] [Muttukistna's Decisions p. 121

The High Court in Appeal.*

D. C. (Jaffna?) 5242.

*Modelinacky v. Sithamparappillai et al.*

*Thesavalame—Dowry property—Liability for husband's debts—Diminution of dowry—Husband's power over acquired property.*

1. The acquired property of spouses under the *Thesavalame* is liable for the debts of either.
2. A husband may mortgage acquired property without wife's consent.
3. The wife's dowry property is liable for the husband's debts if such property had been mortgaged.
4. The provision in the *Thesavalame* sec. i. 15 that diminution in dowry must be made good from the acquired property presupposes the sufficiency of the acquired propery to meet preferent claims.
5. A mortgage debt is a claim prior to a claim for compensation for diminution of dowry property.

The facts of the case appear in the judgment of the District Judge *(Brownrigg)* which was as follows:

Plaiatiff obtained judgment for 500 Rds., and interest from 1822 against Vissowanather Valayder and his late wife. Defendants have no claim on the estate and Valayder by judgment of this court. There is an amount in deposit, being the proceeds of sale of Velayder's and his wife's property, and

* It does not appear who the Judges were. Between July 1828 and March 1829 Ottley, C. J. and Marshall, J. were Judges.—*Ed. Rev. Rep.*

plaintiff sues that her claim be satisfied first in preference to defendants'.

By the former decrees of the court in the case 4,356, 4,586 and 4,494 it appears to me that the claim of the plaintiffs in the case 4,586 (now second defendant) is first to be satisfied from the acquired property, and if that be insufficient, from the dowry property of the defendant in that suit, the first of whom is also defendant in case 4,494; that the acquired property to be applied in discharge of the whole claim of the plaintiff in 4,586 in priority of the claim of plaintiff in 4,494 and present suit whose bond being dated in 9th August 1822 is later than that in 4,586, which is dated in January of that year; after settling the claim of the plaintiff in 4,586 the half of the remaining proceeds of acquired property, which would belong to the defendant in 4,494 is liable to answer the demand of the plaintiff in that amount, in the present suit, but as according to the decree in favour of the plaintiff in 4,365 they are entitled to certain lands as dowry as well as money, and to half the acquisition, according to Thesavalame, sec. 27 clause, all diminution of dowry property is to be made good from the acquisition, the court considers the plaintiffs in 4,356 have a prior claim on the present plaintiff to any surplus remaining for satisfying the decree in 4,586. It is therefore decreed, first that the proceeds of the acquired property of Vissowanather Velayder and his late wife, shall first be applied to the discharge of the amount decreed in favour of the plaintiff in the suit 4,586, according to the decree of this court in that suit; second that the proceeds of the said acquired property must, under the provisions of the Thesavalame, be next applied to make good the dowry property decreed by this court, in favour of the heirs of the said Velayder's deceased wife, who are the plaintiffs in 4,365.

That should there be any residue of the said proceeds of acquired property, it be divided into two equal shares, one of which is (under the decree in 4,365) to go to the heirs in that case, and the other, as liable to the claims of the plaintiff in 4,494 and present suit.

Plaintiff's libel dismissed with costs.

## Judgment.

Per High Court of Appeal.—The object of the present suit is to obtain satisfaction of the judgment which the plaintiff obtained against Vissowanather Valayder in No. 4,494 notwithstanding the judgment obtained against the same person in 4,586, by Ramalingam Tamodaram the second defendant, now before this court. And the judgment now to be pronounced, must depend in the joint effect of these two decrees, together with that given in No. 4,365, all which three decrees never having being appealed against, must now be considered as binding and must be carried into effect as strictly as possible. The decrees in No. 4,365 declares and specifies that part of the property possessed by Velayder and his deceased wife, is to be considered as the dow-

ry property of the said wife and what part shall be considered their acquired property, which latter is to be equally divided between Velayder and the heirs of his late wife. It seems only to be material for the present question to observe, that the two pieces of land Mulinekattie and Mullukalatty (of 50 lachchams). mortgaged to the plaintiff, in No. 4,586 by Velayder by the deed of eleventh January, one thousand eight hundred and twenty two, in which judgment was obtained by plaintiff in 4586 were decreed to be dowry property, and that the two pieces of land, viz, the other Mullukalatty and Ittaidy mortgaged to the plaintiff in 4,494, who is also the plaintiff now before the court, by Velayder by the deed of ninth August one thousand eight hundred and twenty two, on which also she obtained judgment in No. 4,494, were decreed to be acquired property. The joint effect of the decrees in Nos. 4,586 and 4,494 is this—In 4,586 the debt was incurred by Velayder in the lifetime of his wife, the acquired property is therefore adjudged liable for it and if that be insufficient the dowry property also becomes liable. But in No. 4,494 since the bond was granted by Velayder for a debt of his father's whose estate Velayder held, Velayder alone is held liable, and no part of his wife's estate. But there is nothing in either of these decrees, which decides that the whole of the acquired property is to be applied in liquidation of the judgment in 4,586 before that of 4,494 can be taken into consideration nor does the property of the bond in 4,586 in point of date, entitle it to this exclusive preference. In each bond certain property is especially mortgaged, which consequently is in the first instance liable to satisfy the particular debt which it was intended respectively to secure. There is nothing in the Malabar law as it prevails in the district of Jaffna to prevent a husband from mortgaging the acquired property whether with or without the consent of his wife. If so the mortagage must be considered as having a paramount claim over all others or else such mortgage is a mere fraud. The decree however in case No 4,494, by which this Court must now consider itself bound, has declared, that the lands mentioned in the mortgage bond filed in this case being acquired property of Velayder and his late wife, are to be divided equally between the defendant and the heirs of his late wife's estate. The defendant's half being liable for the debt in this case that half therefore must be considered as primarily liable to satisfy the

claim in No 4,494. The passage which has been cited in the decree of the Court below from the Thesawaleme only declares that the dowry if diminished must be made good from the acquired property if it be sufficient, if not, he or she who suffers the loss must put up with it patiently, Here again the principle in which a special mortgage must be considered as having the first claim, must prevail and the qualifying term in the Thesawalme "if it be sufficient" must be understood with reference to claims of a prior, and higher nature, which must first be satisfied and then, if these be sufficient, the dowry property shall be made good. It is therefore decreed that of the lands Mulukalaty and Itiady declared to be the acquired property of Velayder and his wife and mortgaged to the present plaintiff the half of which by decree in No 4,494 was awarded to Velayder and was decided to be alone liable for the debt in that case shall first be applied in satisfaction of that judgment. That if any remain of that half after satisfying the judgment in No 4,586 that the rest of the acquired property as well as the dowry lands specially mortgaged to the plaintiff in 4,586 be applied in the first instance in satisfaction of the judgment in that case as therein decreed and lastly if any acquired property should remain after satisfying the judgement in 4,586 it shall go to make up the deficiency if any there be in the dowry property decreed to the heirs of the deceased wife of Velayder in 4,365.

## Notes.

*Thesavalame—Dowry—Liability for debts—Rents and profits.*

1. The facts of the case D. C. J. 2089 are thus stated in Marshall's *Judgments* pp. 222, 223, "The question arose on a prisoner for debt applying to the D. C. of Jaffna to be discharged under the insolvent Regulation. The D. C. decreed his discharge, and the creditors having appealed the case came before the Chief Justice (on circuit) one of the objections to the prisoner's discharge being that he had not inserted all his property in the schedule. The Chief Justice felt compelled to dissent from the opinion of the D. C. considering that one half of the proceeds of the property to which it was admitted the husband was entitled ought, in justice, to be answerable for his debts, and to be inserted, therefore, as yearly income, in the statement of his property; but reserved the question for further consideration at Colombo. Having accordingly referred it to assessors, those who appeared to be well versed in the customary law relating to dowry, and having inquired into the practice in the latter district, with reference to insolvents similarly situated, the Chief Justice found that the decision of the D. C. of Jaffna was fully warranted by long established usage,

and that the dowry property, had certainly been excluded from the statement given by the insolvent. Without entering therefore into any discussion of the justice or equity of such exclusion, the Supreme Court was bound to affirm the decree of the D. C. as being supported by law in the shape of constant and invariable custom."

The above is quoted into Muttukistna's *Thesewalame* p. 134.

2. Dowry is dealt with by the *Thesavalame* Code in sec. 1 (2), (3), (4), (5), (6.) As regards liability of dowry property for husband's debts it has to be remembered that the dowry is the wife's separate estate and thus, except in the case of acquisition during marriage, there is no community of property between spouses under the *Thesavalame* (D. C. Valigamam, 4603, of date March 28 1843, affirmed in appeal, reported in Muttukistna's *Thesavalame* pp. 260-262. See, 1 N L R. 254). In 1828 the Supreme Court laid down in case No. 5242 from Jaffna (reported above from Muttukistna's *Thesawalame* pp. 221-125), that the wife's property is not liable for her husband's debts unless specially mortgaged. So in 1832 it was held by the District Court of the Islands in case No. 2897 (Muttukistna's *Thesavalame* p. 148) that dowry was exempt from liability for husband's debts unless wife was co-debtor. This has always been the law, but an exception was grafted into it in the case of the husband being indebted to the Crown. The husband in 6 S. S. C, 46 died having failed to account for money received by him as shroff, and joint estate of husband and wife was held liable for the money as the husband's own was insufficient to meet the debt.

3. That part of the judgment of Marshall, C. J. which exempts from liability for the husband's debts *the rents and profits of the dowry*, while it seems very reasonable, is unfortunately not law at the present day. In D. C. Valigamam 4603 (*Muttukistna* pp. 260-262 noted above and reported below) the rents and profits were treated as common property, and common property is always liable for husband's debts (*Muttukistna* pp. 117,134) notwithstanding even a divorce (2 C. L. R. 132, decided in 1892). In 1 N. L. R. 251 (1895) the above decision was followed, Withers, J. holding that " Common property is restricted to the rents, revenue and income of the spouses' separate estate and what is acquired by the exertion of the spouses."

Aug. 10, 1843] [Muttukistna, p. 260.

## Oliphant, C. J.

## D. C. Valigamam 4603.

*Valliammai* v. *Supper.*

*Thesavalame Code—Common estate—Rents and profits—Acquired property—Moodisam - Seedhanam—Separate estate.*

1. The Moodisam (or paternal inheritance) of the husband is his separate property, as is the Seedhanam (or dowry) of the wife.
2. What is acquired by the spouses by their exertions during marriage is common to both.
3. The rents and profits of the separate estates is also common property.

## Judgment of D. C.

*(Affirmed in appeal.*)*

Wood, D. J.,—This action is brought by the plaintiff against the defendants, to shew cause why execution should not issue against certain lands in a decree of the Provincial Court of Jaffna dated the 3rd February 1826 in favour of plaintiff's late mother, for otty consideration and costs, who together with her sons the intervenients, assigned over their prospective interest in the result of the said case, by a deed dated 15th December 1824, in consequence of the money advanced in otty having been raised by sale of certain of the plaintiff's dowry lands, and her having advanced the sums necessary for the prosecution of the said case.

This deed is admitted by the intervenients, and the decree is also admitted by the defendants, but first defendant puts in three pleas.

1st. That the amount of the decree and costs have been paid.

2nd. That the third clause of the Ordinance No. 8 of 1834, is a bar to the action, as a period of more than 10 years have elapsed since the date of the decree.

3rd. That the plaintiff has brought this action not only in her own name without her husband being a plaintiff, but has even made him a defendant, which she ought not to do, and cites authorities in support of this objection. As this last objection affects plaintiff's right to bring the action at all it is necessary to consider what weight is to be attached to this plea; first the English and the Roman-Dutch laws certainly recognize a community of goods between man and wife, but the Thesavalame or country law, clearly recognizes a distinct and separate interest—the husband in the property inherited from his father, and the wife in her dowry and inheritance, and the only property in which both have a mutual interest and is in common is the profits arising from each of these respective pro-

* The correct date is 1843 and not 1848. This case is given here as part of the notes preceding it.—*Ed. R. R.*

perties, or what is acquired by their own exertions during their marriage. This is one general objection to the validity of the plea, but there is also a special one in the present case viz. the necessity of the plaintiff's making her husband a defendant arising from the act of his having been one of the original defendants in the former case; and one against whom the decree is given in plaintiff's mother's favour, plaintiff had consequently, no alternative. The second plea depends in a great measure upon the first, namely, whether the money had been paid and if not, why execution under the decree has not been issued before; and these are the issues in the case. Plaintiff has clearly proved her possession of the ottied lands up to 1841 which fact together with the close relationship of all the parties, the first and second defendants being brothers-in-law to plaintiff, the third her husband, the fourth and fifth her husband's cousins and the intervenients her brothers at once accounts for the decree not having been acted upon as long as she (the plaintiff) has been permitted to remain in possession of the lands, but first defendant pleads payment of the amount by his deceased mother, and the subsequent possession by the defendant of the ottied lands and has brought two witnesses to prove these facts, whose evidence is unworthy of credit.

Intervenients have been premature in their intervention, having only a prospective interest and have not proved the alleged combination between the parties to their detriment.

It is therefore decreed, that execution issue against the lands called Yatey, registered etc., as per decree No. 4147 dated 3rd Feb. 1826.

It is further decreed, that first defendant to pay the costs of this suit incurred previous to the intervention and that intervenients do pay the subsequent costs.

Affirmed in appeal by Sir A. Oliphant, Jaffna, 10th Aug. 1843.

Dec. 5. 1834] [Morg. Dig. Sec. 126.

Present: Marshall C. J., Rough and Norris .J .J

D. C. Tenmaratchy. 210.

*Thesawalame—Pre-emption—Mortgagee—Neighbour—Value—*

1. Pre-emption is available to the holder of a mortgage or other claim on the land.

2. The right is founded in the contiguity of lands.

3. The right should be enforced only on payment of the highest price by the pre-emptor.

## Text of Digest.

Marshall C. J.—From the Thesawalame (appended to Van Leeuwen's Comm. p. 753-4.) it would seem that in the Northern Province the right of pre-emption only existed where the party claiming it held a mortgage or some other claim upon the land; at all events, it seems the height of injustice that this right should be enforced, except on payment of the highest price which any other person would offer for the land. The right must be founded on the contiguity of the land to be sold to that already possessed by the party seeking to exercise the right. To him therefore the land must be more valuable than to others and he ought consequently to pay the highest price which could be g ot for it.

## Notes.

*Thesawalame—Pre-emption—Text of Thesawalame Code.*

1. The right of pre-emption is not peculiar to the *Thesawalame* code. It is the *Jus Retractus* of the Roman-Dutch Law (See. *Grotius* 3. 16., *Voet* 18. 3. . . . )

It is known to the Dutch as *Naasting* (Pereira's *Institutes*, ii. p. 588). The *Thesewalame* code being a Dutch compilation (A. D. 1704—1706) for the people of Jaffna, naturally contains [sec. vii (1)] provision for this right.

2. With reference to this right of pre-emption the following questions, among others, have been of late before the Supreme Court:

(1) Is the right of pre-emption, according to the *Thesewalame*, of force now in Jaffna?

(2) Who may pre-empt?

(3) Is notice necessary, and of what sort?

(4) What is the authentic text of the *Thesewalame?*

3. In *Tillaynathar* v. *Ramasamy* (4 N. L. R. 328, 1 Br. 308) decided in appeal in 1900, Bonser, C. J., was inclined to hold

that the right of pre-emption was of force in the absence of statutory abolition of such right, and the case was decided on the merits. In four pre-emption cases in Jaffna the answers uniformly contended that the right of pre-emption was obsolete—the cases did not go in appeal. The case of *Suppiah* v, *Thambiah*, D. C. Jaffna 2443, (7. N. L. R. 151) decided on appeal in 1904 is the leading case on the subject. There were two appeals (1903, 1904) and on each occasion the Supreme Court ruled, "The right of pre-emption according to the *Thesewalame* of Jaffna still exists." It was a judgment of two judges. It is a very unsatisfactory judgment.

4. Who may pre-empt?

*Suppiah* v. *Thambiah* (7 N. L. R. 151) is authority for the proposition that the *Thesewalame* provisions regarding pre-emption affect "the rights of any person who assumed to buy land in Jaffna, be he English, Moor, or Tamil resident or not resident in Jaffna,"—although the *Thesewalame* avowedly applies to "*Malabar inhabitants of the province of Jaffna.*" There never has been any doubt as to the right of "heirs or partners [*Thes.* sec. vii (1) ] to pre-empt, but it has been questioned for some time whether a neighbour *not being a mortgagee also* could exercise the right. In 4 N. L. R. 328. Bonser, C. J., thought he could not, and C. R. Kayts 4305 (1903) in which the Commissioner followed the doctrine of Bonser, C. J., in 4 N. L. R. 328 was affirmed by the Supreme Court (3 *Tamb. Rep.* 52.) The Full Court in *Sabapathy* v. *Sivapragasam*, C. R. Jaffna, 2795 of 1905. (8 N. L. R. 62) set all doubts at rest by holding that the neighbour must be a mortgagee.

5. Is notice necessary, and of what kind ?

The *Thesawalame* code itself, sec. vii. (1), refers to modes of notice as defunct by A. D. 1706 and enjoins Sunday publication in the churches. In *Suppiah* v. *Thambiah* (7 N. L. R. 151) the Supreme Court, not being able to reconcile itself to the mode of notice prescribed, discreetly held "reasonable notice" has to be given, and the words of Wendt, J., are significant, "It certainly is desirable that to prevent dispute as to notice and consequent litigation, some definite formality should be prescribed by the Legislature *if the right of pre-emption itself is not taken away*" (7 N. L. R. p. 155, italics ours). Middleton, J., is not happy in his suggestion of "reasonable notice *according to the times specified in the first paragraph* [Sec. vii. (1) ]" (7 N. L. R. 157).

6. What is the authentic text of the *Thesewalame* Code? In 4. N. L. R. 328, 7. N. L. R. 154, and 8. N. L. R. 62 this question was discussed and in the last case (8. N. L. R. 62) it was finally ruled that "the English text of the *Thesewalame* published in vol. I. of the Revised Edition of Ordinances must be taken as the sole recognized official repository and declaration of the laws and customs of the Tamils of Jaffna." The code was in Dutch, and in 1707 translated into Tamil, and in 1814 into English. According to the English text those who may pre-empt are heirs, co-owners, and adjacent mortgagees; but according to the Tamil, heirs, co-owners, neighbours and mortgagees. In 8. N. L. R. 62 the Supreme Court didn't think it had power to revise the English text even by comparison with the Dutch original. In

the matter of pre-emption the Tamil text agrees with Atherton's *Compendium*. For another example of difference see the passage sec. 1. (7) quoted in the argument in D. C. Jaffna 1274 (3 *Tamb. Rep.* 120.) For a lengthy discussion of the *Theswalamee*. text and extent of obsoleteness, see *Ceylon Law Review*, vol. ii. pp 13—20, 35—49, and especially for reasons in support of the obsoleteness of pre-emption see the same vol. pp. 42—45.

Feby. 20. 1835.] [Morg. Dig. Sec. 152.

Present: Marshall C. J., Rough and Norris J. J.

D. C., Batticaloa 1623.

*Prescription—Suit commenced—Not pressed on—Is it interruption?*

The institution of a suit by party in possession does not bar his prescription.

## Text of Digest.

Marshall, C. J. In an action to recover certain lands it appeared that the defendant had previously commenced an action against the plaintiff for disturbance of his possession, which, however he had not pressed to a conclusion; but it was in evidence that the defendant had been in possession ever since his purchase, remaining in possession during such suit, and continuing in possession up to the present action. *Held*, that the mere circumstance of the defendant having commenced the previous action which he did not press on, was not sufficient to bar the right of prescription which his possession had conferred upon him.

## Notes.

*Prescription—Interruption by suit—conflict of decisions.*

1. That an abortive action by a party in possession need not be to his detriment is based on reason. He might have had at the time of such suit some cause of action other than that which affects possession, or his possession was not disturbed and his suit might have been without any cause of action. (3 *Tamb. Rep.* 17.)

2. The effect of a suit against a person on the continuity of his possession has been the subject of conflicting decisions. Among other cases (more fully to be dealt with in their place) may be noted:

Ram. Rep. 1843—'55, p. 54, Constructive or civil interruption is effected by *litis contestatio* or by *vocatio in Jus*, and even by a complaint or protestation duly made, when

on account of the absence of the adversary a *litis contestatio* cannot be interposed"—on the authority of the Roman-Dutch Law and early decisions.

Ram Rep. 1843—'55. p. 62.

Ram. Rep. 1860—'62, p. 189. Case by plaintiff, even nonsuit, bars defendant's prescription (Creasy, C. J., *dub.*)

2. Lorenz, 31 (1857) Pendency of suit which had abated by death of one of the parties more than 15 years before action, does *not* interrupt prescription.

3. Lorenz, 271 (1859) Partition suit does *not* interrupt prescription. See Pereira's *Institutes* ii. 275.

Austin 12, 23, 54. First suit interrupts.

Marsh. Judgments p. 575, Suit or plaint interrupts. In the case in *Austin* 54 the S. C. wanted proof of *first* case, or even of *summons* on defendant, so as to shift burden of proof of prescription on defendant.

Ram Rep. 1877, p. 133, suit interrupts.

1. C. L. R. 103 (1892), Unsuccessful suit against adverse possessor does *not* interrupt his prescription, but suspends. When suit is lost or abandoned period of pendency of suit enures to benefit of possessor.

1 N. L. R. 288 (Feb. 1, 1896), Suit "disturbs" possession (Withers and Browne, J. J.,)

2. N. L. R. 261 (June 1896), following 2. C. L. R. 103, case by plaintiff, if unsuccessful, does *not* interrupt defendant's prescription (Bonser C. J., *diss*)

It is not necessary to discuss these decisions at any length. The latest (2 C.L. R 103, 2 N. L.R. 261) are acquiesced in as law (Perera's *Institutes*, ii pp. 269-270-276). The subject is very carefully discussed in SenathiRajah's *Law of Prescription* pp. xxv--xx and 24--31. It may be pointed out that in the consideration of this subject, especially the cases, the following questions have to be met:

(1) Is the law of prescription in Ceylon the Roman Dutch Law or Ord. No. 22 of 1871? (*Laurie, J.*, in 2 N.L.R. 261; *Withers J.* in 2 N. L. R. 261., *Withers J.*, in 1 N. L. R. 200; *Bonser C. J.*, in 5 N. L. R. 210.)

(2) If the law is only Ord. No. 22 of 1871 what is the value of old decisions under the Dutch Law? (*Laurie J.* in 2 N. L. R. 261)

(3) If Ord. No. 22 of 1871 is all the law of prescription what is the duty of Courts with reference to Two-Judge or Full Court rulings made under the Dutch Law? (See *Bonser C.J.*, in 2 N. L. R. 261, and *Layard C. J.*, in 7 N. L. R. 173.)

(4) Does the fact of a suit override the substantial fact of physical possession? (*Laurie J.* in 1 N. L. R. 288. Pereira's Institutes, ii. 270, and see 2 N. L. R. 261.)

June 20, 1835.] [Morg. Dig. sec. 218.

Present: Marshall C. J., Rough and Norris J. J.

## D. C. Kaltura 1238.

*Ecclesiastical matters—Mahomedan mosque—Exclusive right of festivals -Does civil remedy lie? -Voluntary offerings—Tithes in English Law—Civil right distinguished from religious privilege.*

1. Where one temple attracts to it the devotees and offerings hitherto associated with another, it is not a matter for the civil courts.

2. Where there is no right there is no remedy.

3. Voluntary offerings not being recoverable by compulsion are not in the nature of tithes under English Law.

4. A religious privilege of paying the voluntary offerings of a festival, however immemorial and exclusive, does not give a civil *right* to recover them or to prevent their being offered anywhere, and any breach of such priviledge is a matter for purely ecclesiastical interference.

### Judgment.

**Norris, J.***The plaintiffs in this case are the priests and officials of a certain Moorish mosque, situated at Marandahn in the village of Barberyn; and they seek to recover from the defendants, who are the priests of the Mollia Mulla mosque in the same village, one thousand rix dollars—damages, alleged to have been sustained by them, the plaintiffs, in consequence of the defendants having for the last 3 years, celebrated at the Mollia Mulla mosque the religious festivals of Nombo Perunal and Hadjee Perunal; the right to celebrate which the plaintiffs claim as exclusively appertaining from time immemorial, to their own mosque at Marandahn. The decree of the Court below [although it gave no damages] declared the exclusive right of celebration to be vested in the Marandahn mosque. Had the question simply related to the plaintiffs' right to celebrate these festivals at their own mosque without molestation or interruption there could have been no room for doubt upon the subject; for the evidence is abundantly suffi-

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**Morgan's Digest* gives only a summary, but this text of the judgment is taken from Marshall's Judgments pp. 656—659.

In *Morgan's Digest* the judgment of the court is ascribed to Marshall C. J. but it is rightly ascribed to Norris J. in *Marshall's Judgments (Ed. R. R.)*

cient to show that, from time immemorial, the Marandahn mosque has enjoyed this privilege, and we are bound by law to protect all classes of the people, in the free and undisturbed exercise of their religious rites and ceremonies. Again, had the inquiry been of a purely ecclesiastical nature, as for example, whether these festivals could consistently with the Mahomedan religion and the precepts of the Koran, be celebrated in more than one consecrated mosque of the same village, and whether the favoured mosque at Barberyan was not that of the plaintiffs, the evidence might perhaps be considered sufficient [supposing it were the business, but it certainly is not of this or of any Court of Justice to decide such matter] to warrant a decision of the former question in the negative, and of the latter in the affirmative. These, however, are questions which we are neither called upon nor will consent to decide.

It is very possible that the Mahomedan worship may have been scandalized, and the religious veneration due to the ancient mosque of Marandahn abated, by the irregular practices and arrogant assumption of the priests officiating at the rival mosque of Mollia Mulla. But the law does not recognize these as civil injuries for which compensation can be claimed in a Court of Justice. These are matters purely ecclesiastical, and a remedy for the abuses complained of, if obtainable at all, must be sought for in ecclesiastical censure or penance. But the question which we are called upon to decide is very different from either of the foregoing. The plaintiffs do not complain of the disturbance in the celebration of their religious rites at their own mosque; nor do they seek redress for the insult offered to Mahomedan worship by the celebration at an unaccustomed place of rites peculiar to the mosque of Marandhan: they are actuated by no apparent zeal for the honor of their religion or the peculiar sanctity of their mosque. Their claim is of a pecuniary and personal description being for specific damages, which they profess to have sustained for the last two or three years by the deviation, from their own mosque to that of Mollia Mulla of certain offerings, made by devotees during the celebration of the abovementioned festivals, which offerings they claim as their exclusive right by virtue of the alleged exclusive privilege attached to their mosque as regards these festivals. The religious privilege as I have already observed is a question for the decision of the priests or spiritual guardians of the Mahomedan religion, the civil right is the sole question

with which we are concerned and this, I apprehend may be settled in very few words.

Where there is no legal remedy, the law presumes that there can be no legal right, the one being in contemplation of law an inseparable adjunct to the other. Now I should be glad to know by what form of law the plaintiffs in this instance would enforce their alleged right to the voluntary offerings of the devotees? Voluntary, *ex vitermine*, all offerings must necessarily be considered to be; and if voluntary, of course not recoverable by any compulsory process, whether legal or otherwise. The assumed right, therefore, admitting of no legal remedy in case of its being refused or withheld, is in truth no right at all; and if it be no right, the present action which seeks compensation for the disturbance or abstraction of that supposed right of course falls to the ground. To decide otherwise, would, in truth, be to incur a fearful responsiblity, and indirectly to commit, under colour of law, the very offence or injury which we are now asked, and which we are bound by our oaths to prevent, that of interference with the people, in the free and peaceable exercise of their religious rites and ceremonies. For no right can be dearer than that of religious devotees, to make their free will offerings, at whatever church, temple or mosque they please; and if in preferring one mosque to another they act contrary to their religion, it is for their priest or spiritual pastors, not for a court of law to enlighten their consciences and correct their practice. The case of tithes in England to which the present claim has been compared, is entirely different. Tithes are not voluntary offerings, but a legal provision for the clergy, which cannot legally be withheld and are recoverable by the aid of the civil power, and constitute therefore, in every sense of the word a civil right, terms wholly inapplicable, as already shewn, to mere voluntary offerings". The decree of the D. C. by which the plaintiffs claim had been allowed, was, therefore, reversed with costs.

## Notes.

*Ecclesiastical matters—Civil Court.*

This case about the power of Courts in respect of ecclesiastical matters has to be distinguished from *Kurukkal* v. *Kurukal*, 1 S. C. R. 354, and *Supramania Ayer* v. *Changarappillai* 2 N. L. R. 30. See also *Ram. Rep.* 1863-'68 p. 240, and *Creasy* p. 155. See the latest case D. C. Jaffna 3575 (1905), 4 *Tamb. Rep. 107.*

Jan. 6. 1836] [Morg. Dig. sec. 298.

Present: Marshall, C. J.

D. C. Negombo 1652.

*Title by prescription -Essence of it -Right of possession, is title.*

Even in the absence of documents the law presumes title or right of possession in favour of long and uncontested possession.

Text of Digest.

Marshall, C. J, Where possession has been enjoyed for many years uninterruptedly and without contest the title or right of possession becomes in fact an adverse one against all the world; because as nobody has disputed it, the law presumes that the possessor has a better right to it than any other, even though he has not a single paper or document to show in support of his title, and this is the very essence of a title by prescription.

June 15, 1836.] [Morg. Dig. sec. 360, 361.

Present: Norris, C. J., Rough & Carr, J. J.

D. C. Batticaloa 2667.

*Prescription—Mortgagee's possession—Presumption in favour of heir—Acknowledgment of mortgagor's title.*

1. Long possession by mortgagee, with an acknowledgment of mortgagor's title within the prescriptive period is not prescriptive possession.

2. The law raises a presumption in favour of the heir, and such presumption must be rebutted by strong proof by party claiming adversely on his own title.

Text of Digest.

Carr, J.,—Where it appeared that the plaintiff had inherited the land in dispute from her parents and that it had been mortgaged nearly twenty years before to the defendant, but that there had been an acknowledgment of the plaintiff's title till within the last 8 years, when the possession became adverse, *Held*, that such possession of the defendant did not give him a prescriptive title, and that the plaintiff would be entitled still to recover it on payment of the alleged debt due on the mortgage unless the defendant could adduce evidence in support of his title to set aside the

claim of the plaintiff, and that it being a rule that the right of the heir is favoured and that he cannot be disinherited except on clear proof, the plaintiff had a right to know by what means, or under what deed, he was to be disinherited and therefore that the defendant should produce the deed under which he claimed, or should give satisfactory evidence of his title.

The payment of produce or ground—share by the defendant (who claimed as mortgagee) to the plaintiff, was held not inconsistant with the usual practice of the mortgagee's retaining the produce for their interest; for it is not probable when land is mortgaged to a small amount and below the value thereof, the mortgagees might be the goiyas of, or allowed to cultivate, the whole land on payment of part of the produce to the plaintiff, retaining a portion of such ground-share in payment of the interest due on their mortgage.

July 12, 1837.] [Morg. Dig. sec. 511.

Present: Rough, C. J. and Jeremie, J.

D. C. Kaltura 2887.

*Gheroenanslagey* v. *Christian Aracthie.*

*Prescription— Possession presumed adverse - Possessor presumed entitled - Rebuttable by evidence.*

1. Possessor presumed to hold in his own right, and as proprietor, until the contrary be demonstrated.

2. Where it is shewn possession commenced by virtue of some other title, e. g. as tenant or planter, then the possessor is presumed to have continued to hold on the same terms, until he distinctly proves his title has changed.

Judgment.

Jeremie, J., There are two points regarding the law of prescription, that should be always well borne in mind or else from that law being a most wholesome one it may be rendered pregnant with injustice. The first is that a possessor is always presumed to hold in his own right and as proprietor until the contrary be demonstrated; the second that the contrary being once established and it being shewn that the possession commenced by virtue of some other title, such as that of tenant or planter,

then the possessor is to be presumed to have continued to hold on the same terms until he distinctly proves that his title has changed. In the present case all the documents and much of the oral evidence shew that the defendant and his predecessors were the proprietors, the plaintiff and his predecessors the planters, and there is no document or other satisfactory and unequivocal proof to explain how or at what period these respective relations were changed or that they ever have been changed. For the fact that the plaintiff was allowed (being then the acknowledged owner as planter of part of the produce) to sow a portion of the garden with vegetables, or to fence in the new plantation, proves under such circumstances only the forbearance of the acknowledged owner, and not that he had renounced his rights as proprietor.

Aug. 9, 1837.] [Morg. Dig. sec. 529.

Present: Jeremie, J.,

D. C. Matura 2343.

*Garehingey* v. *Garehingey.*

*Possession—Possessor must shew when title became adverse—Possessor originally cultivator Minority of owner.*

The person in possession of a land, having commenced possession as a cultivator, must prove when his title became adverse.

This case in which the right to certain lands was in question had been sent back on a previous occasion for further evidence on the part of the defendant, the Supreme Court observing that it fell on the defendent who was proved to have been originally the cultivator of the land in question, to shew when his title became adverse to the plaintff, the original proprietors, and that he had undisturbedly possessed under such adverse title for ten years from the plaintiff's majority. The case having come a second time in appeal, the Supreme Court pronounced judgment as follows.

## Judgment.

Jeremie, J., The defendant has not shewn when his title became adverse, for the deed is not better proved than it was before, the late Modliar who made the endorsement having continued in office until 1829,

nor has he called a single additional witness to possession, his whole case therefore rests on testimony already pronounced insufficient; on the other hand plaintiff has adduced the additional witnesses, who corroborate the preceding witnesses' evidence in his favour, and prove not only plaintiff's recent possession but that the field in dispute was mortgaged by his mother and held for many years by the mortgagees (defendant being always the cultivator) subsequently to the date of the deed of sale said to have been passed by him then a minor, and his sister then under coverture, in 1813 and all the witnesses who depose to this effect are the nearest neighbours, to whom not a shadow of suspicion attaches and whose testimony agrees in every material point.

The court cannot therefore but consider this as another attempt on the part of a mere holder to usurp the title of a proprietor.

The decree of the court below was therefore reversed and judgment entered for the plaintiff.

July 24, 1839.] [Morg. Dig. sec. 625.

Present: Jeremie, J.,

D. C. Colombo 21429.

*Angohamy* v. *Samuel Appoo.*

*Possession -Mortgage—Fixed period for redemption—Adverse title.*

1. Possession by mortgagee becomes adverse after the period fixed in the bond for redemption.

2. Ten years' adverse possession covers every defect of title.

## Text of Digest.

**Jeremie, J.,** Where it was stipulated by a mortgage deed that the property mortgaged should be redeemed within a given time; and it being proved that the property was not so redeemed, held that from that time the possession became adverse. Ten years' adverse possession clearly covers any defect of title; so that it becomes immaterial to inquire whether the stipulation as to the repayment was sufficient *per se*, or not, to establish a perfectly valid title.

Oct. 3 1840.] [Morg. Dig. sec. 653.

Oliphant, C. J. Carr, and Hilderband J. J.

D. C. Chilaw and Puttlam 6218.

*Meydeen Saiboo* v. *Sibra Saibo*

*Prescription—Deed invalid or informal—Right to prove possession.*

Even when a deed is invalid or informal, yet party relying on such deed may prove prescriptive possession if pleaded.

## Text of Digest.

Collective Court—The regulation No. 1 of 1806 does not operate retrospectively, and therefore cannot be pleaded in bar to the present action; and if it could operate so as to affect the validity of the plaintiff's deed, yet the plaintiff having set up prescriptive title should have been allowed to prove such prescriptive title.

July 10, 1841.] [Morg. Dig. Sec. 673.

Present: Carr, J.

D. C. Colombo, 25035.

*Pieris* V. *Coste.*

*Possession under mortgage—No transfer—Long possession—Improvements to land—Right to redeem—Delay in suing—*

1. When a person's title commenced as mortgagee the law will not, without strong proof to the contrary, presume his possession to be otherwise than consistent with such legal title.

2. The laches of the true owner of a land contribute towards deciding if an improver of the land is a *bona fide* improver.

## Judgment.

Carr, J. That the decree of the D. C. be reversed without costs: and the defendant is declared to be entitled to the land in dispute upon her paying to the plaintiff the sum of £ 3-7-6, due upon the old judgment of the sitting Magistrate's Court and also such

further sum as the Disirict Court may (in default of the parties mutually agreeing to the same) assess by way of reasonable compensation to the plaintiff for the value of the house built up by him upon the land, and for the expenses and trouble incurred by him in planting it as deposed to by the 5th witness; and both parties are decreed to pay their own costs of this suit. The plaintiff has no notarial transfer, and can rest his claim only on a prescriptive title of ten years' adverse possession, which has not been satisfactorily proved. The plaintiff's original title to the land having commenced as a mortgagee the law will not without strong proof to the contrary presume his possession to be otherwise than consistant with such legal title, and thereby debar the defendants equitable right to redeem. The circumstance of the plaintiff also never having got a notarial transfer after incurring the expense of a survey, and his adopting the irregular course of asking the surveyor to note down the sale in his book, are not in favour of the plaintiff's claim especially when the surveyor refused. But laying aside all suspicious circumstances, it appears that this action was not instituted until the 27th May 1839, for previous interruption of the plaintiffs possession by the defendant, but for how long is not stated in the libel; nor is it very material because Mr. Franke deposes to acts of the plaintiff in 1829, which amounted to an acknowledgement of a title then existing in the defendant to the land. The survey is also dated only on the 23 June, 1829, and the marriage register book produced today in court shews that the marriage of the defendant, (which is referred to as the period of the alleged sale) did not occur till the 12th of July 1829. From the same book it appears however that the defendant was born in 1804, so that her alleged minority is untrue, and a mere subterfuge to excuse her great laches in sleeping over her legal rights, for many years, and in not bringing this action sooner, whilst she has in the interval knowingly permitted the plaintiff to continue in uninterrupted possession of, and in good faith to build upon, and plant the land, as the owner thereof; she cannot therefore expect under such circumstances that her claim would not be disputed by the plaintiff, or to be favoured by this court, in being allowed to benefit by her own laches and deceit.

# Notes to Cases on pp. 110—115.

*Adverse possession—Mortgagee's possession—When did title become adverse?-Redemption of mortgage - No deeds - Bad deeds.*

1. The cases in *Morg. Dig.* sec. 298 360, 511, 529 625, 653, 673, are grouped together for the convenience of annotation. They deal with connected subjects. The main fact in them all is possession, and with reference to it these cases lay down the following principles:

(a) Long and uncontested possession is an element of title, even without title deeds. Even where the title deed produced is bad, for informality possession may be proved. That the mere production of title deeds proves no title is good law (C. R. Gampola 8316, 28th July 1905, 4 *Tamb. Rep.* p.112).

(b) There is a presumption of ownership in favour of an heir against an outsider.

(c) So important is the fact of possession that a possessor is presumed to hold in his own right until the contrary be proved.

(d) Where possession, however long, is proved to have begun *dependently*, the burden is on the possessor to prove when his title became adverse. (See Privy Council Judgment in *Nagudu Marikar* v. *Mahmadu*, 7 N. L. R. 91, overruling *Anthonisz* v. *Cannon* 3 C. L R. 65) This applies to tenants, agents, cultivators, mortgagees and the like. The dependent character of the possessor must be proved first. (*3 Tamb. Rep.* 74). See. 3 N. L, R. 213

2. As regards mortgagees it was held in a number of cases since 1833 that a mortgagee could never prescribe (*Morg. Dig.* Sec. 5, 22. 30, 51). One reason for this was that Ord. No. 8 or 1834 did not apply to *vicious* possession (Senathi Rajah's *Prescription* p. ix), and it seemed consistent with the Roman and Roman-Dutch Laws that possession to be adverse must have commenced in *good faith* (*Ibid*, p. xxiii. See also pp. xix-xxv). Since 1844, however, it has been law, contrary to all systems of civilised jurisprudence, that even a vicious possessor could prescribe (*Ibid*, xxiii). But it is refreshing to find that the old law has been indirectly restored by the Privy Council (7 N. L. R. 91) by making it *obligatory on the adverse possessor to prove how he got rid of his dependent character and when his title become adverse* (See above, note 1). See *Thomson*, vol. ii. pp. 84, 85.

3. In connection with mortgage and prescription the question of the right of redemption is an important one. Within what time must a mortgagor redeem? Where there is a time fixed in the bond for redemption, ten years' possession from that time would be adverse (*Morg. Dig.* sec. 625, reported above). If there is no time fixed, does prescription bar redemption? In the case of usufructuary mortgages, (and the otty mortgage of the *Thesavalame* Code) the possession by the mortgagee, his enjoying the produce in lieu of interest keeps alive the mortgage and the bond, in consequence, is not prescribed, nor is the right to redeem. [As to the *Theseva-*

*lame* otty-mortgage, see *Theseralame* sec. v (1) (2) (3), and *Muttukishna* pp. 328-386] With reference to ordinary mortgages, is the action to redeem prescribed by sec. 11. of Ord. No. 22 of 1871? The section speaks of "three years from the time when such *cause of action* shall have accrued." Now, cause of action is defined (*Civil Pro. Code* sec, 5) as an actionable wrong and includes "the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury". As to finding the cause of action of a plaintiff in a redemption suit, the *actio pignoratitia directa* of the Common Law, it is not necessary to inquire if the word "includes" in sec. 5 of the Civil Procedure Code is exclusive and exhaustive; it is enough to agree that the redemptor's grievance is covered by the definition. His right is the right to pay the debt and release the property from the pledge, the creditor's duty is to accept tender and grant release. The creditor gives the debtor a cause of action when he refuses to release and this can happen only where the debtor offers to redeem. *The cause of action then accrues*, and sec. 11. of Ord. No. 22 of 1871 can then only apply. Its application being to events after the offer to redeem, it does not regulate the time within which the offer itself has to be made. The ordinance applies after the accrual of the cause of action, but it does not lay down when the cause of action shall accrue. *By the Roman Dutch-Law the right to redeem cannot be prescribed* (Voet 23. 7. 7.) So Lorenz in his *Civil Practice* p. 82. Even after the passing of Ord. 22. of 1871 the Supreme Court held in *Flerk* v. *Jansz* 9 S. C. C. 81, that prescription does not begin to run against the right to redeem a pledge so long as any part of the debt remains due. Neither Pereira's *Institutes* nor Jayawardene's *Law of Mortgage* affords any help in the discussion of this subject In Jayawardene's *Law of Mortgage*, pp. 65.66, a short note on the *actio pignoratitia directa* leaves it doubtful whether the principle in 9 S. C. C 8. would apply to mortgage of immovable as well. (What is the effect of the *Pawnbroker's* Ord. No, 8 of 1883, sec. 9. 10. on the law in 9. S. C. C. 81?) It is not necessary perhaps to discuss the point as prescription extinguishes the mortgagee's rights, and the question of redemption would not arise except in usufructury mortgages.

For a discussion of "adverse title" and "adverse possession' see Senathi Rajah's *Law of Prescription* pp. xix—xxx, 30—37; Thomson's *Institutes* ii 188—192; Pereira's *Institutes*, ii. pp. 269—277; 1 N. L. R. 288, 2 N. L. R. 261, 2 N. L. R. 370. 3. N. L. R. 213, 5 N. L. R. 210, 6 N. L. R. 50, and 6 N. L. R. 197.

April 16, 1836.] [Morg. Dig. sec. 323.

## Norris, C. J., Rough and Carr, J. J.

## D. C. Colombo 6613.

*Negligence—Carrier—Condition of goods—Condition of ship.*

1. Everything is negligence that the law does not excuse.

2. A promise to carry safely is one to keep safely.

3. Evidence of goods being put on board dry and in good condition obviates proof of unseaworthinesss of ship.

### Text of Digest.

**Rough, J.**—Everything is negligence in a carrier or a Hoyman [master of a carrying vessel] that the Law does not excuse. He is answerable for goods whilst in his custody and in all events, except they happen to be damaged by the act of God or the King's enemies. And a promise to carry safely is a promise to keep safely, and though the party be no common carrier, yet if he takes hire he may be charged upon his special promise.

Where it was attempted to be proved that the injury to the goods shipped in a vessel had occured through unseaworthiness of the vessel, *Held*, that this evidence was unnecessary as the evidence was forcible in proof of the goods having been put on board dry and in sound condition.

## Notes.

*Carrier by sea—Extent of liabilities.*

The principal judgments about carriers by sea may be simply noted here:

1 **Lorenz 200** The owner and the master of a ship cannot be sued together.

**Ram. Rep.** 1862-'68 p. 159. Accident due to act of God or King's enemies exempts carrier.

**Creasy 113.** Contributory negligence.

**Creasy 115.** Master liable for packages damaged by contact with creosoted timber stowed in the ship.

**Creasy 116.** Master liable for damage at time of discharge from ship into cargo boat.

**VanderStraaten 208.** If bill of lading says ship master is liable for "wet and damage" the plea of perils of sea is bad.

**2. Browne 181.** Where barrels were old and leaky, master not liable for loss.

July 20, 1836] [Morg. Dig. sec. 370.

Present: Norris, C. J., and Rough, J.,

D. C. Kandy 8327.

*Mahommedan woman — Suing alone — Husband not joined.*

*Held.*—(On the opinion of assessors), A Mahommedan wife can sue without joining her husband.

## Text of Digest.

**Rough, J.,**— In a suit brought by a Mahommedan woman, the defendant had pleaded that the husband of the plaintiff ought in law to have been joined as co-plaintiff, but the Mahommedan assessors in the Court below having stated, as a matter of law, that the wife might sue alone, and it appearing further that the plaintiff had previous to the filing of the plea been examined under rule 31 of the Rules and Orders, touching a sequestration obtained by her in the case, the Supreme Court thought that the plea of the defendant was too late and under all the circumstances of the case (the information tendered to the Supreme Court tending also to shew that the wife is accustomed and has a right by Mahommeden Law to sue alone) directed the court below to overrule the plea, and to proceed to the investigation and determination of the case; the plaintiff being of course liable in costs should she fail in the proof of the allegations in her libel.

## Notes.

*Mahommedan wife— Suing alone—Roman-Dutch Law.*

1. A Mahommedan wife is virtually a *feme sole* and the Roman-Dutch disabilities attaching to her sex do not bind her (4 N. L. R. 65). She can sue her husband, so she can sue anyone else. She has not only this privilege of suing without her husband, but she need not appear in court in person (Secs. 420. 422, Civil Procedure Code)

2. In D. C. Colombo 54376 (*Van Der Straaten's Reports* for 1871, p. 196) the question is discussed at length and it is held there that a Mahommedan wife can sue alone.

Aug. 24. 1836] [Morg. Dig. sec. 380.

Norris C. J., Rough and Carr J. J.,

D. C. Ruanwella, 3001.

*Professional liability—Proctor—Neglect—Damages.*

*Held.*—That a proctor wanting in due skill or care in the management of a suit is liable to his client in damages, if neglect be clearly proved.

Text of Digest.

Carr J.—When a proctor has been wanting in due skill or care in the management of a suit, he is liable to his client for any damages arising from it, provided he can clearly prove such neglect.

Notes.

See *Revised Reports*, vol. i. pp. 45, 48, and authorities there quoted. See also *Voet.* 3. 1. 10; *Voet.* 9. 2. 23. *Ram. Rep.* 1843. 55. p. 267 and *Godfrey* v. *Dalton*(24 *Campbell's Ruling cases*, 656)

Sep. 28. 1836] [Morg. Dig. sec. 402

Present: Carr J.

D. C. Colombo 6499.

*Surety—Cession of action—Civil Law.*

*Held*—On payment of principal debt surety has privilege of cession of action.

Text of Digest.

Carr J.—By the Civil Law a surety, on the payment of the principal debt, has the privilege to demand from the creditor cession of action not only against the principal debtor, but also against all other persons that are liable and there is no law more generally and clearly defined than the equity or right of a surety thus to enforce every security and all means of payment which the creditor had and to have any fund in court which is charged with the principal debt applied for his exoneration or indemnification.

Dec. 7, 1836.] [Morg. Dig. sec. 427.

## Present: Carr, J.,

## D. C. Jaffna 3193.

*Cession of action—Surety—Neglect to obtain cession at time of payment—Co-debtor in solido—Cession when necessary—Ancient Laws of Holland—Modern practice—Extent of Dutch Law on the subject introduced into Ceylon.*

*Held*—1. In practice the authority to sue without cession of action has never been disputed, all that was ever required being the receipt of the creditor to prove the payment.

2. Cession of action is only necessary to enable the co-debtor or to proceed against his co-obligor or co-surety *in the same manner as the original creditor could*, but it is not necessary to enable him to sue in his own name for their portions.

3. Cession of action though not obtained at time of payment of debt, might be obtained subsequently.

### Text of Digest.

**Carr. J.**,—In this action to recover from the defendant a sum of money paid on his behalf by the plaintiff in respect of a debt due by the plaintiff and defendant as co-obligors, and which sum the defendant had admitted to be due to the plaintiff as claimed in the libel, certain other parties intervened and claimed preference over the plaintiff in respect of certain debt due to them by the defendant. The Supreme Court entered judgment for the plaintiff as against the defendant for the amount claimed and as to the plaintiff's right of preference, considered the three following points, viz:—

1. Whether admitting the debt due by the plaintiff and defendant to have been discharged by the plaintiff alone out of his own private property, it was not necessary by the existing laws of the colony for the plaintiff to have obtained cession of action from the creditor at the time of such payment, or having neglected then to obtain it, she was still entitled to that benefit?

2. Whether the plaintiff having failed to procure such cession previously to instituting her action, she could be allowed to do so at that stage of the case?

3. Whether the plaintiff had sufficiently proved as against the intervenients, that the debt due by herself and the defendant had been paid by her or on her sole account only, out of her private property?

And as to the first point, it appeared that in practice the authority to sue without cession of action had never been disputed, all that was ever required being the receipt of the creditor to prove the payment. It is indeed

necessary for a co-debtor *in solido*, on paying the whole debt to the creditors to obtain from him cession of action in order to enable him to proceed against his co-obligator or co-surety in the same manner as the original creditor could, such cession not taking place *pleno jure*; but where a co-obligor or co surety had neglected to take this cession of action, he has nevertheless at law a personal action, or the right to proceed in his own name against his co-obligors or co-sureties to recover their portion of the whole debt which he has paid on their respective accounts. The authorities being however very conflicting as to the right of the co-debtor or co-surety, who neglects to obtain cession at the time of payment, to claim it subsequently or *ex intervallo* (though at the time of payment the creditor is bound to grant such cession, or payment might be refused) the Supreme Court laid down the following distinctions:—

a. That cession of action might be obtained or expressly agreed for at the time of payment, where the co-obligor or co-surety pays off his whole debt on behalf of not only himself but of his co-obligors or co-sureties; in which case the equity or implied promise does not so clearly arise, as he may be then presumed to have neglected taking. such cession for their benefit and to have been contented with his personal right of action;—and a stranger, not being entitled *de jure* to cession can have no such equity.

b. Where the payment is made by the co-debtor in his own name and behalf only, or simply i. e. without stating on whose account the payment was made, such equity or implied agreement arises and cession may be obtained afterwards *ex intervallo.*

c. Cession of action is only necessary to enable the co-debtor to proceed against his co-obligor or co-surety in the same manner as the original creditor could; but it is not requisite to enable him to sue his co-obligor or co-surety in his own name for their portions.

The Supreme Court expressed its reluctance to make any decision which would alter or infringe upon any long established practice of the profession especially where such practice is consistant with well-known principles of equity, and when the deviation from it might be productive of extreme private injury and hardship. It was bound to administer the laws as they subsisted under the ancient Government of the

United Provinces and even admitting that Vander Linden and the authorities on his side were correct, viz. that according to the modern practice of the Roman-Dutch Law in Holland if a debtor *in solido* had neglected to take cession at the time of payment, he could not obtain it afterwards, it might still be doubted whether that practice had been introduced into this colony. The Court therefore guided by the opinion of Van Leeuwen in his commentaries in the Roman-Dutch Law (which is alleged by Sir Alex. Johnstone to be the work to which the Dutch Court of Ceylon most usually referred, and to be the basis of the civil and criminal law of all the ceded Dutch Colonies) consistent as such opinion is with the real equity and justice of such cases as well as the long established practice in the colony decided in favour of the plaintiff's right to obtain cession of action from the creditor, notwithstanding her neglect to do so at the time of payment.

And, secondly, the Supreme Court, guided by a former decision by which a similar indulgence had been granted, allowed the plaintiff in obtaining such cession to avail himself of that benefit in the present action. This former decision related to the want of administration, but the observations made therein by Marshall C. J., were held to apply with equal force to the present case considering the former practice in the profession and the proceedings in the suit.

And, thirdly, it was held that the evidence in the case was sufficient to support the plaintiff's claim as against the intervenients for the admission of the defendant could not affect the intervenients, against whom the plaintiff should have fully proved that the sum claimed had been actually paid on her sole behalf out of her own private property. The only evidence adduced to establish this fact was a Fiscal's receipt, by which the payment appeared to have been made by the defendant himself with an interlineation in a different handwriting to the effect of such payment having been made on behalf of the plaintiff and this was held to require much further explanation by clear and satisfactory proof in its favour.

And under these circumstances the proceedings in regard to the plaintiff's claim of preference over the intervenients were referred back to the District Court to require the plaintiff to establish by sufficient proof that there were no available assets of her late husband from which the above judgment debt could have been

paid on her own sole behalf out of her own private property and to allow her also to obtain and file her cession of action from the creditor after amending her libel accordingly.—

## Notes on Cession of Action.

1. This is the *beneficium cedendarum actionum* of the Civil Law. See *Voet*, 46. 1. 30, *Grotius* 3. 3. 31, Pothier's *Obligations* 400—442. (Evans). *V. D. Linden* 4. 4. 13 and 15, Tambyah's *Contracts* (1st edition) pp. 117, 118 and Pereira's *Institutes* vol. ii, pp. 630-632.

2. The principal Ceylon cases on the subject are:

3. **Lorensz** 319, No cession necessary when Crown is creditor. (*Jos. and Beven*, 61).

**Creasy** 136, cession necessary when Crown is debtor (*Vanderstraaten*, 89. 91)

**Wendt** 9,349, To reach mortgaged land cession before notary and witnesses necessary, and cession must be claimed within reasonable time

**Ram. Rep.** 1877, p. 224. Without cession co-obligor on a promissory note cannot recover from other co-obligors more than proportionate share of debt.

3 **S. C. C.** 56, Assignment of debt is a cession.

3 **Lorensz** 235, Creditor paying off a mortgage entitled to mortgagee's rights without cession.

3. The case No. 3193, D. C. Jaffna, reported above, was followed by Carr, J., on Jan. 16 1839, in D. C. Colombo 3787, *Morg. Dig.* sec. 599. The principle of cession of action appears to be well established, and the cases in *Wendt* p. 7 (case of 1882) and *Wendt* 349 (cases of 1875, 1876) shew that the principle had not been deemed unnecessary in recent times. The judgment therefore, in Morgan's *Digest* sec. 652, of Carr, J. dated Sep. 19, 1840, is as surprising as it is solitary. It is as follows; and the italics are ours: "The plaintiff's notarial bond though of prior date is not entitled to be satisfied out of the proceeds of the land in dispute, in preference to a subsequent special mortgage of such land; and if the defendant prove he has redeemed he is entitled to stand in the place of the original mortgagee as to the portion he has *bona fide* paid on behalf of plaintiff's debtor, without any cession of action *which has been held by the Supreme Court to be unnecessary in this Colony.*" These last words, if they refer to anything said by the Supreme Court in D. C. Jaffna 3193 cannot mean that cession of action had ceased to be by the year 1840, since in 1882 the Supreme Court recognised it. What perhaps Carr, J., meant was that in some cases (mentioned in D. C. Jaffna 3193) cession was held unnecessary.

4. In addition to the authorities noted above may be mentioned the following:

*Censura Forensis*, part i, 4. 7. 24.
*Voet*, 2. 14. 14.
*Vinnius ad Inst.* 3. 17. 1.
*Groenewegen de leg. abr.* 8. 41. 11.
*Sande de Act Cess.* 7. 11. 12.

*Neostadius Decis.* xli. p. 49.
*Wassenaer Pract Notar.* x. 23. 24. 25.
*Domat* (ed Strahan) part i. 3. 3. 1. Sec. 6.
*Costa ad Inst.* 3. 16. 1.
*Huber Praelectiones Juris Civilis*, vol. i. 1. 2. 8. Vol.ii. 17.1.9. vol. iii, 46. 1. 8.
*Burge* vol. iii. p. 545.
*Digest* 46. 3. 76; 17. 1. 28.
*Codex.* 5. 58. 1.

Jan. 4, 1837] [Morg. Dig sec. 444.

Present: Rough, C. J., Jeremie and Stoddart J. J.

*Bastiampillai* v. *Hugens.*

D. C. Colombo 12838.

*Defamation—Letter about a dismissed servant—Malice-Imprudentia Dolo proxima—Is truth justification?—Mitigation — May evidence of truth be received?—Is the Roman-Dutch Law or English Law the law of libel in Ceylon?—Distinction between animus defamandi in civil and criminal cases—Plea of confidential communication—Suspicion—Writing of a man as a thief without taking steps to get him punished—Truth a plea in oral injury.*

*Held.*—1. If H writes to A that B is a thief and not fit to be employed as a servant by reason of dishonesty but has taken no steps to have B punished at law, H is liable in damages by reason of his culpable imprudence amounting to malice in publishing his views to A.

2. The Roman-Dutch Law, and not the English Law, applies in Ceylon to cases of defamation.

3. (*per* Rough, C. J.) In modern Roman-Dutch Law the opinion seems to prevail that in cases of verbal injury, truth may be given in evidence, perhaps in justification, certainly in mitigation.

4. (*per* Jeremie, J. ) Truth is considered an important element in forming a right judgment of the motive by which the defendant was actuated, but it is only an element, and cannot therefore be exclusively pleaded as a sufficient reply to any defamatory publication.

5. (*per* Stoddart J.) In a criminal action truth is according to the Roman Law, a *presumptio juris et de jure* of the absence of malice, but in civil cases truth can be pleaded only in mitigation.

6. (*per* Stoddart J.) Confidence may not be pleaded as a full justification in all cases of libel.

In an action for damages, brought by the plaintiff (Bastiam Pillai) against David Hugens, it appeared that the plaintiff had been hired into the service of Colonel Arbuthnot by that gentleman's head servant,

having some months before been in the domestic employment of the defendant who had dismissed him for alleged misconduct of a serious nature. The defendant on hearing the plaintiff's engagement at Colonel Arbuthnot's had written the following letter to him, which led to the dismissal of the plaintiff:

"New Bazaar, June 7. 1836. Sir, I hope that you will excuse the liberty I take in addressing you, that having been informed that you have engaged a servant by name Bastiampillai I beg to apprize you that he was in my service for the last 5 months, and that I was obliged to discharge him on account of his dishonesty, having been robbed of plate to the amount of Rds. 200, under circumstances which leave no doubt as to his being a thief. Since this occasion I have been most credibly informed that plate has been abstracted from several families in which Bastiampillai was at the time employed as a servant. I therefore feel it my duty to inform you of the above circumstances, in order that you may take means to prevent a similar loss with yourself, and also to prevent a servant so deserving of punishment from obtaining employment of which his past behaviour shews he is so unworthy. Should you have any doubts as to what I have stated above, I shall be happy to acquaint you with all the particulars I know regarding this man's dishonesty; and should these prove unsatisfactory, I beg to refer you to A. W. Archer Esquire: I remain sir &c, David Hugens."

To this action the defendant alleged three defences, viz. 1. that the information contained in the letter was communicated confidentially, and not with a view to injure the plaintiff; 2. that what was therein stated was true, and 3. that if the truth was not admissible as a complete justification, it should at least be admitted in mitigation of damages. At the trial, the letter being admitted, as well as the facts of the plaintiff having been discharged from Col. Arbuthnot's service in consequence of it, the defendant was allowed to go into proof of the facts therein stated, viz. the absence of any malice in writing the letter, (one of the witnesses deposing that the defendant had previously consulted him as to the propriety of informing Col. A as a stranger to the country, of the loss mentioned in the letter), and the fact of a strong suspicion having been entertained against the plaintiff by the defendant and others. The Court below hereupon gave judgment (E. P. Wilmot one of the assessors, *dissentiente*), (1) that the letter tended to the infamy of the plaintiff, and had been written with the deliberate intention of injuring the plaintiff by getting him dismissed from the service he then held and preventing him, as far as defamation of character would avail, from procuring another situation as a servant; (2) that

the defendant having previously discharged the plaintiff from his employ without publicly charging him with theft for the sake of justice or taking any legal steps against him, had no right to accuse him in private and to calumniate him behind his back upon mere suspicion; and (3) that in an action of injury for written defamation the truth of the imputation was no excuse, and could not be admitted either in justification or in mitigation, where the plaintiff concludes merely for pecuniary reparation, unless where the defamatory matter related to some offence, which it was the interest of the public should be made known and the communication was made to a Magistrate or other person in authority for the lawful purpose of bringing the person accused to justice, and thereupon the defendant was condemned in £ 15 as damages and costs of suit.

On an appeal against this decision, the judges of the Supreme Court affirmed it and delivered their judgments severally; and as these are not recorded in the minutes the original MSS being merely filed separately in the Draft Judgment Book they are here given severally in a digested form:*—

## Judgment.

**Rough C. J.**,—The question for inquiry is whether the plaintiff's action is maintainable, and whether he is entitled to recover damages against the defendant. The defendant writes to Col. Arbuthnot stating his own conviction of the plaintiff's misconduct, with the view of protecting Colonel Arbuthnot's interests and to prevent the plaintiff from being retained by him, and it is argued that this was merely the performance of a duty, and was unaccompanied by any malice; and that being a confidential communication, which he the defendant had a right to make and being founded in the belief of its truth, he cannot be held responsible for it. But if in its form and structure of expression, it bears upon it evident marks of an intention unduly to injure, it is not because it is termed and designed to be confidential, that protection must therefore be extended to it. Such a communication is not the less libellous, because meant only for the ear of the individual whose conduct it is intended to guide and sway.

*This summary of the facts of the case is reproduced *verbatim from Morgan's Digest.*—Ed. R. R.

But it is urged again that circumstances may rebut the inference of malice; that the letter being openly signed and subscribed by the defendant, and the previous consultation entered into by him with respectable individuals as to the propriety of sending such a letter tend to demonstrate that a sense of public or private duty alone was the motive influencing this act. I confess, however, after cautious meditation, I cannot but be of opinion that the declaration of the dissentient assessor as to the candour which is due from one Englishman to another and the John-Bull honesty of intention which guided the conduct of the defendant towards Col. Arbuthnot partakes more of the zeal of an advocate than the calmness of a sworn juror. In opposition to this, I have the judgment of the District Judge and the two other assessors and I am to express my own opinion upon the letter itself. It is clear from the evidence that this letter was a work of great deliberation, and it is idle to talk of it as the character of a servant given by his master. It is not indeed pretended that it is such; and it seems to me impossible not to feel that the existing motive for thus writing, though it be to serve Col. Arbuthnot, is yet at the same time more effectually apparent, injuriously to prevent the employment of the plaintiff. It must always be borne in mind that however impressed the defendant's mind was with conviction of the plaintiff's wrong doings, he yet made no effort whatever to bring him through any magisterial enquiry to justice; and yet having avoided to do this, he in the most undoubting manner communicates to Col. Arbuthnot, his suspicion, as if suspicion was equivalent to proof. He scarcely leaves it to Col. Arbuthnot to form a judgment but boldly affirms what after all can only be suspicion, and not only does he state his belief as to that in which he himself has a personal concern, but he goes out of his way to insinuate charges, the truth of which he possesses no means whatever of being at all assured of. I cannot think this a letter which should have been written on such an occasion, and to this act of such writing may well be applied the maxim cited by the senior Puisne Justice that it is *imprudentia dolo proxima* But again a justification of this letter is sought to be founded on an allegation that the plaintiff was by a common consent a man destitute of all character and therefore not entitled to recover damages at the hands of Justice for any injurious expressions used towards him. The proof of this has however utterly

failed; for not only had he a character sufficiently good to entitle him to be recommended to service by Col. Arbuthnot's butler but the very charge brought against him was founded on suspicion only and where there is possibility of doubt, it cannot but be dangerous to assert criminality in the uncompromising manner in which this has been done. It is scarcely necessary under these circumstances to inquire whether or not the District Judge has betrayed some inconsistency in receiving evidence, and entering upon the merits of the case and yet giving as his judgment that in cases of written injury the truth of the slander cannot be received in justification, and scarcely in mitigation of damages. In the case decided by Sir Hardinge Giffard, it appears to have been laid down by the learned Judge that the truth of an allegation can be received in justification neither of verbal nor written slander; but he admitted evidence in mitigation of damages. In modern Roman-Dutch-Law the opinion seems to prevail that in cases of verbal injury, truth may be given in evidence perhaps in justification, certainly in mitigation, *Vender Kessel, Thes. 803.* In *Titterton* v. *Armstrong* decided in 1831 by the then acting Chief Justice (Sir Charles Marshall), it seems not to have occurred to him that written injurious slander might not be justified, were the fact stated proved to be true. The cases are not however irreconcileable; and this point does not require to be gone into on the present occasion. Conceiving this letter to be an unguarded, rash, and in many material respects unfounded, and therefore in a legal view a malicious communication, I think the judgment of the District Court must be affirmed.

**Jeremie J.**,—Whilst confirming the decree of the District Judge, I differ so materially from him on the law, that it appears but right to guard against the possibility of my sentiments being mistaken on a point of so much importance. I concur in the opinions of the two very learned Justices who determined in two preceding instances cases of this nature, that of Sir Hardinge Giffard in the case of *Hopman* v. *Stork* and of Sir Charles Marshall in *Titterton* v. *Armstrong* and I not only conceive that there is no discrepancy in their opinions, but I also incline to think that their sentiments are in perfect harmony with the law of this country.

The legal question subdivides itself into the following points:—1. Is the court in cases of libel to

be guided by the principles of the English Law or the Roman-Dutch Law? and 2. What is the actual difference between these laws on subjects of this nature?

It is, I conceive, an unquestioned doctrine that the laws of a conquered country are silently adopted by the conquerors, even if there were no express capitulation; and therefore that it requires a positive law from the conquerors to change, alter or amend the law as it stood at the period of the conquest. In this Colony there is no such positive law or regulation with regard to cases of libel. True, it had been enacted by a recent ordinance that the English Law of Evidence shall be observed in this country, but the question here is one of pleading and not of evidence. The question is not what evidence shall be sufficient to prove the truth of a libel, but whether the truth can be pleaded at all as a justification, and for this we must have recourse to the Roman-Dutch Law which was avowedly the law of the country at the period of its capitulation.

But then comes the second question, what says the Roman-Dutch Law on this point, or as I have already stated it in what respects does it differ from the law of England? The Law of England admits of two kinds of action for libel—the one exclusively civil; and the other exclusively criminal; the one having for its sole object a reparation in damages to the party offended the other the suppression and punishment of a public offence. In the civil action the truth may not only be given in evidence if pleaded but is under all circumstances in itself if proved a complete reply to and justification of the libel; whilst in the criminal action it can neither be pleaded nor given in evidence and if taken into consideration in affidavits filed after a verdict of guilty has been actually pronounced by the jury. The Roman-Dutch Law on the other hand admits of none of these technicalities. It does not admit that the truth alone is of necessity a sufficient reply to any libel and therefore it does not allow the truth to be pleaded in justification; but it does not thence follow that the truth may not be given in evidence; when it may be received in mitigation of damages, occasionally also in justification, and at other times, though rarely in aggravation, where for instance a person of station, honor and respectability, but labouring under some bodily deformity has been held up to public ridicule, insult and contumely owing to

such deformity. On the other hand suppose a man guilty of some serious offence or of a tainted character, who is likely to obtain a trust where he may have an opportunity to renew his culpable practices; here the occasion being such as to warrant the communication of the truth by a person of ordinary discretion, the truth will, under these circumstances, amount to a sufficient justification of the act, for here the two following circumstances combine, viz, the occasion was sufficient to warrant the communication, and the communication is substantially true; in a word, the truth is considered an important element in forming a right judgment of the motive by which the defendant was actuated, but it is only an element, and cannot therefore be exclusively pleaded as a sufficient reply to any defamatory publication and so in effect has it been viewed by Sir Hardinge Giffard and Sir Charles Marshall.

I am aware that at a period not perhaps very remote, the doctrine which still prevails in the Criminal Courts of England was held by many writers of eminence on foreign jurisprudence, was adherred to and strictly laid down during the Middle Ages, and is supported by some texts in the Corpus Juris. But it is by no means clear that this was the general doctrine of the Roman Law, whilst it is tolerably clear that a jurisprudence more conformable to equity has now very generally obtained in the continental courts, whose laws like the laws of this country have the Civil Law as their basis. And when this doctrine is further confirmed by the concurrent judgment of the Supreme Court, in two important occasions, there seems to be no necessity for recurring in this exclusively civil action to principles in a great measure obsolete.

It appears therefore that evidence ought to have been gone into; that it was correctly taken by the Court below; and that there is an error in the judgment of the Court inasmuch as the judge has refused to take cognizance of the evidence, but has proceeded to determine the case without reference to the truth of the charges contained in the letter. But these charges are not proved, and we are therefore bound to believe them not true: and the laws of every country, the very well-being of society, command that conduct so rash and ill-advised, not to say wanton, as that of the defendant should not pass unchecked, and that if injury has been suffered, as it undoubtedly has been, adequate reparation should be made.

**Stoddart J.**—In the defence which has been offered in this case certain averments have been made, the competency, the evidence and the effect of which are all equally disputed. The evidence must be estimated by the rules of the English law of evidence, which under certain limitations is the law of this Island by a recent regulation. The effect must be determined by the Roman-Dutch Law as administered in Ceylon at the period of the conquest in 1796 *(Clark on Colonial Law* p. 4 ed. 1834.) It has been plausibly argued for the plaintiff that though the effect of the averments is to be decided by our common laws, we must determine their admission to proof, as a question of proof, by the English Law. I apprehend however that the law of evidence does not determine the nature of the averments that may be established by evidence, but the nature of the evidence by which averments may be established. I have therefore no difficulty in concluding that the competency of the articles of this defence is not affected by the regulation.

By the Roman-Dutch Law, the civil remedy against slander consists of two actions, usually but not necessarily, conjoined,—*the actio ad palinodium* and the *actio ad injuriae aestimationem.* The former was unknown to the Roman Law, but the latter is in every respect the same as the civil action of damages under the Praetorian Edict in the general case of slander and under the *Lex Cornelia de injuris* in the instance of defamation by writing. The words of Vander Linden might indeed have led us to believe that the object of the Dutch action for profitable amends was the infliction of an arbitrary fine payable to the poor, but the language of Van Leeuwen is more accurate—"which amount is mostly deserved for and on behalf of the poor". But Voet and the other authors who have treated this subject more fully, clearly shew that the action is no other than a civil action for damages, to be estimated strictly by the actual injury, and appropriated in the way most agreeable to the party injured—*ad injuriae illatae aestimationem, sibi, et si ita velit, pauperibus applicandum.* This is a precise definition of the Roman action; and this Dutch action for profitable amends, when it arose out of written slander, was governed by the courts of Holland and must be governed here, by the Roman practice under the *Lex cornelia de injuriis.* The *Lex cornelia* was enacted by Sylla the Dictator to provide against all the more aggavated injuries. After enumerating certain real injuries of a serious nature, it specified

injuries to charater by writing and it provided a double remedy—a criminal action for a public penalty, and a civil action for damages proportioned to the actual injury. The latter was strictly an *actio ex delicto*, an action arising from misconduct in the legal sense. It therefore necessarily supposed misconduct in one party and injury done to the other. The misconduct without the injury, or the injury without the misconduct, gave no room for the action.

Under this view of the law, I apprehend that the ultimate points to be determined are only two: 1. To what extent has this letter hurt the feelings or injured the reputation of the plaintiff? and 2. Was it written with a malicious intention to defame, or with such negligent or wanton disregard of the just rights of the plaintiff as it is held in law equivalent in its civil consequences to such intention?

Whether the letter was intended to be confidential, whether it was calculated to be so considered, whether the defendant had reason to believe the allegations it contained: these are inquires that only form a part of the question as to his malice or culpable negligence. On the other hand, whether the letter was actually understood as confidential and so used, whether the allegations in it are true, and whether their truth was generally believed by others before the letter was written: these are inquires that only form part of the question as to the existence or amount of the injury sustained. If no injury had been sustained by the plaintiff, or if no culpable conduct can be proved against the defendant (taking the word 'culpable' in it legal sense) the action must be dismissed for we must have both to justify us in acceding to the prayer of the plaintiff.

A discussion had been raised, as to whether it is competent to plead the truth of the libel, or common fame or the confidential nature of the communication, in answer to the present suit. I have no hesitation in saying that under the Lex Cornelia all these might have been pleaded in the civil action, but only in as far as they went to prove either injury to the one party or misconduct to the other. Rules indeed were admitted in the criminal action, at different periods in the history of the Law, which had no place in the administration of the civil remedy. Into these I conceive it quite unnecessary to enter. The doctrine of Paulus on the one hand—*eum qui nocentem infamavit non esse bonum equum ob eam rem condemari*„— and the edict

of Valens and Valentinian, on the other, which reprobated the publication of defamatory writings even when true, had both exclusive reference to the criminal action. The law of Constantine, which required at all,it can only be by the court in mitigation, the publisher to prove its truth, and declared nevertheless that even if the proof was complete, he should still suffer a certain degree of punishment, is also exclusively applicable to the criminal remedy; and besides, though it has been frequently cited by modern jurists, being found only in the Theodosian Code, is no part of the Roman Law of modern times. On the whole therefore I have no hesitation in my opinion, that by the Roman practice in the civil action, all the circumstances I have enumerated may be pleaded but only in as far as they mitigate the misconduct of the defendant or the injury done to the plaintiff. In the criminal action, I incline to the conclusion of Fachinoeus, that the truth of the libel was taken (in the time of of Paulus at least) as a *presumptio juris et de jure* of the absence of malice, but I find no trace of any such rules in the civil action at any period in the history of the Roman Law.

Then as to the confidential nature of the communication, it is true that by the Roman law certain kinds of privileged communication did give rise both in the civil and the criminal action to a *presumptio juris et de jure* of the absence of the malice and on general principles it is also clear that any degree of confidence in a communication does in some degree affect both the natural presumption of malice on the one hand, and the actual degree of injury on the other. But I find no such rule in the Roman Law as that in all communications, in any degree confidential, one may plead the confidence as a full justification in a case of libel.

Let us come then to the two main questions upon which all the others depend; and firstly, I do not think it can bear question that an injury has been done, not merely an injury to the feelings of the plaintiff, but a substantial injury to his character and prospects. If he had been a man totally and notoriously without character before the publication of the libel, it is certain that we could have given little or no damages, because little or no injury could have been done. But it is not my individual opinion and it is not the opinion of the court that any thing amounting to that has been proved; and secondly, as to what in the language of the law is

termed the the malice of defendant—we must remember that this is a civil, not a criminal action. It is an action indeed arising out of conduct reprobated by the law, but there is a broad distinction between a crime and conduct which is simply illegal. The *animus: defamandi,* which must be proved in the criminal action, i. e. the vindictive purpose to defame, which constitues the criminal offence is a deep stain on the moral character of the offender justly visited by the reprobation of all good men. But the *animus defamandi,* which must be proved in the civil action includes not only a vindictive purpose to defame, but also all culpable negligence whereby the character of others is affected and may possibly amount rather to an imprudence than to an offence. I would find difficulty in saying that the conduct of the defendant has exhibited deliberate and vindictive purpose to ruin the plaintiff, or that no better motive entered into his mind when he wrote the letter which has given rise to this action. That in writing it he was actuated chiefly by a spirit of kindness to Colonel Arbuthnot as his fellow-countryman and a stranger in the Colony I think extremely probable; and that he believed the plaintiff to have acted ill, I have no manner of doubt. But it is sufficient to the judgment in this civil action, if the defendant has shown either a culpable negligence in forming his opinion on the plaintiff's character or a culpable imprudence in communicating that opinion to others. And the court is unanimous in its conclusion that whether the plaintiff be a man of purest conduct or not, the defendant was culpably inprudent in publishing to Colonel Arbuthnot, however confidentially, the positive averments against his character which are contained in the letter, if he proceeded upon no better evidence than that which he produced to the District Judge. We are bound to believe that he produced the best evidence in his power, and we are therefore of opinion that judgment of the district Judge should be affirmed.—

## Notes.

*Defamation—Slander—Privilege—Palinode—Apology—Truth—Justification—Dutch and English Laws.*

1. The chief Roman-Dutch authorities on the subject are: *Voet (De Injuriis)* 47. 10, *Vander Linden* 1. 16. 1, *Grotius* 3. 36, *Van Leeuwen* 4. 37, *Censura Forensis* I, 5. 25, *Codex* 10. 34, *Digest* 47. 10, *Pothier ad Pand.* 47. 10, *Mattheeus De Crim.* 47. 4, *Groenewegen ad Dig.* 47. 10, *Vinnius ad Inst.* 4. 4.

2. The principal Ceylon cases may be noted thus:

**Ram. Rep.** 1863-1868, p. 126, Defamation defined.
**Marshall's Judgments.** p. 403, Pleadings and depositions are privileged. (See also *Nell* 87 and 2 *Lor.* 122)

**Ram. Rep.** 1872-'76, p. 165, Injury to feelings actionable. Dutch forms of apology are obsolete, but apology may be decreed.

**6 S. C. C.** 89. Meaning other than what plaintiff puts on words complained of does not entitle him to judgment.

**3. Lorenz** 294 (*Jos. and Ber.* 47), Transmission of libellous letter to Governor of Ceylon is publication. *Semble*, that by Dutch Law publication is not necessary, all that is wanted being *contumelia*.

**Grenier.** 1873 (C. R. Cases)p. 29, To succeed in an action on a letter to the Governor about a public officer, plaintiff must prove malice.

**1 S. C. C.** 29, Writing letter against a dismissed employee to a new employer is actionable. (Case on all fours with one reported above.

**Ram. Rep.** 1843-'55, p. 160. Malicious intent is necessary to sustain slander suit. (See *Semble* 7. S. C. C. 154. *Nell* 103, *Marsh.* 407.)

**Ram. Rep.** 1863-'68, p. 189, 7 *S. C. C.* 154, and *Grenier* 1873 (D. C. . ases) p. 42, Petty and pettyfogging action for slander to be discouraged.

**Ram. Rep.** 1843-'55, p. 92, Simple plea of truth is no justification, but it must be stated and shewn that truth was uttered without malice and for a lawful purpose.

**Austin.** 11, Provocation is a good plea.

**8 S. C. C.** 158, Defendant's communication to P. W. D. Director about an overseer, the defendant *bona fide* believing his information, held privileged.

**Marshall.** 404, 405, Petitions about public servants are privileged *if directed to the proper authority* and containing statements *honestly believed to be true*. A privileged petition is not necessarily confidential.

**Ram. Rep.** 1843-'55, p. 52. Letter by one member of a club to the committee calling another a liar is not privileged, (*Austin* 178)

**Austin** 17, Mere ill-tempered abuse without malicious intent,no slander, but to call a man a "whore's son" is actionable (*Nell*, 103).

**1 N. L. R.** 225 Defendant to be excused must prove absence of *animus injuriandi*.

**1 N. L. R.** 83, To sustain action for slander in Ceylon special damage need not be proved. To say of a Vellala woman that she has run away with a low-caste man is actionable, but the father cannot sue for daughter.

**5 N. L. R.** 257, A headman's report on matters submitted to him is privileged.

**6 S. C. C.** 4, Writing in servant's register cause of his dismissal is privileged. (See also 3 *S. C. R.* 140, 142) But is master bound to justify entry? (See *Ram Rep.* 1872-'76, p. 93)

3. See *Thomson's Institutes*, vol. ii pp. 463-478, *Pereira's*

*Institutes*, vol. ii pp. 649-683. Defamation as an offence is dealt with in secs. 479-482 of the Ceylon Penal Code.

4. In D. C. Colombo 76606, reported in *Browne's Reports* vol. i, App. D. and in D. C. Colombo 77877 (*ibid*), the learned District Judge, Mr. Thomas Berwick, goes at very great length into the question of truth being or not a plea in defamation suits. The case of *Bastiampillai* v. *Hugens* (reported above) is criticised, the *dicta* of Stoddart and Jeremie, J. J., being contrasted with the opinion of Dutch Jurists, but Mr. Berwick's views learned and luminous, unfortunately lack the force of law, the cases not having gone in appeal. Doubtless the Supreme Court, had the cases been before it, would not have dissented from that eminent Judge. The principles enumerated by Mr. Berwick may be thus summarised:

1. *Truth is a justification but must be proved by defendant*:

(1) In merely verbal slanders containing charges either of such punishable crime or of such misconduct as it is for the public interest to be exposed (*Dig.* 47. 1. 18; *Cod.* 9. 35. 5; *Cens. For.* I.5.25. 2; *Voet* 47. 10. 9; *Gail* 2. 99; *Vinn. ad Inst.* 4. 4. 1;). Some writers (*Groen. ad Dig*, 47. 10. 18; *Grotius* 3. 35. 2) say that there must have been an *accusatio* before a court, but this is disputed by other jurists (*Voet ad loc*; *Van Der Keessel* Thesis 803; *Matth. de Crim.* 47. 4. 1 sec. 7)

(2) In all cases of public interest.

(3) In all cases where defendant had acted honestly in the discharge and within due limits of any public or private duty, and on a justifying occasion, even though the matter may not concern public generally.

2. *Truth is no justification*:

(1) In cases of wanton publication, exposure, ridicule, opprobrium; in things not concerning the public good, e. g. a man's poverty, his bodily defects, his atoning for a fault cannot do good to the public to be published.

(2). In cases of *famosi libelli* including anonymous writings, [letters] and lampoons, satires, placards, poems, songs, inscriptions imputing punishable crimes or bringing a man to ridicule, contempt and loss of reputation. This does not apply to publications which are neither anonymous nor impute punishable crime.

3. *Truth need not be proved*:

When a man speaks or writes or otherwise acts under circumstances negativing any contumelious intent.

**Feb. 1 1837.]** **[Morg. Dig. Sec. 447.**

**Present Rough C. J. & Jeremie, J.**

**D. C. Jaffna 3685.**

*Fiscal's Conveyance—No debt at time of sale—Cancellation of Conveyance—Parties—Fiscal to be heard—Duty of Court.*

1. The cancellation of a Fiscal's conveyance must take place in the presence of all parties to the proceedings, and after fully hearing the Fiscal.

2. The Fiscal, as responsible for the sale and as party delivering the certificate shall be a party.

3. A purchaser at a Fiscal's sale is a purchaser at the bar of the Court, and the Court is bound to see that such purchaser is not a sufferer by his confidence in the Court.

The facts of the case may be thus summarised (from *Morgan's Digest.* pp. 129—131.)

1832, Oct. 17 Writ in D. C. J. 2562 against Suppan Venasy and others.

1832, Dec. 20. Land seized and sold money deposited; claim by Sinnavan on an otty mortgage of 1821.

1833, March 22. Fiscal's conveyance:

1833, June 1. Claim by otty morgage ordered to be investigated into and writ accordingly returned.

1833, June 7. Claim upheld and claimant held entitled to hold the land in otty.

— Distribution of purchase money stopped and D. C. J. 3685 filed by Fiscal's vendee against successful claimant, otty holder.

The District Court cancelled the certificate of sale and annulled all proceedings.

The Supreme Court, in appeal, set aside the order and directed the case to be heard before it on circuit*

## Judgment.

**Jeremie, J.,** This cancellation of the certificate may or may not be requisite, but if requisite, it can only take place in presence of all the parties to these proceedings and also in the presence of and after having fully heard the Fiscal. But especially do the interests of public justice and the public faith command that the plaintiff be first completely indemnified in principal, interest and full costs at least. He has purchased at the bar of the Court, and the court is bound to see that he be not a sufferer by his confidence in it. The only question therefore is whether a secure title can be made out for the plaintiff or who shall indemnify him, if it cannot: and for the purpose of determining this point it is decreed that the judgment of the Court below be reversed the certificate having been under any circumstances prematurely cancelled and plaintiff unduly condemned in costs and it is further decreed that the present case No. 3685 and the case No. 2562 be conjoined, the parties to either being rendered parties to both; and that the Fiscal under whose authority the sale was effected, and who delivered the certificate of sale, be rendered a party intervenient in this case, the further hearing to take place before the Supreme Court on circuit.

*We have not been able to get at the Report, if any, of the final order of the S.C. [Ed. Rep.]

Feb. 23, 1837.] [Morg. Dig. sec. 461.

## Rough, C. J., Jeremie and Stodart, J. J.,

## D. C. Ratnapoora, 1220.

*Judge a Revenue officer—Government plaintiff—Transfer.*

*Held.*—The Judge who is also Government Agent may not try a case in which the Government of Ceylon is plaintiff.

### Text of Digest.

Per Jeremie, J.,—In a case from Ratnapoora wherein the Government of Ceylon were plaintiff, and which had been tried by a Judge, who was also the acting Government agent of Ratnapoora, the Supreme Court ordered, "That as the District Judge had no jurisdiction being also acting Government agent and the plaintiff therein, the case should be referred to District Court Caltura."

## Notes.

1. In *Morgan's Digest* sec. 546 is giventhe following case of *Rex* v. *Donjey*, dated 30th December 1837. It is a judgment of Jeremie, J.,

"The question in this case is whether the same person being both District Judge and Custom-master can prosecute a suit in his latter capacity before himself in the former or is this not an infringement of the 24th clause of the charter? The Court is of opinion that the charter has been infringed. The decree of the court below is therefore reversed, together with the proceedings dating from the first summons; and the prosecution is to be entered before the D. C. of Caltura."

2. See the principle of this case upheld in recent cases, *Daniel* v. *Usoop* (I Tamb. Rep. 60), *Pereira* v. *Carolis* (I Tamb. Rep. 61) *Rode* v. *Bawa* (I N. L. R. 373), *James* v. *Latiff*, (5 N. L. R. 312). Bonser, C. J. in *Rode* v. *Bawa*, laid down correctly the guiding principle, "That justice should be believed by the public to be unbiassed is almost as important as that it should be in fact unbiassed."

3. See also 5 *S. C. C.* 210, 8 *S. C. C.* 167, 9 *S. C. C.* 126, *Ram. Rep.* 1863-'68 p. 314, 3 *Lorenz* 287, and *Wendt* 337.

March 1, 1837] [Morg. Dig. sec. 463

Present: Jeremie and Stoddard, J. J.

D. C. Mannar, 84.

*Contract—Written agreement—Signed by one party—Mutuality—Ultra petita—"General Relief" clause.*

*Held.*—1. It is a very ancient commercial practice whereby an agreement is good and mutual in the case of instruments, in counterparts, signed by one party alone.

2. A court may not upset settled principles of practice by awarding *ultra petita*.

In an action for damages for the breach of an engagement for the purchase of the pearl fishery of Condatchy for the year 1829, it appeared that in December 1828, the plaintiffs had entered into an agreement with certain parties in India, whom he stated to be the partners of the defendants by which in the event of his taking the rent of the pearl fishery from Government, they bound themselves for a quarter of that rent and agreed to deposit £4,700 in ready money and that when the dhoneys for the quarter-share should be delivered to them they would give up the above deposit and pay the remaining price of the quarter-share as the instalment became due. This instrument further provided that if the plaintiff should engage as partner with others without purchasing the rent (in other words should become as under purchaser from the contractor) the defendants were to have a fourth of his share whatever it might be; and that the £4,700 to be paid by them should first be applied to the payment of their share of the deposit, and next together with the profits to the payment of the remaining instalments; and further that, whether the plaintiff took the whole or the half of the rent (provided it was as contractor) they should pay the &4,700; and that in case the plaintiff took a quarter or an eighth of the rent the £4,700 were to be paid back. The parties in India having signed the agreement (exhibit A) gave the plainliff, as "ready money" a draft in favour of the defandants, native merchants in Ceylon.

Having arrived in Colombo in January 1829 the plaintiffs entered into an agreement (exhibit B.) as Coomaraswamy and Muttooswamy that the tender to Government should be made by Muttooswamy and that he should have two-eights and Coomaraswamy one-eighth.

and the plaintiff the remaining three-eighths and the rent was accordingly obtained on this tender for £45,100, of which £9,020 were to be deposited forthwith and the remainder paid in instalments. The contract with Government was entered into by Muttoosamy and one Akady Maricar, who was known by all the parties as the mere agent of the plaintiff.

In the meantime the plaintiff had presented the draft for £4,700 to the defendants, who gave him in exchange, and on receiving from him a receipt in full for the draft on ola document, in the form of a cheque or letter of credit drawn on Muttooswamy at the fishery, which however Muttooswamy declined to honour when presented to him.

The fishery then proceeded but in consequence of the dishonour of draft, the plaintiff's share was reduced from five-eighths to one-fourth whereupon the plaintiff brought his action against the defendants, averring that they were partners with the parties to the agreement A., and that he had suffered special damages to the amount of the above mentioned difference. To this action the defendants pleaded that the agreement was not mutual, that they have received no consideration, that the plaintiff had not performed his part of the condition and was neither actually nor potentially the owner of the article mentioned to be sold by him by the agreement, that the defendants had on their part complied with the stipulated conditions having given a bill of exchange which had been duly accepted and paid; nor had any notice been given to the contrary, nor any protest made for non-acceptance or non-payment; that the plaintiff had waived his agreement, and that no loss had accrued to him as no profits had arisen from the fishery.

The Supreme Court after hearing evidence themselves, gave judgment as to the facts, that the defendants and the parties to the agreement of December 1828 were partners,—that they were aware of the rent which the plaintiff was to receive under the agreement B,—that the Indian draft for £4,700 had never been paid having been only discharged by the partners at Colombo by means of a cheque subsequently dishonored in their presence and at their request—that there had been no waiver of the agreement on the part of the plaintiff and that damages did accrue to the plaintiff from such non-pay-

ment to the extent of £2,000 and as to the point of law the court pronounced judgment as follows: -

## Judgment.

**Per Curiam** [on the Law]. The objection as to the want of mutuality arises from the circumstances of the plaintiff's signature not being attached to the agreement A, and from its being in language an obligation to him only, and not also one from him to the defendants. This however is very ancient commercial practice well recognized not only in India but on the continent of Europe. In mutual contracts, two parties, instead of entering into joint articles of of agreement which they both sign each receiving a copy, draw up and sign simply separate instruments, in which each sets forth the nature and condition of his obligation to the other. They then exchange these instruments, and thus each obligee becomes the holder of his obligor's acknowledgment or obligation, or sometimes, now indeed more frequently, the instruments are counter parts of each other though they each bear the signature but of one yet the mutuality equally exists in either case, and the circumstance of one party holding the other contracting party's signature establishes a *presumptio juris*, that that other party has the counterpart bearing his. They therefore bear the shape rather of English bonds with the conditions set forth by each obligor, in which they respectively stipulate that their obligation shall be binding or void.

As to the want of considertion,—what is the nature of the contract? It is a contract of that class in which the mutual consent of the parties is sufficient to render the agreement obligatory on both,—in which as in articles of partnership, it is sufficient consideration that the party did and was willing to do all that had undertaken to do, and that he has done nothing which could put this out of his power.

As to the objection that the plaintiffs are not actually or potentially the owner of the article mentioned, this as well as the further question whether if it were so, this was not owing to the defendant's breach of promise, is determined in the plaintiffs' favour by the evidence adduced in the case that the defendants throughout the transaction well knew the portion which the plaintiff was to receive from the rent under the agreement B.

Then as to the damages, special damages are alone demanded by the plaintiffs, no claim being made for damages generally and though this court would not tie down parties on occasions of this kind to the strict rule of European practice, and would be prepared to afford them every relief against mere formal irregularities, yet it cannot of itself consent to infringe settled principles by awarding ultra petita, there not being in the libel or in the plaintiff's petition of appeal even a prayer for 'general relief.' The decree of the court therefore is that the defendants do pay to the plaintiff two thousand pounds sterling and costs and that the counter part of exhibit A in the hands of the defendants be cancelled.

July. 19, 1837] [Morg. Dig. sec. 513

Jeremie, J.

D. C. Jaffna 2225.

*Van Hek.* v. *Maartensz.*

*Frivolous litigation—Power of Supreme Court to fine—Inherent power—Practice since the charter of 1833.—*

*Held.—1.* That the Supreme Court has, as an undoubted part of its appellate jurisdiction the power, by an additional amercement to check frivolous and vexatious litigation.

2. The Supreme Court has exercised this power since the charter of 1833.

The facts [summarised from Morgan's Digest pp. 171—175] necessary for the report are these:—

1836. Oct. 4. Executors of one VerWych applied to D. C. Jaffna for custody of certain papers belonging to certain Maartensz an insolvent. The insolvent and one Toussaint opposed the application.

1836. Oct. 25. Application of executors rejected.

1836. Nov. 2. Executors appeal. *Toussaint not made a party respondent to the appeal.*

Various proceedings were then had in appeal—the case being twice before the Supreme Court—and the original decree was finally modified, and there were additional proceedings in the D. C., but *Toussaint was not renderd a party* and the proceedings closed without him.

1837 Feb. Executors applied to D. C. for costs of appeal against Toussaint.

1837 Feb. 6, D. C. allowed costs against Toussaint.

1837 May 31, Supreme Court reversed order of D.C. as to costs against Toussaint and held him liable for costs of these proceedings only to which he was a party.

1837 July 17, Jeremie, J., said:

On a matter so purely elementary and alphabetical the executors have thought fit twice to remonstrate with this court.

On the first occasion, the court in the hope of terminating all disputes consented to explain—what required no explanation—its original decree. This act of condescension has only led to a second reference, when the executors without adducing any one single new fact, required to be heard a third time on the same plain and simple subject-matter and they have it appears retained counsel. Heard, against the court's deliberate and recorded judgment, counsel cannot be. It must be executed to the letter. But heard counsel may be provided he be prepared to appear forthwith on this further question, which the court feels bound in vindication of its own authority to determine, viz; what further penalty shall be levied on those parties as a check on the remonstrances, which, as now advised, appear to the court equally frivolous, vexatious, and puerile, and which has notwithstanding been urged over and over again in defiance of all rule with the most contumacious pertinacity.

The execution of this court's solemn and definite judgment is in the meantime suspended.

On the following day the court, after hearing counsel on this point delivered judgment as follows:

## Judgment.

Jeremie, J.—The court will now proceed to examine the reasons assigned for this unprecedented step. The remonstrants state that they could not render Toussaint a party to the appeal petition of the 2nd November. Why not? He had appeared in this case, had filed and signed an objection, been heard upon and succeeded in establishing it in the court below. What then was to prevent his being made a party to the proceedings taken for the express purpose of overruling his objection in appeal? Nothing, either technically or substantially. The respondents, when they required he should be condemned in costs contrived to make him a party, and have kept him in the suit ever since. Why then not have made him so before? For if he could become an appellant, he should be made a respondent: there is no limit to the possible number of intervenients; and every person who takes part in a suit and who is not either plaintiff or defendant, is an intervenient.

They next attribute the error in omission to the Secretary of the Court. What then ? Is a party to be condemned uncalled, or rendered responsible in purse and person for proceedings to which he is a stranger, under any possible or imaginable contingency ? If there be fault in the secretary, he and he alone is responsible for his faults, but the fact is, in the present case, there was none, the fault lay with the framers of the original petition of appeal.

The excecutors finally ask whether the Supreme Court's decree of May is to affect Maartensz ? Did not Maartnesz appeal ? If not, the court is not likely to have committed precisely the same mistake that caused the reversal of the order of the 6th February in coming to a decision on Maartnesz's interests when Maartenz had not applied to it and this is already quite clearly explained in its decree.

As to the authority of the court to award damages as costs, it has already expressed its sentiments in other cases. It is unacquainted with the practice of any appeal tribunal in modern or ancient legislation which has not possessed and occasionally exercised as an undoubted part of its appellate jurisdiction, the power by an additional amercement to check frivolous and vexatious litigation.

The Civil law says "*ne temere autem ac passim provocandi omnibus facultas praebetur arbitramur eum qui malam litem fuerit persecutus mediocriter poenam a competenti judice sustinere,*" 1. 6 sec. 4 Cod. de appell. In England there are three established courts of appeal. The House of Lords, the Privy Council, and the Lord Chancellor's Court and in all these are increased costs thus awarded. In France, in Holland, the appellant formerely as now, was invariably bound to deposit a fine which he forfeited, if the appeal proved frivolous, see among others VanLeeuwen p.646 v 5 ch 25 sec. 18. And that the Supreme Court possesses all the usual and accustomed rights and powers of courts of appeal generally as well as that the tribunals established under the charter possess all the various rights and powers universally attaching to courts of Law and courts of Equity, appears beyond doubt or question and that again, this power in particular has been occasionally, but of course discreetly, exercised by the Supreme Court as now constituted from the time of its institution, is a fact admitted.

It is true that by various statutes passed for the pro-

tection of persons charged with duties involving considerable responsibility, such as Justices of the Peace, it has been expressly enacted by the Legislature of Great Britain that if any persons who prosecute them shall fail in their action such persons shall pay a penalty in the shape of double or treble costs, and these of course being penal statutes cannot bear any extension, but this is quite a distinct branch of the subject both as regards the principle and its applications.

Then this pertinacious resistance to a final decree, whatever shape it takes, is in itself a contempt of the authority which pronounced the decree and as such punishable alike by every court of record.

The executors are therefore, in addition to all other costs hitherto recoverable against them adjudged to pay to the appellant F. A. Toussaint the further sum of two pounds and ten shillings as increased costs for frivolous and vexatious litigation, and as an indemnification for the delay arising in the enforcement of the decree of this court of the 31st May last.

## Notes.

*Frivolous litigation—Power of Supreme Court to punish.*

1. The judgment given above clearly shews that the Supreme Court has power to punish, by way of imposing extra costs, persons who engage in frivolous litigation. There have not been in recent times instances of the exercise of this power, but we know of no statute or decision which has taken away the power claimed for the Supreme Court by this judgment. In Sept. 19th 1838 in *Velayudan* v. *Appuchetty*, D. C. Jaffna 5608 (Morg. Dig. sec. 583) Jeremie, J., cast the appellant in double costs for frivolous litigation: "This is a very frivolous appeal. The appellant must have known that if his statement was true, viz, that he was not served with a notice, though the Fiscal has reported service of notice, his remedy was not by appeal. His object was, however, evidently to obtain a delay. The decree of the District Court of Jaffna is affirmed with double costs." Justice Thomson writing his *Institutes* in 1866 refers to the cases in *Morgan's Digest* Secs. 224, 533, as law in his day, (Thom. Vol. II. p. 480. 481.) The subject is dealt with in *Marshall's Judgments* p. 15, 76, 184-187. where the question mainly discussed is, and decided in the negative, whether District Courts have power to punish for preferring false claims apart from any criminal consequences to which false claimants may be liable. It need hardly be added that at the present day a person preferring a false claim is liable under section 206 of the Ceylon Penal Code. The present writer is aware of only one Ceylon case under the section. It was a Mannar Case No. 28 of 1901 and the accused was acquitted.

2. The Civil Procedure Code and the Courts Ordinance are silent as to the power of the Supreme Court to punish frivolous litigants.

3. The subject of frivolous actions is discussed at length in the *Ceylon Law Review* Vol: I. p. 61-65. From that article the following portion is quoted. 'In the course of the foregoing pages it must have become apparent that this jurisdiction to deal with vexatious or frivolous claims and defences is inherent in every Court of Justice, and that this power has been invoked to deal with cases which could not fall within the four corners of the English Rule. Courts of every country must be deemed to possess this power. In a case from Madagascar *Haggard* v. *Pelicier Fieres* [1892] A. C., p. 61 Lord Watson, delivering the Judgment of the Privy Council, when the action was brought against a Judge for having dismissed an action summarily as frivolous and vexatious, expressed himself thus: "Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process by staying or dismissing without proof, actions which it holds to be vexatious," pp. 67. 68. Courts in India appear to us therefore to have the power which is claimed as inherent in every Court although it is not conferred by the Code of Civil Procedure. As regards plaints, it is not merely where they do not disclose a cause of action, or the claim upon the face of the plaint is barred by any positive rule of law, that even where otherwise they are shown to be frivolous and vexatious, as in the case of concealed fraud (*Lawrence* v. *Norrays*, 15 A. C. 211) or in the case of a perfectly stale claim, the Courts in India have the power, which is certainly to be sparingly and cautiously exercised, but exercised firmly and unhesitatingly where the circumstances require it, of summarily dismissing the action; and the same power is possessed by them of striking out a frivolous or vexatious defence and entering judgment for the plaintiff. There are no cases in the Indian Reports to show that such a power has ever been exercised. It was once exercised in a recent litigation relating to the Shivaganga Zemindary, by a subordinate Judge; but although the case went up to the High Court in Appeal, it was unnecessary for the Appellate Court to pronounce any opinion upon this novel and salutary departure from the practice of the Courts.'

**July 26, 1837]** **[Morg. Dig. Sec. 526.**

**Rough, C. J., and Jeremie, J.**

**D. C. Kaltura 3319.**

*Merinhegey* v. *Merinhegey.*

*Proctor and Client—Bad civil case—Proctor's duty—Private opinion—Reasonable defence.*

*Held*—1. A proctor is not bound to uphold officially a civil suit which he conceives perfectly groundless or iniquitous.

2. When there is a good defence he may, in spite of his private opinion on the merits, act in the case but he should first state his opinion to his client.

3. A proctor is not expected or required to mention to others but his client his private opinion on the matter of the case.

The petition of appeal in this case contained the following footnote:

As proctor and one of the drawers of the papers here, I am compelled to sign the petition, but am of opinion that the petitioner has no cause of appeal whatever.

## Judgment.

**Jeremie, J.**—The Proctor was in error. A Proctor is not in a civil suit bound to uphold officially a case which he considers perfectly groundless or iniquitous; though where there is a fair and reasonable ground of defence he is at full liberty to act in a cause whatever may be his private opinions of its merits. But he should first state that opinion to his client. He is not expected or required to mention it elsewhere.

## Notes.

1. As regards criminal cases it seems to be law, but perhaps a principle of very doubtful morality, that the defence of a man known to be guilty is not bad. See Ceylon Evidence act sec. 126 *Illus: a.*

2. The question how far counsel may listen to the dictates of his conscience when inclined to suppress an authority likely to be against his client's interests but certain to help justice has been the subject of keen discussion in England and India. See *Ceylon Law Review* vol. 1. pp 65-68 for opinions on the subject in the *Hindu*, the *Madras Law Journal* and the *Law Quarterly Review*.

**Feb. 15, 1838.]** **[Morg. Dig Sec. 556.**

Present: Rough, C. J., Jeremie and Stodard, J. J.

### D. C. Colombo 16230.

*Purlett.* v. *Pettachy Chetty.*

*Contracts—Breach of covenant—Damages—Penalty—Probable loss—Liquidated Damages—English Law—Roman-Dutch—Intention.*

*Held*—1. A penalty in an agreement is nothing more or less than an estimate of probable loss, stpulated at the time of the contract as a criterion of the risk, but subject to be re-considered on either side, when the loss has actually occurred.

2. The recovery of the full amount of a stipulated penalty as liquidated damages is peculiar to the Law of England, and does not obtain in Ceylon.

3. No mere form of words will prevent the court's looking to the meaning and obvious intention of the parties at the time of the agreement.

## Judgment.

**Per Curiam**—The principal question in this case arises from a claim of damages for a breach of covenants.

By agreement dated 22 September 1836 defendants undertook to deliver to plaintiff 250 cwt. of coffee of good and approved quality perfectly dried and picked, fit in all respects for shipment and to the satisfaction of plaintiffs at the rate of £2 per cwt. of 112 lbs English. They received an advance of £ 250 and agreed to fulfil their agreement within three months in a penalty of £ 200 over and above the re-payment of the £ 250. On the 9th November, the parties entered into an additional agreement by which the defendant agreed to deliver to plaintiffs within 21 days 500 bags containing each 4 parrahs of good and merchantable coffee, picked and perfectly dried, and free from black and white beans and entirely to the satisfaction of the plaintiffs, at the price of £ 2-3-per cwt. of 112 lbs English. In part payment they recoverd an advance of £ 360. There is no penalty stated in this latter agreement. Towards the acquittance of their undertaking the defendants made four deliveries, for the three first of which reciepts were given at the time. But they admit that they have not entirely fulfilled their agreement and the plaintiff claims damages to the full amount of the penalty, in consequence. The defendants reply, that the fault lay not on them, but with the plaintiffs, who refused to pay them the balance upon what they had actually delivered, and who made very unnecessary and frivolous objections to the coffee actually delivered.

The court is of opinion that damages are due but not the amount of the penalty. Damages are due. The defendant was only entitled to payment at the close of the periods stipulated for the several deliveries; or with so heavy an advance at the close of the contract, and as to the obections made by the plaintiffs, they might at least have tendered and had

the articles so tendered been in every other respect conformable to their engagement it is not the insertion of the words "to the entire satisfaction to the plaintiffs" that would have deprived the defendants of their remedy. Such stipulations are always very incautious; but yet a person by entering into them must be understood to have rendered himself dependent upon the judgment, and not the mere pleasure or the caprice of the other contracting party. They shew that he has stipulated to deliver the best kind of merchandise obtainable at about that rate in the market at the time of the contract; and if he offers goods of that description, he is to be considered as having fulfilled his engagement, though the goods be refused, for it can never be far strongly inpressed in the minds of parties, that in all, and more especially mercantile contracts, the most perfect good faith is expected from all sides and will be insisted upon. A breach of contract therefore can never be excused except on the most satisfactory grounds, the more so, when as in this case, the party, owing to a considerable rise in the market price of the article had a direct pecuniary interest in infringing his contract; but on the other hand, provided it be executed in good faith no mere form of words will prevent the court's looking to the meaning and obvious intention of the parties when they entered into the engagement. The full penalty is not due. On this point again, the same good faith enjoins that the measure of damages should be the probable loss. Penalties therefore which exceeded that amount are reducible, whilst to that extent damages are equally due though there should be no stipulated penalty. It is true that in England the full amount of a stipulated penalty has been occasionally recovered as liquidated damages: but this is peculiar to the Law of England. It does not obtain here (see *Censura Forensis* and *Vander Linden*) and even in England a penalty is hardly, if ever, recoverable, except it be expressly stipulated "as liquidated damages" and even when so expressly stipulated, it is but rarely allowed, the equity of the case overruling almost invariably the positive terms of the agreement, as it has in another country the plain meaning of the text of its recent celebrated code. A penalty in an agreement is therefore nothing more or less than an extimate of probable loss, stipulated at the time of making contract as a criterion of the risk but subject

to be re-considered on either side, when the loss has actually occurred and this Court has already so ruled in a case between the same plaintiffs and another party in January 1837, and it seems no reason to alter its opinion.

The Court has now to consider the amount of damages. But, the parties are at issue as to the quantity of merchandise delivered.

This difference principally arises from the condition in which the coffee was offered, the plaintiffs having, as they state, been obliged to pay, re-pick and re-sort it, which occasioned a defalcation in the quantity. It appears by the receipts that of the three first deliveries, the first was accepted conditionally, the two last unconditionally—the first receipt containing the following note which is omitted in the two others.—"This must be dried again." the Court is therefore of opinion that the plaintiffs' estimate ought to be taken for the first; the defendant's as stated in the receipts, for the two others. There remains the fourth, for which there is no receipt respecting this delivery. Mr. Lambe, a witness called by the plaintiffs states: "The last delivery was the worst of of all, it was wet and hot. It was objected to, as not according to contract. Defendant complained of the loss he sustained on the contract, and pressed us to receive it, as it then was. I refused to weigh it, as it was so wet and would lose about 20 to 25 per cent. Defendant then proposed to take it away, but we refused to allow that, as we had made large advances of money, and we required the coffee as a vessel the *Duchess of Clarence* was then in the roads. The vessel was consigned to us." From this deposition it is clear that the coffee, instead of being declined was accepted, since though the defendant offered to take it back, the plaintiffs, from the motives of convenience to themselves refused to return it. In so doing they have made this delivery their own for it remained with them to consider at the time, whether they would reject the coffee and sue for the breach of covenant or take coffee and carry it into account. They made their election in favour of the coffee, and are now bound to carry it into account,—of course, at the rate at which it was tendered, and must be considered as having been accepted. The more so, that it is questionabe whether they were not at the time debtors instead of creditors of the defendants, and that whether so or not, there was nothing to induce them to believe that the defendants were less

solvent then, and when they made the whole advance. The three last deliveries must therefore be calculated at the rate set upon them by the defendant,—the first by the plaintiff. Defendants have consequently delivered.

| | | |
|---|---|---|
| First delivery | - - | cwt. 189 - 3 - 26 |
| Second " | - - | " 191 - 1 - 10 |
| Third " | - - | " 116 - 3 - 25 |
| Fourth " | - - | " 126 - 0 - 0 |
| | | 624 - 1 - 5 |

But to establish the deficiency to ascertain the quantity in cwt. stipulated for by the second agreement, on which the point the parties are at issue. The loss to be principally considered will then be, the difference in the market price of coffee at the time when these engagements were entered into, and when they should have been fulfilled. But in this also the court is not satisfied with the evidence. Its final decision is therefore postponed for the purpose of enabling the Court to receive further evidence, prior to its assessing the damages and definitely settling this account.

## Notes on Damages.

1. The following cases relating to damages may be briefly noted here:

**Murray's Reports 18,** Damages being liquadated damages and not interest are chargeable up to the date of the institution of the suit only.

**Vand 213.** Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it.

**4 S. C. C. 2.** Upon a question of damages for non-delivery of timber according to a contract: *Held*, that the measure of damages must be estimated according to the principles laid down in *Haddley v. Baxendall*, 9 EX 354 and the English authorities.

**8 S. C. C. 84.** Under an agreement between A and B, a land belonging to B. was given to A. to clear and plant B. supplying the plants of the plantation. A was allowed six months in which to clear and plant the land, and B was allowed the same time for supplying the plants and B further agreed that if he should fail to supply A with necessary number of plants within the stipulated time, he (B) would pay A a fine of Rs. 100. *Held*, that the Rs 100 was liquidated damages, which A could not recover without proving the actual amount of damages sustained.

**5. N. L. R. 114.** Where a certain penalty was fixed by a-

greement for non-delivery, nothing in excess of that amount could be claimed.

2. The question whether under the Roman-Dutch law the full amount of a penalty stipulated for can be recovered was considered in the case of *Fernando v. Fernando* [4 N. L. R. 285], and it was there held that a court might award as damages the amount of the penalty stipulated between the parties, if it was not too excessive or disproportionate to the circumstances of the case Withers J., in the case of *Saibo v. Cooray* [I S. C. R. 233] was of opinion that where it was stipulated to pay damages on a breach of contract, and the stipulation was made in respect of a sum certain, and the amount fixed on as damages, was greater than that sum, it was generally to be treated as a penalty and not as liquidated damages, and only the actual damages sustained could be recovered [see also *Huxham v. De Wass* Ram. 1820-1833, 39 1 Rev. Rep. 80 and *Davith v. Dinger*, 8 S. C. C. 84.]

3. The English Law on this subject is, shortly, as follows—where there is added to the contract a clause as to the payment of a sum of money in the event of non-performance, equity presumes it to be a penalty for which relief will be given on fair compensation being made. The presumption may be rebutted by showing that the sum was intended by parties to be liquidated damages, or an alternative mode of performance. The stipulation for a penalty does not prevent the court from ordering specific performance of the contract. But where a sum is agreed upon as liquidated damages, the party wronged is entitled to the sum as compensation, and to no other remedy [*Peachy v. Somerset*, 1 Str. *Soloman v. Walter*, 1 Bro: C. C. 418; *Bird v. Lake*, 1 H. and M. 121; 6 C. R. C. 540] Pereira's *Institutes* Vol. II. pp. 520, 521.

If a contract is a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, the sum may be recovered as liquidated damages. If a contract is for a matter of certain value, and on breach of it a sum to be paid in excess of that value, this is a penalty and not liquidated damages. If a contract contains a number of terms, some which are of certain and some of uncertain value, and a fixed sum is to be paid for the breach of any of them, this is a penalty [Anson, 278]

Sep. 12. 1838] [Morg. Dig. Sec. 580.

Jeremie, C. J.,

D. C. Ratnapura 1741.

*Bailee—No remuneration—Responsibility.*

*Held*—A gratuitous bailee is not bound to take that scrupulous care of property as a paid bailee.

Judgment.

Jeremie, C. J., It is clear that the defendant was reasonable and bound to acconnt for the property, as

it is also clear that, as he received no remuneration, he was not bound to take that scrupulous care of it that would otherwise have been required of him and he has shewn to the satisfaction of the District Judge and Assessors, that the paddy was actually stolen, whilst the negligence that led to the theft is, under the circumstances, to be imputed rather to the plaintiff.

## Notes.

1. For the Roman-Dutch Law on the subject of bailment see Tambyah's *Contracts* (1st Edition) pp. 125-129, and Pereira's *Institutes* ii pp. 536-539. The principal Roman-Dutch references to the subject are in *VanDerLinden* bk i ch. 15, *Grotius* bk iii. ch. 7, *VanDerKeesel* sec. 531-535, *Voet* bk xvi. tit iii.

2. The principal Ceylon cases on the subject may be here noted:

**2. Lorenz** 26,-Bailee may sue for restoration of goods.

**Ramanathan** 1872—'76, p, 9,-Bailee, gratuitous or paid, is not liable if goods are lost by housebreaking and robbery, and not through any want of reasonable care on his part.

**Austin** 13, Bailee who is not well paid and yet has taken reasonable care of animal is not liable for loss.

**Austin** 29. Mere depository liable only for gross negligence.

**Grenier** (C. R. cases) 1873, p. 5, Depository who has not asked for deposit is liable only for loss by *dolus* or *culpa lata*.

[Grotius says depository must take care of goods as his own, or else he is liable for loss, 3. 7. 9, but VanDerKeessel says, sec. 531, that the doctrine of Grotius is very exacting and cannot be supported by the Roman Law, Dig. 16. 3. It must be added that a paid bailee is not liable for accident nor for *culpa levissima*, but only for *culpa levis*: *Vander Keessel* sec. 532.]

**2 New Law Reports** 127. Bailee alone ought to sue and can sue, without joining owners of goods as parties.

Jan. 16, 1839] [Morg. Dig. p. 599.

Present: Stoddart and Carr, J. J.

D. C. Colombo 3787.

*Perera et al* v. *Fernando*

*Surety—Cession of action—At time of payment—When unnecessary—Practice.*

*Held.*—1. A surety paying the debt is entitled to stand in the place of the creditor as to securities and remedy.

2. Cession of action need not be obtained at time of discharge of debt but may be subsequently obtained, even pending the suit against principal.

Per Carr J,—It is a well established principle of equity, that, where a surety discharges the debt of his principal he is entitled to stand in the place of the creditor as to all securities for the debt; and to have any benefit therefrom, and remedy, which the creditor had against the principal debtor. In the present case the defendant has retained the securities in his own possession upon paying off the debt, and the only main question is with whose money the creditor was paid.

It has not been the practice in this Colony, for a surety on paying off the debt of the principal to obtain "cession of action" from the creditor, and this court has in a Jaffna appeal No. 3193 dated 7th December 1834* decided that it was not necessary for such cession to be made at the time of payment, but that the surety might subsequently obtain it, even pending the suit against the principal debtor. If the defendant has not, therefore, already clothed himself with his express authority, he ought to obtain it now from the creditor.

Feb. 16, 1839] [Morg. Dig. Sec. 603.

## D. C. Colombo, 3366.

*Arnis et al* v. *Emnanis.*

*Civil case for assault—Record of conviction—Damages —Receipt of medical attendant—Evidence.*

*Held.*—1. The Surgeon's receipt is not by itself evidence of his attendance.

2. In an action for damages for assault, the record of the conviction in the criminal court is not admissible.

### Judgment.

Carr, J. The record of conviction in a criminal prosecution for assault is not admissible evidence, in an action for damages, by the complainants for the same assault, as the verdict being in part procured on the evidence of the complainants, it would be indirectly to admit their testimony in their own cause *(Roscoe on Evidence* 102). Indeed, it has been rejected even on the plea of guilty, (2 *Phillimore on Evid.* 203 Ed: 7). The only evidence of the surgeon's attendance and charge

*This is a misprint for 1836. The reference is to the case given above at p. 121. See Notes pp. 124. 125 above—Ed. R.R

is his bill and receipt, which is not admitted by defendant (who has filed a general denial) nor proved, and the evidence of the secretary by itself is clearly insufficient to support plaintiff's claim.

## Notes.

1. By sec. 43 of our Evidence Ordinance No. 14 of 1895, "Judgments, decrees and orders, other than those mentioned in secs. 40. 41. 42 are irrelevant, unless such judgment, decree or order is a fact in issue or is relevant under some other provision of this ordinance." The judgments &c referred to in secs. 40. 41. 42. are: judgment operating as *res judicata*; orders in probate, matrimonial, admiralty and insolvency matters; decree &c. relating to matters of a public nature. Now a judgment of conviction or acquittal is *not* a judgment belonging to any of the above mentioned classes. It has been distinctly held in *Queen* v. *Ramalingam* (2 N. L. R. 48) that a judgment of conviction or acquittal is not a judgment *in rem* which could not be controverted. A plea of guilty in the criminal court may, but a verdict of conviction cannot, be considered in evidence in a civil suit (*Taylor on Evidence*, sec. 1694; *Q.* v. *Fortaine Moreau* 11 Q. B. 1028, 1033; *Chowdhry* v. *Kyburt*, 10 Weekly Reporter p. 56, *apud* Ameer Ali's *Law of Evidence*, 1st edition, p. 338)

"If A pleads guilty to a crime and is convicted the record of judgment upon this plea is admissible against him in a civil action as a solemn judicial confession of the fact. But if A pleads not guilty to a crime but is convicted, the record of judgment upon the plea is not receivable against A in a civil action as an admission to prove his guilt. For the judgment contains no admission, and in conformity with the rule which rejects judgments *inter partes* as evidence either for or against strangers to prove the facts adjudicated, a judgment in a criminal prosecution, unless admissible as evidence in the nature of reputation or taken in conjunction with the prosecution, as an act of ownership, *cannot be received in a civil action to establish the truth of the facts on which it was rendered;* and a judgment in a civil action, or an award, cannot be given in evidence for such a purpose in a criminal prosecution" (Ameer Ali's *Law of Evidence* 1st edition pp. 338. 339.)

2. The following Indian cases may be noted here:

**Negoy** v. **Negoy** (5 Weekly Reporter 27.) A proceeding of a criminal court is not admissible as evidence; a civil court is bound to find the facts itself.

**Surmah** v. **Nyalunker** (W. R. 26,) Conviction in a criminal court is not conclusive in a civil suit for damages in respect of the same act.

**Doctor** v. **Samiruddin**, (4 B. L. R., A. C. 31, 12 W R. 477,) Acquittal on charge of robbery is no bar to civil suit for taking money forcibly.

**Ram Lal** v **Tula Ram** (I. L. R. 4 Allahabad 97,)

**Empress** v, **Ghose** (I. L. R. 6 Calcutta 247), In a suit for damages for an assault *the conviction of the defendant in a criminal*

*court is no evdence of the assault.* The *factum* of the assault must be tried in the civil court.

3. Among English cases may be noted *Yates* v. *Taylor* (Law Journal, Feb. 25 1899), *Mrs. Maybrick's case* (61 L. J. Q. B. 128), and *Marsh* v. *Marsh* (28 L. J , Matr. 30).

4. The remarks of Berwick, D. J,. in *Gould* v. *Ferguson* [Browne's Reports vol. i. Appendix D, pp. xx, xxi] may be quoted here, "The plaintiff desired virtually to have a case in which he had been convicted of forgery..... tried over again in this court in the hope of a virtual reversal of that conviction, and to establish his innocence of the crime of which he had been so convicted. But I was, and am, of opinion and ruled that whatever the consequences of a conviction for crime in a criminal court may be outside the bounds of a particular civil suit in which the convict's guilt happens to come in question, *the record of such conviction is not evidence of his guilt for the purpose of the civil suit;* and that consequently, the defendants having adduced no evidence (for the purpose of the civil case) that he had committed any act of forgery, the plaintiff could not be allowed to adduce evidence having for its purpose to prove that he had not committed such an act...The proof adduced by the defendants by the record of the trial in the Supreme Court showed that plaintiff had been convicted of forgery *but was not admissible to shew* and was not put in for the purpose of shewing, *that he had in fact committed forgery.*" See *Marshall*, pp. 115, 116.

**March. 20, 1839.]** **[Mor. Dig. Sec. 610.**

Jeremie, C. J.

D. C. Batticaloa, 3473.

*Madache* v *Marikar.*

*Batticaloa Native Laws—Acquisition—Community—Husband's Control--Power to encumber—*

1. Among Batticaloa Tamils property acquired during coverture falls into the community.

2. The husband is the sole administrator of the common property and is at liberty to encumber it at his pleasure during the subsistence of the marriage.

## Judgment.

Jeremie, J. —In this case the plaintiff originally alleged that the property in dispute was the modisum, or hereditary property but this (as is admitted by the District Court) she has not proved. On the contrary it appears from the testimony of the majority of her witnesses that these were acquired by herself and by her husband since the marriage, and

therefore it falls into the community. That the husband is the sole administrator of the common property, and is at liberty to encumber it at his pleasure, during coverture, is a well established principle. Had this property indeed, been paraveny or hereditary, it might here been advisable to have ascertained whether there is any local custom at Batticaloa which secures such property to the wife when there is no marriage contract, but under the circumstances the inquiry is unnecessary.

April. 24, 1839] [Mor. Dig. Sec. 614.

Jeremie, C. J. Stoddart and Carr, J. J.

*Kander* v. *Ramasay.*

*Thesewalame—Father's debts—Son's liability—Repudiating inheritance—Benefit of inventory—Administration—Thesewalame code and later usage—Opinions of assessors—Dowry property.*

1. The heir is liable for the ancestor's debts, unless he had repudiated the inheritance which he is at liberty to do whenever he is sued for any such debt.

2. The heir is liable when he has intromitted and he cannot repudiate after intromission.

3. Letters of administration have superseded the benefit of inventory.

4. The *Thesewalame* is a collection of Jaffna customs and usages, and assessors were examined to see if the custom (as to debts) admitted of modifications.

## Judgment.

**Collective Court.**—The plaintiff and appellant, in this case, is a creditor of defendant's deceased father and claims the amount of his debt against the son. He alleges that the son inherited property from the father; but he adds, whether he did or not the mere circumstance of his being his son renders him liable for all the father's debts.

In this demand there can be no doubt that he is borne out by the text of the Thesewalame which distinctly states that "although the parents do not have anything the sons are nevertheless bound to pay the debts contracted by their parents," and again, "although the sons have not at the time where

with to pay the said debts they nevertheless remain accountable for the same."

The District Judge has however thrown out this action on the ground that "there is no proof adduced that the defendant inherited or received any of his deceased father's property; and that in fact it appears that he died leaving no property, as per report of the headmen made on the writ which was proved by plaintiff himself. Such being the case it is indeed hard to make the defendant sacrifice what he has acquired, with his own labour and industry, for his father's debts. That although the Country Law directs that the sons are to pay the father's dets it at the same time declares that it is a hard one. Under the foregoing circumstances and consideration and with the opinion of the assessors, it is decreed that the plaintiff's claim be dismissed, and he do pay defendants costs of suit."

The Supreme Court, whilst it also admits the hardship of the law, would not have felt warranted in overlooking it on that ground alone, but as the Thesewaleme is in fact nothing more than a report of the customs and usages of the country, it conceived that it might occur in this, as it often has in other instances, that the usage admitted of modifications which softened the rigour of the general principle and reconciled it to the rules of natural equity.

For the purpose of ascertaining this point it directed three special assessors, well acquainted with the Malabar usages as practised at Jaffnapatam, to be selected, and it further proceeded to examine several of the most experienced among the native inhabitants on the custom. The following questions were then put to the latter:

First,—a father dies in debt leaving no available property; are his sons liable to discharge his debts from the property accruing to them from their own industry and if so are they also liable to personal arrest for such debts ?

Second,—are lands given in dower to a daughter liable to these debts ?

Third,—was there any ancient, or is there any known form, by which after the decease of the parent, the sons by renouncing their inheritance, could exempt themselves from this liability ?

The answers were as follows:—Three of the witnesses

declared, "That the sons were liable in person and property.

That lands given in dower to the daughters were not; and that they did not know, nor had they heard of any form by which the sons could exempt themselves from this liablity."

Mr. Mootiah, the District Judge who was the fourth witness, gave the same answer to the two first questions, but to the last he answered that he had heard of instances, and was himself aware of one, in the time of Mr. Dunkin, when, on the sons coming forward and repudiating altogether their father's inheritance, they had been exempted from the payment of debts, and this he understood to be the present law. He also quoted an instance in the High Court of Appeal of about ten years' standing, in which the sons had been exempted from liability on the grounds now taken by the District Judge ("the extreme hardship of the law") but he added that this precedent had never been considered law and had been overruled by the subsequent practice.

The three assessors concurred entirely in opinion with Mr. Mootiah, and the first assessor stated that he had a full knowledge of the case in Mr. Dunkin's time, to which Mr. Mootiah referred, which he considered consonant with the usage.

It thus appears that the above passage in the *Thesewaleme*, though correct as far as it goes, is nothing more or less than a rule of the civil, or rather Roman-Dutch-Law not only at Jaffna, but throughout the Maritime Provinces—by which law the heir is responsible for the ancestor's debts, unless he had repudiated the inheritance which he is at liberty to do whenever he is sued for any such debt, except he should, in the meantime, have intromitted or done any of these acts which show that he intended to appropriate the inheritance to himself.

Nor has this law been in any way rescinded or modified up to this time. Formerly, indeed where the heir entertained a doubt whether the estate could discharge all its liabilities, he was at liberty to apply for the benefit of an inventory and now he applies for letters administration. The latter form, is in many respects the more convenient and consonant with our present judicial institutions, having in effect super-

seded the former; but this has not done away with the doctrine of intromission, or removed the responsibility of the heir. Letters of administration are only requisite *for his protection* and they are also requisite when a stranger, such as a creditor, or others having claims upon a vacant estate, are desirous of obtaining a title which will warrant them in recovering the assests and managing the property.

On these grounds the decree of the District Court is affirmed, unless the plaintiff shall undertake to prove that the defendant has appropriated to himself any portion of the property of the deceased father without having obtained letters of administration. Should the plaintiff not undertake this proof, and should his debtor have actually left any property the said plaintiff will still have his recourse against such property on taking out Letters of Administration to that estate.

## Notes.

*Thesewalame Code—Ancestor's debts—Heir's liability—Custom—Expert opinion.—*

1. This case is also reported at p. 298 of Muttukistna's *Thesewalame*. The same principle was upheld in cases (affirmed in appeal) noted at pp. 302, 303, 306 of Muttukistna's *Thesewalame*. See also *Muttukistna* pp. 229, 241, 251, 293, 290, 296, and 4 *Tambyah's Reports* p. 69.

2. The Supreme Court in this case directed assessors "well acquainted with the Tamil usages" to be examined. That evidence as to existing customs was taken in the Civil Courts of Jaffna from the earliest times (1820) and that in very many instances the practice was known to the Supreme Court is clear from the cases noted in *Muttukistna* pp. 11, 17, 31, 42, 46, 51, 57, 58, 60, 70, 113. 132, 157, 175, 211, among many more. In 1836 there were even "permanent assessors of the District Court" (*Mutt.* p. 175). In a case of 1825 (*Mutt.* pp 112 113) the assessors spoke of "the spirit of the *Thesewalame*." In recent times too the Supreme Court has been known to direct the taking of expert opinion as to custom (D. C. Jaffna 1925, *Ceylon Law Review*, vol. ii. p. 14) In D. C. Jaffna 1925 however, upon a second appeal, Wendt, J. directed that when the *Thesewalame* is silent recourse be had to the Dutch Law. It was reserved for Moncreiff, J., in 1905 (4 Tamb. Rep. 116, 1 Bal. Rep. 201) to be the first to doubt the power of the Supreme Court to consult living experts on questions of customary law and usage in the North, and he was the first to condemn the ascertaining of expert opinion and the invocation of the " spirit of the Thesewalame."

April 24, 1839.] [Morg. Dig. Sec. 616

Jeremie C. J., Stoddart and Carr. J. J.,

D. C. Trincomalie, 7014.

*Brook* v. *Jones*

*Lottery ticket—Unsanctioned lotteries—Gaming—Action on private lottery ticket.*

*Held*—A party to a private lottery ticket connot recover thereon.

## Judgment.

**Collective Court.**—The question in this case is simply whether a party can recover upon a private lottery ticket, and the Supreme Court is of opinion that he cannot. Unsanctioned lotteries are a species of gaming prohibited by law. Such is the express opinion, among other authorities, of *Vinnius*, in which the court concurs. The decree of the District Court is therefore reversed, the plaintiff's action dismissed, but without costs.

## Notes.

1. On wagers &c., see pp. 42—45 (*Rev. Rep. Vol. 1*) and authorities there cited.

2. See Penal Code, Sec. 288 and 1 C. L. R. 57. On cheetu club, see *Vand Rep.* 180, 181.

April 24, 1839] [Morg. Dig. Sec. 620.

## D. C. Colombo, 19620.

*Perera et al* v. *Perera et al.*

*Prescription—Co-heirs, co-tenants, co-owners—Adverse possession—Commencement af possession—Change of character of original tenure—Good faith—Common and statute laws—"Adverse" possession in sec. 2 of Ord. No. 8 of 1834 [Sec. 3. of Ord. No. 22 of 1871]—Tenant—Prescription after change of title—*

1. Possession by coparcener or other tenant in common is not adverse possession.

2. The words in Ord. No. 8 of 1834 [Same as in sec. 3 of Ord. No. 22 of 1871], "*that is to say, possession unaccompanied by payment of rent or produce, or performance of service, or*

*duty, or by any other act of the possessor from which an acknowledgement of a right existing in another person would fairly and naturally be inferred*" are given by way of example ad demonstrandum, and not by way of limitation, the passage enacting nothing.

3. The tenure under which possession *commenced* is held to have *continued* until the possessor proves that it has been changed or introverted.

5. Ten years' possession after change of title, e, g, by sale or legacy, gives prescription.

## Judgment.

**Collective Court**—[The point before the court in this case was as follows: viz. Is an action by a coparcener or tenant in common who has not taken possession, against his coparcener or co-tenant in possession, for his share of the common estate, barred by a prescription of ten years, or any less term than thirty years?] The question thus stated resolves itself in the first instance into this,—Is the possession of the co-heir or co-tenant an adverse or independent possession? For, if it be not so, the above section clearly does not apply; but if it does not, no other part of the ordinance can and all preceding local regulations in the same subject are distinctly repealed by that ordinance so that reference must thenceforth be had for the decision of the point to Roman-Dutch principles.

The Court is of opinion that by the known laws of all countries, English and Roman, as well as the modern Laws, derived from the Roman including expressly the Roman-Dutch, the possession of a coparcener or co-tenant is not an adverse, but a concurrent possession; the original title is the same and the possession of the one is the possession of the whole so that the one is neither adverse to nor independent of the other in the only sense in which the latter word can be used in an ordinance on prescription—for it is impossible to make out the title of the one without at the same time making out the other. There can be no doubt that the possessor entered as a coparcener—his coparceners having *then* an equally good title and in all questions of prescription of real estate, the tenure under which possesssion commenced, is held to have continued until the possessor proves that it has been changed or introverted. The possessor is therefore never called upon for his title until a title is proved against him and then he must make out a better title by something more than ten years' possession. To establish, in short, a ten years'

prescription, the possession must have commenced in good faith; it must therefore be founded on such a title as is entirely inconsistent with the claimant's right so that both titles cannot be valid at the same time and consequently the possession of the one must be irreconcileable with the right of the other. But though these principles taken generally, are beyond dispute it is contended that the following words in the above section of this ordinance shew what was intended to be an "adverse" possession under that ordinance:— "that is to say a possession unaccompanied by payment of rent or produce, or performance of service or duty or by any other act by the possessor from which an acknowledgement of a right existing in another person would fairly and naturally be inferred." The Court cannot but consider such definitions inserted in a parenthesis, as given by way of example *ad demonstrandum*, and not by way of limitation; the passage enacts nothing; it merely designates a few instances, concluding with words so vague and general as to leave the definition exactly as it stood at Common Law.

Then though the period of prescription whether of five, ten or twenty years or of any less or longer time varies in different countries, and is universally regulated by positive law— (Cujas quotes several hundred of these periods ranging from a day to a century as existing in the Roman Law alone)—yet the principle upon which such questions ought to be determined are matter of doctrine. They are equitable rules common to all countries with which no doubt every Legislature may deal, and occasionally will deal, but with which a Legislature will never be presumed to have dealt by mere inference, nor indeed unless the terms it has used are terms of enactment express and distinct. This rule applies with peculiar force to the present subject. Most of the land throughout this Island (garden or field) is occupied by others than the proprietor,— by planters, by cultivators, by tenants—and these several holdings are occasionally handed down from father to son, not only for a few years, but actually for centuries. Can it be contended that such possessors, holding under a title entirely precarious, are, because they fail for ten years in paying their annual redditus, to become by such their laches the usurpers of the soil? That they are to throw out their landlords, and changing their own title,

to become incommutable proprietors and that this benefit is to commence accruing to them from the first day they failed in their engagements ?

Then, when a tenant does actually pay his rent the receipt is in his hands. The proprietor has no written proof of the payment, so that whether such holders have paid or not he would, if this opinion were allowed to prevail, incur the risk of being deprived, however clear his original title however clear the ground of his tenant's occupation not only of his income, but of the fee simple of his estate, except he could at all times adduce oral evidence of an actual payment within ten years preceding. A fraudulent trustee again would be protected by ten years' continued misconduct. The construction endeavoured to be put in the ordinance embraces all these cases as well as the case under consideration. It either applies to all or it applies to none. It has been repeatedly maintained that it applied to all; but the established jurisprudence of the Court in accordance with every well known principle of law, good faith and equity has ruled that it applied to none and that an adverse possession is still what adverse possession was at Common Law. The plea for the opposite opinion is that it tends to secure titles; but title so easily won, may be as easily lost; such titles are scarcely worth having. To give value to property a title must not be easily obtainable by fair means, but lost with difficulty by dishonest means or the very object in obtaining any title is defeated. Nor are the dangers above stated merely imaginary. A tenant under notarial lease in due form has already been known to claim the fee simple in the soil merely on the ground, that he had not paid the rent he unquestionably owed for ten years, in which plea he was certainly borne out by the construction attempted to be put upon this ordinance for "no *act* had been done by the possessor *within the ten years* from which a title could be in any way presumed" and if this *act* may be done *upwards of ten years before* then the original entry *as an heir* is an act from which the right of all persons in the same right not only "*may*" be "*fairly and naturally*" but must necessarily be presumed and the attempt by planters and cultivators to usurp the fee simple are very numerous. See among other cases *Caltura* 4944, 2889, and *Matura* 2363.

What then is the common or Roman-Dutch Law? The Court, perfectly acquainted with the decision in case No: 2364 before the High Court of appeal, would

question the correctness of the judgment then pronounced with great hesitation; for few judicial opinions does it entertain so high a respect as for Sir Hardinge Giffard's. He has however with his usual straight forwardness of purpose and disposition quoted the authority on which he relied; and there can be no doubt that, according to the sentiments of all commentators in the Roman Law the *Dig. Lib. 42 Tit. 6 sec. 13* so quoted and relied upon by him has no reference to this point. Nothing short of this uniformity of opinion among authors could have induced the Court to confide in its own previously formed judgment thus opposed. The applicability of this quotation is not however a point of doctrine but of fact, and upon this fact it entertains not a doubt. To multiply citations from any large number of commentators were superfluous. The Court will limit itself to three, viz: the principal among the more ancient writers, Cujas; the principal among the moderns, Pothier; and one of the first—the most familiar in these Courts among Roman-Dutch writers on Civil Law,—Van Leeuwen's *Censura Forensis*, and this author is selected in preference as it is probably owing to a mistranslation of a passage in his more popular work. "The commentaries", that the doubt suggested itself.

The law quoted by Sir Hardinge Giffard is as follows;—*Quod dicitur post multum temporis separationem impetrari non posse accippiendum ut ultra quinquennium post additionem numerandum separatio non postuletur.* The construction which the court itself puts upon this law has been explained in its judgment of this day's date, Manaar 1959. It refers not to a division of common property, but to the right possessed by creditors of insisting on the estate of a deceased person being kept separate from that of his heirs when the latter are insolvent or nearly so which by this law they are at liberty to claim for five years, by which means they prevent a "confusio" or merger of the debts and credits of the two estates.

So Cujas observes—*Ultra quinquennium post additionem hereditatis* creditores *defuncti separationem non impetrare.* Pothier:—*Est superioris Tituli sequela hic Titulus in quo agitur de separatine bonorum quam inpetrant* creditores *defuncti, cujus hereditatem adivit is cujus bona proscribuntur*—Pothier *Pandects* Lib. 42 Tit. 6. And Van Leeuwen in Lib 4 cap. XI sec. 23 (whilst quoting the same law in his margin L 42

Tit. 6 De separationibus) comments on it as follows: *Aliud porro privilegium est, quod* creditori *contra debitoris sui heredem suspectum competit, etiam eum qui solvendo non sit* and then he proceeds to show that a quinquennial prescription is a bar to this privilege by virtue of the passage quoted by Sir Hardinge Giffard which forms sec. 13 of this title 6. But superior in authority to all commentators, what is the first clause sec. 1 of this very *Title* 6, *Lib* 42 in the Digest itself? It distinctly explains the sense in which the word "separatio" is used throughout. It states "solet autem separatio permitti *creditoribus* ut puta debitorem quis Sejum habet, hic decessit haeres ei extitit Titius; hic non est solvendo patitur bonorum venditionem; creditores Seji dicunt bona Seji sufficere sibi, creditores Titii contentos esse debere boni Titii et sic quasi duorum fieri bonorum venditionem; hic est igitur aequissimum, creditores Seji desiderantes separationem audiri; impetrareque a Praetore ut separatim quantum cujusque creditoribus praestetur" which separation this law proceeds to say (section 13) must be applied for within five years.

What then are the passages of the Civil Code applicable to this subject, and what the term of prescription stated by that code? Those applicable to this subject are the law "de communi dividundo familiae erciscundae, et de petitione hereditatis", *ff* 10 *Tit.* 3 *ff* 10 *Tit.* 2: *ff.* 5. *Tit* 3: and to all those the same period of prescription by the Roman Law applies, viz: thirty years. So Cujas: Secundum est de prescriptione 30 annorum qua tolluntur actiones personales et mixtae veluti petitio heredetatis communi dividundo familiae erciscundae", so that even the *prescriptio longi temporis* (10 years among persons present, 20 if absent) did not apply to either. See also the Code L. 7 *Tit* 40 sec. 1. By the Roman Dutch Law however it would appear that the rule is not so clearly established. Some authorities favour the Roman term; others maintained that the period is one third of a century or thirty three years and four months. This in the present case is perfectly immaterial, and the court does not therefore feel warranted in going into this last point. It is true that in the present English law the right of a coparcener is barred by twenty years prescription, but it required a very recent Act 3 and4 Wm. 4 c 27, to effect this. Previously it was not barred by any lapse of time whatever, which is also the case by the Roman

Law when either of the coparceners actually in possession claims a division, for the right to sever a common tenure is unprescriptible and it is to this the Law *L. 9. Cod. Commun utriusque Judic* (iii 38) applies.

The court deems it right to conclude with the following observations. If any sale or *bona fide* transfer by legacy or gift had taken place in favour of respondents, so as to produce a change in the title and 10 years had expired from the period of such change to the date of the action, no doubt the appellant's right would be effectually barred. Here indeed there is a legacy, but ten years have not expired from the date of that legacy. Nor would the court have it supposed that though in its opinion nothing short of a thirty or thirty three and one third years' prescription is an actual bar to this action the lapse of time whether of ten years or more or even less ought not to be taken into consideration as a fact tending to induce a presumption that a division has really taken place; on the contrary very little additional proof (as for instance of a separate holding of any portion of the property) will easily induce it to presume such division. All that is before it,—all that it definitely rules is—that a possession by coparcener, or other tenant in common is not an adverse possession and that neither the Prescriptive Ordinance nor the law *L. 42 Tit. 6 section 13* apply to such cases—which consequently are not barred by a less prescription than thirty years.

The decree of the District Court is therefore reversed and the case referred back for further proceedings without costs.

## Notes.

1. This is a full court ruling and it is just to demand for it the sanctity with which the Supreme Court has, of recent years, been at considerable pains to invest full bench decisions. It has not been repealed by statute nor overruled by the Privy council, and therefore it is law to this day. (See *5 Tamb. Rep. 58*, 2 N. L. R. 261 &c.)

No doubt it was a case under Ord. No. 8 of 1834, but in all particulars material to this judgment our present Ord. No. 22 of 1871 is no way different from the earlier enactment.

2. In 1844 "for some inexplicable reason the Supreme Court ° * suddenly veered round and adopted a new definition of the term *adverse title*" (SenatheRajah's *Prescription*, p. xxi)— this is a justly indignant description of the unreasonable abandoning by the Supreme Court of its positive position of 1839 as set out in the case reported above. For a full discussion of the subject see *SenathiRajah* pp xix—xxiii, 33—37,

and see *Ceylon Law Review* vol. v. pp. 2–8 for a learned defence of the element of *title* in prescription and for incisive comments on *Vand. Rep.*, 44 rightly styled by the writer "the *fons et origo malorum*". In that article the following cases are noticed *Vand. Rep.* p. 44, 3 *S. C. R.* 63, 7 N. L. R. 91, *Ram. Rep.* 1876, p. 318, 1 *S. C. R.* 282, *Morg. Dig.* p. 272, *Ram. Rep.* 1843—'46, p. 9, *Austin*, 53, 106, *Grenier* 1876 (C. R.) 7, and *Ram. Rep.* 1862, p. 145.

3. The Privy Council case in 7 *N. L. R.* 91, followed in 5 Tamb. Rep. 20, in which last case Wendt, J., (March 28, 1904) held *Vand. Rep. 44* as overruled by 7 *N. L. R.* 91, has rendered the restoration of the law of 1839 a righteous possibility.

See Pereira's *Institutes*, vol. ii, 271—273, and see 3 N. L. R. 137 where the Supreme Court went a great way back near the law of 1839 by insisting on "the strongest evidence in the form of conveyances" for one co-heir to prescribe against another.

Sep. 17, 1839] [Mor. Dig. § 628.

Present: Jeremie, J.

D. C. Colombo. 2893.

*Potenits* v. *Albertsz et al.*

*Bonafide builder on another's land—Compensation—Laches of real owner—Deed from co-owner.*

1. A person who builds on another's land in the honest belief that the land is his is entitled to compensation.

2. The holder of a deed from one co-owner for more than what such co-owner was entitled to, where the other co-owner has been guilty of laches with reference to the share included in excess in that, deserved to be credited with good faith.

## Text of Digest.

**Per Jeremie. J.** The Supreme Court concurs fully in the opinion of the District Court as to the right of the respondent to recover her share of the property in dispute. But it appears that the land has been built upon by the purchaser from her co-heir, the first appellant, under a title which there were certainly very strong grounds, owing to respondent's own laches, for their believing valid. It conceives therefore that the equity of the principles laid down in Van Leeuwen p 190 and acted upon by this Court in other cases since the promulgation of the Charter, applies here and that a full indemnification in money for her share of the said property is all that the respondent can ex-

pect or be permitted to recover. On these grounds that part of the decree appealed from by which a specific portion of the land in dispute has been adjudged to the respondent, is set aside, and in lieu thereof it is ordered that a commission of three persons, one to be named by respondent, another by appellant, and the third by the District Court, do proceed to spot and there inquire and report upon the value of the whole of the price of ground formerly belonging to the common ancestor of respondent and first appellant, exclusive of the value of the house built by Mr. De Quaker thereon; and that the present proceedings with the commissioner's report be then remitted back to this Court.

## Notes.

1. As to compensation to *mala fide* possessor see 5 *Tamb. Rep.* p 13 (July 6, 1905), and 3 *Browne* 192.

2. On improvements and compensation generally see 1 N. L. R. 228, 3 N. L. R. 74, 3 N. L.R. 160, 4 N. L. R. 158, 2 *Browne*, 397, 5 N. L. R. 34, 1 *Browne* 343, 2 *Browne* 100, *Koch* 7, 1 *Browne* 77, and, among older decisions, *Austin* 200, *Ram. Rep.* 1877, p. 313, *Ram. Rep.* 1863-68, pp. 129, 286, 3 *Lorenz* 29, 3 *S. C. C.* 31, 8 *S. C. C.* 61, 1 *S. C. R.* 243, 1 *S.C. R.* 71, *Ram. Rep.* 1877, p. 333, 157, *Grenier* 1873 (D. C.) p. 43.

3 See Pereira's *Institutes*, vol. ii pp. 249—253.

4. The question of prescription of the right of compensation is dealt with in D. C. Galle 7459, Oct.11, 1905. See for a trenchant discussion of the case, *Ceylon Law Review*, vol. v. pp. 23-29.

July 19, 1827.]* [Morg. Dig. § 514,

Present, Jeremie, J.

D. C. Madewelletene, 1056.

*Heevapitige Lebbe* v. *Isobae and wife.*

*Mahommedan Law—Magger presumed as received—Rule of division — Collaterals— Inheritance—Deceased daughter—Real and personal properties—Oral bequest.*

*Held.*—(following assessors)—1. When a Mahommedan dies leaving behind a widow and a daughter and collaterals (brothers and sisters), the widow is entitled to one-eighth, the daughter to four-eighths and the collaterals to the remaining three-eighths.

*This case of an earlier year than 1840 is given here to form one of the group of Mahommedan Law cases to which notes are appended.—*Editor Rev. Rep.*

2. When there are three brothers and two sisters as collaterals of the aforesaid deceased the three brothers take each one-third of six-eighths of the aforesaid three-eighths and each sister takes half of two-eighths of the said three-eighths.

3. The rule of division among collaterals is that the moiety due to the collaterals out of the estate is divided into eight parts, and the brother takes six and sisters two.

4. When a daughter dies issueless the mother takes one-third (no father) and the collaterals divide the balance as above, brothers six-eighths of $\frac{3}{8}$ and sisters two-eighths of $\frac{3}{8}$.

5. The widow's claim is in addition to her magger (which she must be presumed to have received).

The facts of the case are (summarized from Morg. Digest.):—

Ismail died leaving a widow (the 2nd defendant) who subsequently married 1st defendant, also three brothers (plaintiff one) and two sisters. The defendant claimed real and personal property of intestate by an oral bequest and inheritance. The oral bequest of real property was disallowed, but of personal upheld.

The property (lands) was divided between plaintiff and second defendant on the principles stated in the judgment. The Court consulted special Moorish assessors as to the law and judgment was given for the plaintiff for $\frac{3}{32}$ ( or $\frac{1}{4}$ of $\frac{3}{8}$) by right of inheritance from Ismailpillai and $\frac{1}{12}$ or ( $\frac{1}{4}\times\frac{2}{3}\times\frac{1}{2}$ ) by right of inheritance from his daughter, but considering the numerous contradictory and untrue statements made by the plaintiff and the exorbitance of the original demand, the Court condemned him in costs except those of appeal, which were divided. And taking the value of the real property at 160 Riddies, the defendants were adjudged to pay the plaintiff the sum of 28 Riddies deducting the cost of the suit.

## Judgment.

**Per Jeremie, J.**— With regard to the bequest relied upon by the defendant the oral testimony they have offered goes to confirm the fact. As regards the personal property, the court therefore considers it as belonging to the defendants under the bequest. But real property cannot be orally bequested. It remains to examine what is the Mahommedan law in this particular.

The court has taken the best information it could obtain at Colombo and it appears that the mother was entitled to one-eighth (besides her magger, which magger however she must be presumed to have received) the daughter to four-eighths or one-half, and the collateral to the remaining three-eighths and as it

appears that the plaintiff, according to his own statement in his petition of appeal is only one of five collaterals (there being three brothers and two sisters of the late Ismailpillai surviving or having left issue,) it follows that he is only entitled to one-fourth of these three-eighths of the real property: the rule of division among collaterals being that the estate is divided into eight parts, of which the brothers take six and the two sisters two; so that as there are three brothers the one-third of the sister is equal to two shares, or one-fourth of the eighth.

It now became further requisite to ascertain who, according to the Mahommedan law, are the rightful heirs of the deceased daughter. And it appears that the mother is entitled to one third and the five collaterals to the remainder, which is to be divided in the same manner, viz: the uncles taking six shares in the eight, aunts the remaining two.

Oct. 3, 1840.] [Morg. Dig. § 654.

Oliphant, C. J., Carr and Hilderbrand, J. J.

D. C. Chilaw and Putlam 8163.

*Sinne Lebbe* v. *Catchu Umma*

*Mahommedan Law —Husband suing wife · Desertion by wife—Penalty Application to priest or arbitrator— Wife taking away husband's goods.*

*Held.*—(on evidence of Morish experts.)1. Either spouse may sue the other.

2. A wife deserting her husband and living with another man forfeited a sum of money equal to her dowry money, or, if it had been already paid to her, double that amount, by way of penalty.

3. The wife so deserting her husband and living with another man is liable to be sued for her husband's property which she might have.

4. In no case can her wearing apparel be taken from her.

5. The husband may sue for the penalty or for his goods without first going to the priest or the arbitrator.

## Text of Digest.

**Collective Court.**— In this case the court, sitting collectively ordered that evidence should be admitted as to certain points of Morrish Law and custom viz : 1st, Whether a husband and wife can reciprocally

sue each other ; 2nd what penalty a wife pays who deserts her husband and lives with another man.

Whereupon certain witnesses were duly sworn and examined, who depose the following:— 1st, A husband or wife can reciprocally bring action against each other without having been previously divorced; 2nd—, If a wife run away from her husband and live with another man, he can bring an action against her to recover any property of his she may have taken away with her. The husband might claim an ear-ring out of her ear if it were his, but not the clothes off her back.

3rd, The wife who so runs away forfeits a sum equal to the amount of the dower, that is to say, Rix dollars forty in this case, being the amount stipulated to be paid by the husband. If it has been paid she ought to forfeit Rix dollars eighty.

4th The husband may bring his action for this penalty, or for his goods taken away without first going to the priest or arbitrators.

Nov. 19, 1841] [Morg. Dig. § 689.

Oliphant, C. J., Carr and Stoddart, J. J.

D. C. Batticaloa. 6672

*Sago Lebbe et al* v. *Maricar M. Salecutty*

*Mahommedan Law—Divorce—"Special Customs of Moors"—Alimony -Evidence—Kaycooly—Magger.*

*Held—1.* Evidence for divorce must be in conformity with the "Special Customs of the Moors" regulation.

2. When there is not sufficient evidence for divorce a claim to Kaycooly and Magger will not be allowed.

3. Though a claim to Kaycooly and Magger may be dismissed yet a Mahommadan may be entitled to maintenance for the time of her separation up to the date of the decree.

Judgment

**Collective Court.**—The decree of the District Court of Batticaloa is affirmed as to the dismissal of the plaintiff's claim for kaycooly and magger, the Supreme Court being of opinion that the evidence is insufficient to establish a divorce in conformity with the Special Customs of the Moors concerning matrimonial affairs, *title, ii.*

appended to Van Leeuwen. The Supreme Court however consider that the second plaintiff should be allowed to recover under this action a reasonable sum for maintenance for the time of her separation up to the date of the decree of the District Court, and it is accordingly further ordered that the District Court shall proceed to assess such reasonable sum for maintenance after having the evidence of the second plaintiff and defendant on the point. All parties are however decreed to pay their own costs in this case.

Aug. 12. 1835] [Morg. Dig. § 236

Present: Marshall, C. J. and Norris J.

D. C. Jaffna, 7487.

*Mahommedan Law—Magger—Kaycooly—Who may recover.*

A Mahommedan wife or her children can recover from the husband or representatives magger, kaycooly &c.

## Judgment

**Norris, J**—Among Mahommedans, on the death of the husband or upon a separation, the wife and after her death, her children, are entitled to recover from the husband or his representatives her magger, kaycooly, &c.

## Notes.

*Mahommedan Law Magger—Kaycooly—Who may recover?*

1. Magger, called also *maskawien*, the marriage gift to the bride is enjoined by secs. 67 to 72 of Regulation of 5th Aug. 1806. The following is from Neil's *Mahommedan Laws of Ceylon* pp. 41. 42.

"This is the term still in use amongst the Malays to signify the gift to be given by the bridegroom and agreed upon beforehand. A gift, it is said, known as Blanje Dapur is sent in money to the bride's house. The persons entrusted with carrying this gift bring back a message from the bride's house, fixing the day for the marriage. The Maskawien of the Malays is identical with the Muhr or Ma'er, written Magger in the Special Laws. (See 78th clause.) The amount of this dower is settled when the bridegroom on the fixed date, in the night time, comes to the bride's house in procession with his male relatives and friends. The bride's party is ready assembled with the priest. The Kaddutam

is then written and the bridegroom conducted by the Mohedin and a friend, as witnesses to the chamber where the bride is waiting with female relatives and guests. The Thali is put round the bride's neck by the bridegroom and the two witnesses leave him to partake of supper, the only male amongst the assembled females. The males sup in their own apartment. The 68th clause provides for the immediate payment of the Maskawien or Ma'er, or, in case the bridegroom is not able immediately to do so, for the carrying of it into a separate account by the special consent of the bride. By this separate account is meant a verbal agreement before the witnesses present, that the amount will be continued to her credit. The 62nd, clause shows that the priest or Lebbe must be informed whether the Maskawien or Ma'er, is paid or not, that is, he being present, that part of the agreement must be settled before him. The entry in the Kaddutam does not disclose if the Maskawien or Ma'er was carried to credit. The rate among the poor Moorman is said to be about 9½ "Kalanchies of Egyptian gold," among the rich it is said to range from 100 Kalanchies upwards. In India the value of the drim also being uncertain, the minimum has been fixed at ten drims. Kalanchie is a term used in avoirdupois weight and the value of a "Kalanchie of Egyptian gold" is said to be variously estimated from one and a half rupees to four and a half rupees. Some fiction was necessary because it is incumbent on every husband to pay the Ma'er, or dower, to his wife, by virtue of the marriage itself, even if not mentioned in the marriage contract. The poor bridegroom would therefore affect to bestow 9½ Kalanchies of Egyptian gold, the indefinite value of which would help the fiction. The bride on her part, would specially consent to the dower remaining unpaid and the law would be satisfied. Dower has been defined to be "in exchange for the usufruct of the wife." It is not an effect of the contract itself. If the dower is not specified in the contract it is said to be called *Ilmithal* or the dower "of the like" or "woman's equal." Ma'er again is said to consist of *Moomjjul*, or prompt, and *Moouwujjul* or deferred dower; the first of which can be recovered if not paid, at any time the woman choses to sue for it and the latter cannot be recovered till the dissolution of the marriage."

See Hamilton's *Hedaya* 44—57 and Macnaghten's *Mahommedan Law* pp. 271—293 on dower. It is well to be aware that in Ceylon the Code of 1806 is the highest authority on all Mahommedan matters and when that is silent resort should be had to the Roman-Dutch Law (*Ibrahim Saibo* v. *Mahamadu*, 3 N. L. R. 116, and arguments of counsel in 1 *Tamb. Rep.* 44.)

3. As regards prescription of dower claims sec. 19 of Ord. No. 8 of 1886 enacts, "The time for the prescription or limitation of a suit or action for the whole or part of a woman's dower shall not begin to run until after the dissolution of marriage by death or divorce, and such suit or action shall be maintainable if commenced within such time as any action shall be maintainable by the Ord. No. 22 of 1871, or by any future ordinance regulating the prescription of actions, for the recovery of money paid or expended by a plaintiff on account of a defendant, or for money received by a defendant for the use of a plaintiff." See 4 *Tamb. Rep.* p. 100, *Van Der Straaten*, 1871 pp. 196-203 Appendix C.

3. See De Vos's *Mahommedan Law* pp. 6, 7, 9, 47, 48, 49, 50, 51, on wife's right to sue, appearance, magger, kaycooly, divorce.

Sep, 8. 1841.] [Morg. Dig. § 679.

Present: Oliphant, C. J.,

D. C. 10243.

*Marriage—Consent by proxy.*

A party to a marriage cannot consent by proxy.

In this case a Mahommedan applied to have his marriage registered, and the bride consented by proxy.

Order.

Oliphant, C. J., "How can the Court decree a marriage to be registered when the consent of the intended bridegroom nowhere appears and the bride consents by proxy."

Sep. 8, 1841.] [Morg. Dig. § 680.

Present: Oliphant, C. J.,

D. C. Jaffna 10,038.

*Vyramuttu* v. *Kadiritamby.*

*Including property in inventory—Action—Cause of action.*

Including property in an inventory as part of the estate gives no cause of action.

Order.

Per Oliphant, C. J., Interlocutory order affirmed. The plaintiff has not stated in the libel any legal cause of action. No action lies for including property in an inventory.

Jan. 3, 1842] [Morg. Dig. § 698.

Oliphant, C. J., Carr and Stoddart, J. J.,

D. C. Batticaloa, 3626.

*Antochy et al* v. *Maria*

*Inheritance—Legacy Election.*

A person cannot claim both inheritance and legacy, where the legacy was in lieu of inheritance.

Judgment.

Per Curiam—It is clear that the testators gave the property to plaintiff as her inheritance. She is therefore not entitled to claim it as a legacy and claim her inheritance also.

Nov. 11, 1835] [Morg. Dig. § 262.

Present: Marshall C. J., Rough and Norris J. J.

D. C. Chilaw No— ?

*Boetsz* v. *Morayo.*

*Malicious prosecution—Malice implied—Requisites of suit for malicious prosecution—Burden of proof—Ill success of charge no reparation—Revenue offence.*

1. Failure to substantiate a charge of theft or a revenue offence gives a cause of action for damages.

2. The requisites of an action for malicious prosecution are (1) false charge (2) want of probable cause (3) malice (4) damage.

3. The defendant must negative falsity, want of probable cause, and malice.

4. The law implies malice where no probable cause is shewn.

Facts and Judgment.*

The following case, though the action was not brought, strictly speaking for a libel, yet is so nearly analogous to actions for that injury, that it may not improperly be placed here.† The action was

*This is from Marshall's *Judgments* pp.407—410 under heading *Libel.*

† The judgment is within quotation marks.—*Ed. Rev. Rep.*

to recover damages for a malicious prosecution, in which the defendant had sworn that the plaintiff a salt store-keeper of Government, had removed a quantity of Government salt in a bag to his own house, from a boat loaded with Government salt. The plaintiff's house had been searched, by virtue of a warrant, but no salt was found. Three witnesses named by the defendant (the prosecutor in the criminal charge) as having witnessed the removal of the salt, denied all knowledge of it, or having ever told the defendant they had seen it. The plaintiff was, of course, acquitted and brought the present action: The D.C. however dismissed it without going into evidence, considering that the plaintiff had shown no valid ground of action, that his character in no degree suffered from the charge which had been made against him, that the defendant did not appear to have acted maliciously in making it and that the revenue might suffer, if actions of this nature were encouraged merely because prosecutors had failed to adduce conclusive evidence so as to convict the accused. On appeal the S. C. referred the case back for inquiry in the following terms. "This court is compelled to express its dissent from the position laid down by the District Judge, that no valid cause of action is assigned in the libel. It appears from the proceedings on the criminal side of the court that the defendant charged the plaintiff with having removed two parrahs and a half of Government salt from a boat to his own house. It is not stated whether this charge was intended to imply a mere infraction of Regulation No. 2 of 1848,14 or whether theft was in contemplation of the informant. The unqualified terms of the deposition would certainly not appear as if it was intended to refer to that Regulation, and if Government salt had actually been found in the plaintiff's possession, it is difficult to imagine how the accusation could have assumed any other aspect than that of theft. But even supposing the charge had been expressly laid for some act contrary to the Regulation, as for removing salt without license, it would be difficult without having heard the evidence, to pronounce that no damage could have been sustained by the plaintiff by such a charge. Even in the case of a private person, it is no very agreeable thing to be subjected to have his house and premises searched under a warrant issued on a charge which turns out to be wholly unfounded. But the effect of an unfounded prosecution on a man's character must often be considered like a libel or any other mode of defamation with reference to the situa-