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THE CEYLON
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SIR EDWARD MARSHALL HALL.

Sir Edward Marshall Hall was born in 1858; he died in 1927. In that period, just short of seventy years, he made an outstanding name for himself at the Bar, and had he possessed the necessary qualities of learning and judgment he would have attained the legal eminence which his abilities and character deserved. Without these, he missed the highest success, with the permanent memorial which judicial rank can give, and the greatest advocacy has only a transient effect. Even of Erskine there remains little but the tradition of a marvellous eloquence. In this book,* however, Mr. Marjoribanks, with affectionate care and appreciative insight, has told the story of a career which will live long in the memory of the English Bar.

At one time, indeed, Marshall Hall looked for judical promotion. In 1917, when he had been knighted, and when Lord Finlay became Lord Chancellor, he hoped to receive the reward to which he considered his long services to the Unionist party entitled him. But politics have, or are supposed to have, ceased to count in such matters, and the first vacancy went to the late Mr. Justice Clavell Salter. It was a bitter disappointment, though Clavell Salter was an old friend. Long before, Marshall Hall had got him his first brief. "How are you getting on, Clavell," Marshall Hall said, meeting him one day in the Strand. "Oh, very badly, Hall. I don't see how I shall ever get a brief." "Never get a brief," said his sanguine and generous friend. "Come along with me; *I'll* get you a brief." And he did, and the judgeship came in due time. Again there seemed a chance of promotion when, in 1922, the Recordership of the City of London became vacant by the retirement of Sir Forrest Fulton. "It has always been the ambition of my career," he wrote to each alderman, "to be Recorder of London, and I hope you will help me to attain to it." But he withdrew his candidature when he knew that the Common Serjeant, Sir Henry Dickens, wished to stand. In fact, however, Sir Ernest Wild was elected, and no other prospect of judicial rank opened before Marshall Hall.

Parliament was equally barren. In 1900 Marshall Hall, after a campaign of

*A Life of Sir E. Marshall Hall by E. Marjoribanks.

only nineteen days, won Southport for the Unionists, charming everyone "by his lightning repartees, his torrential eloquence, and his versatile accomplishment." "No candidate," said Mr. F. A. Greer, now Lord Justice, who spoke for him, "has ever become more popular than Mr. Marshall Hall in so short a time." And Mr. F. E. Smith, not yet himself seeking for Parliamentary honours, was there to help as well. But in Parliament he made no mark. His first speech was a failure, and he had not the Disraeli touch so as to compel the House later on to hear him. In 1906 he lost his seat to Mr. J. M. Astbury, K.C., later to exchange the Bar and politics for the Bench and though Marshall Hall won the East Toxteth division of Liverpool in January, 1910, and increased his majority at the December election in the same year, he never gave himself with any zest to Parliamentary duties, and in 1916 he retired from politics. Thus his career was really confined to advocacy, save for the Recordership of Guildford, which he obtained on leaving the House of Commons.

But his career at the Bar was diversified by strange vicissitudes, and his private life was afflicted by a calamity which might well have crushed him. The story of it is told in the chapter "Tragedy," and we need not reproduce it. His first marriage was on his side a love match, and he did all that was possible to make it a love match on the wife's side as well. But it was useless. "Marriage," he burst out once in his last years, "can be one of the most immoral relationships in the world." There was a separation, and the wife died a year later under an operation performed by a quack doctor, Albert Laermann. "A prosecution," says Mr. Marjoribanks, "followed at the Old Bailey, and Laermann was sent to fifteen years' penal servitude. Thus in the Court which he knew so well, and which was so often to be the scene of his great triumphs, was enacted the aftermath of his own terrible tragedy. No wonder the atmosphere of that grim old building was hateful to him for ever afterwards, till it was pulled down and succeeded by the present edifice."

At the Bar circumstances, though not so tragic, were none the less very unfortunate. Marshall Hall became engaged in disputes with the Judges, and he attracted enmity in the Press. "He had his periods of eclipse, from which a less brave man would probably never have recovered. Twice it seemed as if the day were over, but with indomitable courage he fought through the dark days that seemed to promise failure, and he died in harness at the very height of his powers and reputation." His contests with the Bench were due to his fearless advocacy and to his determination to spare no effort in the cause of his clients. But they probably did not help the clients, and they certainly damaged himself in reputation and pocket. To what was due the enmity which appeared to exist between Lord Justice Mathew and himself can only be guessed. "Mathew," says Mr. Marjoribanks, "was a lawyer of the first rank and the creator of the Commercial Court, withal an exceedingly witty Irishman, with a gift of dry and sarcastic humour which penetrated the chinks in Marshall's armour, and wounded him deeply." And yet Mathew could be the most genial of men. Of him Bowen wrote the Wordsworthian parody, "Old

Mathew,'' suggested by their engagement in the Tichborne case:

Amid the case that never ends,
We sat and held a brief,
Mathew and I—a pair of friends,
And one a withered leaf.

There was probably something in Marshall Hall's style which got on Mathew's nerves. Marshall Hall regretted the position, and was anxious for peace. Lockwood volunteered to be the intermediary, but came back saying, "It's no use, Marshall, the Judge says he hates you." This was Marshall Hall's version, but it probably gained in the telling. And there was a "scene" with Mr. Justice Bigham, which, however, ended amicably. "Marshall Hall," says Mr. Marjoribanks, "was always grateful to Lord Mersey for his generosity, and when the latter was confined to his house, as an invalid, used to visit him often and sit with him. Marshall,' he once said, 'you come to me like a breath of fresh air.' "

More serious were the animadversions of the Court of Appeal on Marshall Hall's conduct of the Chattell libel case. Miss Chattell, for whom Marshall Hall appeared, got from the jury 2,500*l.* damages against the *Daily Mail*, although only 1,500*l.* was claimed by the writ, and Marshall Hall incurred the enmity of Sir Alfred Harmsworth, afterwards Lord Northcliffe, by an unfortunate reference to his wife. Later an apology was made and accepted, but meanwhile the warfare had been carried to the Court of Appeal, and the comments of that Court, which unfortunately included Lord Justice Mathew, on an unfounded allegation as to the tactics of the paper were such as seriously to damage Marshall Hall professionally. This was in 1902. He had taken silk in 1898. In 1901 he received 4,420 guineas; in 1902 his total receipts were 2,099 guineas, of which the greater part was arrears from the previous year. By August, 1902, he was in serious financial difficulties, and Rufus Isaacs was offering a loan of 500*l.*, which, however, was not accepted.

We have no space to describe the famous trials, many of them for murder, in which Sir Edward Marshall Hall was engaged. In Annie Dyer's case he secured acquittal, before Mr. Justice Wills, by getting a favourable accent put on words used by the accused: "How *can* anyone get rid of a baby like this?" He lost in the defence of Bennett, the Yarmouth murder case, but he himself believed in his client's innocence, and did all he could for a reprieve. The case was memorable for his protest against "trial by the Press." These and other cases in which he was engaged are described in detail by Mr. Marjoribanks. They include the Camden Town murder case, in which, owing, perhaps, to a sudden change of view on the part of Mr. Justice Grantham, he was able to save the artist prisoner, Robert Wood; the Seddon case, and the "Brides in the Bath" case, in which he lost; and the trial of Harold Greenwood, where his defence succeeded.

In the days of financial stress Marshall Hall had had to sell his collection of silver and antiques, "a monument of his versatile and accurate judgment in such matters." It realised nearly 6,000*l.* But in his later years his old prosperity was more than restored—though at no time were his fees anything like those of counsel of the same eminence in civil practice; the Press had become friendly, and Judges and Bar alike had learned to appreciate and respect the most fearless advocate of the day.—("Law Journal").

THE PROFESSION OF THE LAW.

At the Law Society's provincial meeting the following paper was read by Mr. Frank A. Graham (London) :—

As members of a profession, engrossed in its daily tasks and engagements, we seldom turn aside to ask ourselves whether, apart from the fulfilment of the pressing duties of our calling, we have any place in the body politic, or whether in this changing age we carry any weight or influence in shaping it for the common weal.

Our annual autumnal gathering, however may prove to be an opportunity, not otherwise to be found, for such reflection; and if so, it should not be impossible to recognise the unique position which the profession, as a whole, in close touch as it is with men and women of every class, should hold, in guiding and stabilising the streams of thought and action, which have been and are flowing strongly through our country, into channels which may, at least, avoid disappointed hopes and harmful upheavals.

The mere realisation of the fact that we are members of a profession which has to play its part in steadying and guiding our country in days of change and crisis will, without doubt, tend to influence both our judgment and our advice. Class warfare, from either side, will be deprecated; disputes and difficulties will be viewed and advised on from more than one angle; while imperceptibly a spirit of goodwill and conciliation will both infuse our arguments and qualify our actions.

With these opening observations as to our place and usefulness in the nation's life may we go on to consider some aspects of a profession which entails such opportunities and responsibilities,

Its Entrance.

One of the most striking features of our profession is that it is carried on by persons of varying degrees of qualification. Indeed, in a period like the present, when knowledge is extending on every hand, and the habits and thoughts of men are perceptibly changing under the influence of a post-war outlook, the suitable equipment for the practice of the profession of the law (apart from the revolutionary character of recent legislation in regard to the laws of property and descent) becomes increasingly complicated and involved.

No longer can the tendering of advice, based only on observation and experience, suffice; for he who would be wise to-day in the ways of the law will find himself, like unto the searcher after mineral wealth, faced with a succession of strata, in the form of Statutes, ancient and modern, and judicial decisions of varying lucidity, through which he must of necessity drive the shaft of his intelligence before he can obtain the desired result.

To meet this situation there is the well planned and expanding curriculum of the Society's Law School; the guide and counsellor of the budding lawyer as he passes through the entrance gate of general knowledge into articles of clerkship, before descending, duly qualified, into the arena of his chosen profession. In this purpose of leading our articled clerks by the best and surest road to that intellectual well-being which will constitute their principal capital in professional life, the Society is undoubtedly undertaking the most important of its many tasks; and no profession, perhaps, more amply repays the acquisition of a thorough, and at the same time practical, education and training. In proportion to the development of his knowledge will the

future practitioner become valuable to himself, and therefore capable of being valuable to others.

In this connection it may not be out of place to suggest that a power worthy of cultivation, but somewhat neglected in our legal curriculum, is that of *utterance*. Our power over others lies not so much in the amount of knowledge and thought within us as in the ability to utilise and express it. A lack of facility, either to express or adapt ourselves to the various degrees of intellect met with from time to time in the practice of the law is not unknown amongst us; and both in negotiation and in argument many a case has failed to secure a satisfactory presentation through want of suitable words. The addition to the present course of studies of a class for discussion (apart from the well-known and approved debating societies) would probably meet a real need.

Its Continuance.

Here, it may be noted, that confidence is the soil out of which employment grows, and that good repute has been likened to fire—once kindled it is easily kept alive, but when extinguished not easily lighted again.

Our work must largely partake of the character of those who do it; and the tone of our professional character will depend on the estimate which we form of the duties we undertake, and of the spirit which ought to actuate us in carrying them out. For instance, service rendered gives a feeling of satisfaction; but if the service is fulfilled solely in the expectation of reward, the consequent satisfaction is no little dimmed.

In the profession of the law there is, it may be said, little or no room for the diffident or retiring nature—distrustful of his own abilities he is unlikely to do justice to his client's cause. At the same time success in the profession is seldom give to him whose chief asset is self-confidence and assurance, and who, while active in the protection of his client's interest, is not careful as to the means used to attain the sought-for end.

To say that scrupulous exactitude in money matters and the strictest integrity in handling the property of others is required in the profession of the law is to state that which is the basis of the confidence we seek to win; while the neglect of suitable care and attention will undoubtedly lead, sooner or later, to difficulties and confusion. The periodical visit of the auditor, if not essential, is certainly most expedient in the practice of the law.

In the profession of the law an intelligent thrift of time is of the utmost importance to the busy man; and order and proportion in our work will be found to be the true secret of the smooth working of the office machine. A certain degree of latitude in regard to working hours may be necessary from time to time; but to seek to stretch such latitude beyond reasonable limits will be found to be harmful and unwise. While intelligence and energy may be stimulated by pressure from without, yet any beneficial effect may quickly be lost if the pressure becomes too great.

Let the younger practitioner have no fear as to the future. The high places of the profession, few though they be, may be reached with the exercise of quite ordinary qualifications, and in the profession of the law application and attention are seldom left without reward.

Its Drawbacks.

Not for us that self-determination, which to-day is claimed not only by the younger nations of the world, but also by the younger professions. At will they may fix

and adopt a scale of remuneration, adequate or otherwise, for their services; while the legal profession remains tied and bound by Statutes and Rules, with resultant fees that at times look strangely meagre in the light of those which have to be paid elsewhere.

Not for us (with few exceptions) government appointments to official positions. That the *Solicitor* to be appointed must needs be a *barrister* is, alas, one of the paradoxes of the legal world.

Not for us the addition of alphabetical lettering to our names, for the purpose of illuminating our professional standing, as the manner of some is.

Not for us the creation of legal literature on the varied branches of the law—for, after the daily demands of our professional life have been met, there is neither time nor strength for authorship. Whilst *originality*, a valued element in most human affairs, finds little or no scope in the practice of the law.

Its Guardian.

It is of moment that members of the profession should not only properly estimate the immense value of the Law Society to our collective and individual well-being, but also take an active interest in its welfare and extension—joint counsels and efforts are ever needful wherewith to meet common dangers and difficulties.

The advantages secured to the profession by the united action of our Society have been many; and it is surely true wisdom to rely, for the preservation and extension of those advantages, on the body by which they have been secured.

The Law Society, therefore, has a just claim on our whole-hearted confidence and support; but to its continued maintenance and efficiency the loyalty and help of *all* members of the profession becomes more and more indispensable.

It is certainly probable that the two branches of our profession in this country will continue to remain apart; but the spirit underlying both must be one and the same: ever seeking to exert its influence in upholding that freedom and justice, amongst all classes of the community, for which as a nation we are justly proud. To this end a joint school of law in the days to come would surely not be unwelcome to all concerned.

Conclusion.

A profession which has proved so useful cannot escape occasional misunderstandings and abuse; but if we are in earnest in seeking to promote a growing spirit of fellowship and co-operation in the service of our profession, we shall be able, in the future, as in the past, safely to weather any storms that blow. That in a sense we belong not so much to ourselves as to our profession is, perhaps, hardly as yet fully realised; else surely the obligation, under which poor persons may now command our service to enforce their rights and redress their wrongs, would be more definitely acknowledged by the profession as a whole, and not left to a minority to undertake and fulfil. The day, however, must assuredly come when the whole profession will be genuinely proud of its Poor Persons Procedure.

To recapitulate, while the services of our profession are indispensable to the well-being of the nation, a responsibility, which cannot be evaded, rests upon us, both individually and collectively, as to the manner in which those services are discharged,

In days, therefore, when movements leading to agitation and upheaval may, from time to time, menace our constitution, there should surely come to the profession of the law a quickened sense of corporate responsibility, a stronger emphasis on right ideals and practical reforms, as well as a close adherence to those indispensable high standards of conduct and practice which are our conscious heritage from the past—thus, and thereby, taking a definite part in rightly directing the forces of this changing age, as well as fulfilling the responsibilities which rest upon the profession as an integral part of the national life.

Present: Lyall Grant, J.

BANDA ARATCHI vs. MADAR SAIBO ET AL

605. 605a, P.C. Anuradhapura 67104.

Decided: October 25, 1929.

Village Communities' Ordinance, No. 9 of 1924, Section 61—Exception in favour of public officers—where the officer prosecuting is the person injured.

Held: Where the public officer who is prosecuting is also the party injured, he is not for that reason excluded from the operation of the proviso to section 61 of the Village Communities' Ordinance No. 9 of 1924.

Rajakarier with *W. M. de Silva* for the accused appellant.

Lyall-Grant: In this case the accused were charged with various offences. The last three were acquitted and no question arises in regard to them.

The first accused was charged with (1) voluntarily obstructing a public servant in the discharge of his public duties, an offence punishable under Section 183 of the Ceylon Penal Code, and (2) using criminal force on a public servant with intent to prevent him from discharging his duty as such public servant, etc., an offence punishable under Section 344 of the Ceylon Penal Code.

The second and third accused were charged with (1) intentionally insulting and giving provocation to the complainant intending or knowing it to be likely that such provocation would cause him to break the public peace, an offence punishable under Section 484 of the Ceylon Penal Code and (2) voluntarily obstructing the said public functions, an offence punishable under Section 183 of the Ceylon Penal Code.

In the course of the trial a charge of common assault was added against the first accused, an offence punishable under Section 343 of the Ceylon Penal Code.

The first accused was convicted of assault under Section 343 and the second and third accused of insult under Section 484.

At the end of the prosecution the defence took the objection that the charges against the accused were triable exclusively by the Village Tribunal

The objection was over-ruled. The defence called no evidence and the accused were convicted.

The only point argued in appeal was that the case was one exclusively triable by the Village Tribunal.

The Magistrate in overruling the objection referred to Section 61 of Ordinance No. 9 of 1924 and apparently considered that he had power to try the case as the complainant was a public officer.

Section 61 provided that nothing in the section shall preclude a public officer from prosecuting in a Police Court any offence which but for the provisions of the Ordinance would be cognisable by a Police Court.

The complainant is undoubtedly a public servant and a complaint was made of obstruction and abuse of himself when engaged in the performance of public duties.

The facts of the case are that the complainant in the course of his public duties had seized some goats which had come from a rinderpest area.

The first accused attempted to drive some other goats into the building where the quarantine goats were. By orders of the complainant his attempt was frustrated. Thereafter the first accused assaulted the complainant and the other accused abused him.

I think that the case falls within the provisions of Section 61. That section restricts the ordinary jurisdiction of the Police Court. It excepts from this restriction prosecutions by public officers.

I have not been referred to any definition of the expression "public officer" but presumably it is equivalent to "public servant."

It might be argued that the exception is not intended to apply to public officers prosecuting in cases where they are the persons injured, but I see no reason why the proviso should be read in such a restricted sense.

The section is one removing certain cases from the jurisdiction of the ordinary Court of the land.

The proviso leaves intact the jurisdiction in a certain wide class of cases. I do not see any reason why the legislature should be presumed to have intended to take a certain class of these

cases, viz., those where the prosecuting officer is also the person injured cut of the jurisdiction when this is not expressly provided for: at any rate whereas in the present case the assault was a direct consequence of action taken by the complainant in pursuance of his duties as a public officer.

In the absence of authority on the point—none were quoted to me—I hold that the plea as to the jurisdiction of the Court fails as the prosecutor is a public officer. For another reason I am unable to say that the Court has no jurisdiction. No evidence has been led to show that the offence was committed within the limit of a Village Tribunal and I do not think that in the absence of proof I would be entitled to make such an assumption.

If this objection stood alone the case might be sent back for evidence on the point, but as I think the plea as to the jurisdiction fails on other grounds it is not necessary to do so.

I see no reason to interfere with the sentence on the first accused.

As the offence committed by the second accused is not one for which he could be bound over, the order to that effect so far as he is concerned, is set aside, and the case remitted back for sentence on the second accused.

On this point see sub-Inspector of Police vs. Silva (1) and Silva vs. Fernando (2).

With this exception the appeals are dismissed.

Present: Fisher C.J. and Drieberg.

DAVID vs. DAVID ET AL.

159 D.C. (Inty.) Jaffna 22900.

Decided: November 4, 1929.

Thesawalamai—The principle that females inherit from females—where the survivor is unmarried—Estoppel.

Held: The principle regulating intestate succession under the law of the Thesawalamai, namely that females shall inherit from females is not affected by the fact that survivor is unmarried.

Where a transfer, subject to a condition, has been executed in respect of property to which the transferee is entitled, the fact that the transferee has been a party to the deed of transfer does not estop him from denying the title of the transfer in an action for a transfer on the ground that there has been a breach of the condition.

H. V. Perera with *Subramaniam* for the appellants.

N. E. Weerasooria with *Gnanapragasam* for the respondent.

Fisher, C.J.:—The first point in this case is whether on the death of Maria, leaving three brothers and one unmarried sister, Elizabeth, the property with which Maria had been dowered devolved upon the three brothers and the sister in equal shares or on the sister solely. The learned Judge held that it devolved on the sister only, and I think that that conclusion is right. De Sampayo J., in his judgment in Kuddiar vs. Sinnar, (17 N.L.R. at page 244) says:—"One general rule of the Thesawalamai is that males succeed to males and females to females, and accordingly it was held in Thamber vs. Chinnatamby (1903; 4 Thamb 60) that where an unmarried woman left a married sister and brothers, the sister succeeded to the exclusion of the brothers." Again Grenier, J. in his judgment in Thiagarajah vs. Paranchotipillai (111 N.L.R. at page 348) says:—"There is thus recognised by the Thesawalamai a principle regulating intestate succession, which may be described as a fundamental one, that males inherit from males and females from females."

The general principle that females inherit from females must in my opinion, be taken to apply in this case. The fact that Elizabeth was unmarried at the time of Maria's death seems to be no reason for holding that the principle does not apply. Sub-section 6 of Section 1 of the Thesawalamai supports the view that Elizabeth succeeded to the entire property. That section states:—"Although it has been stated that where a sister dies without issue the dowry obtained by her from her parents devolves to her other sister or sisters" and goes on to deal with a case in which the deceased sister leaves her mother surviving her who has "in the meantime become a wi-

(1) 10 Ceylon Law Recorder, p.6.
(2) 4 C.W.R. p. 260.

dow and poor." That being so, in my opinion the contention that the legal title for the property remained vested in Elizabeth who sold her interest to the plaintiff-respondent under circumstances to which I shall hereafter refer is perfectly sound. The learned Judge was of opinion that Elizabeth had "come to an understanding with her brothers as to the rights of inheritance," and on that footing he held that in the events which had happened she must be taken to have been entitled to only one-fourth of Maria's property. The subsequent dealings with the property were, firstly a transfer P2 dated the 7th of March, 1900, by one of the three brothers, the 1st defendant Benjamin David, purporting to act as administrator of Maria, by which the property was conveyed to the three brothers and the sister "in equal shares" that is to say one-fourth share to each of them. At that time Elizabeth was a minor, but in any case the transfer could not affect the title which had devolved upon her on the death of her sister. The next document P3, dated the 19th of November 1904, purports to be a transfer by the three brothers of their respective one-fourth shares to their sister. It contained the following provisions:—

"In case if the said Elizabeth Muttammah were to marry in proper way according to the wish of the said John David, Francis Daniel David and Benjamin David, and when she gets our consent in writing this donation will hold good and be a valid one; otherwise we make it invalid.

"After obtaining the aforesaid consent if Elizabeth Muttammah were to marry, we do hereby agree and undertake that all the above described properties will be her dowry.

"And know all men by these presents that the said Elizabeth Mutammah do hereby accept this donation with gratitude and with my full mind subject to the abovesaid conditions and in testimony thereof I do set my signature hereto."

By that document the three brothers were in fact giving nothing to Elizabeth which they had the right to give and that being so it would require very strong evidence to show that Elizabeth by executing that document was estopped from denying the title of her three brothers to three-quarters of the property. In fact one of the brothers, John David, arranged Elizabeth's marriage for her and though there was no consent in writing by the other two there was no reliable evidence to show that at the time of the marriage the other two brothers really took exception to it. But, the construction of the whole document by which the so-called transferors conveyed the property to Elizabeth, subject to the conditions set out above, clearly shows that it did purport to be a transfer to her and could not of itself operate as a re-transfer in the event of Elizabeth marrying without the consent of her brothers. The document was not a family arrangement with mutual concessions. It purported to convey other properties besides the property in dispute and with some of these Elizabeth undoubtedly dealt on the basis of their being absolute property. Certain documents and pleadings were relied upon as showing that Elizabeth acted on the view that the two-fourths share of the brothers who had not consented to her marriage did not belong to her. But there was no document to show that these two brothers dealt with this two-fourths as their own and, in my opinion, Elizabeth did nothing which could operate on death. Even if she "came to an understanding with her brothers," as stated by the learned Judge, a legal title cannot pass by such a process unless possibly in a case where the person in whom the property is supposed to have passed has done something to his prejudice or altered his position in consequence to the knowledge of the supposed quasi-transferee which precluded the latter as against the former from saying that the property is still vested in him or her.

There was a further incident, namely, an action in 1923 by the present defendants to partition the property in which Elizabeth and her husband and the present plaintiff were defendants. That action was brought because Elizabeth by mortgaging the property had placed it in jeopardy of passing out of the family. The mortgagor had brought an action to enforce his security and the execution of the decree was stayed pending a decision in the partition action. The action, however was settled, and the Minute relating to the settlement is as follows:—(D3) "As

the plaintiff is buying the share of the 2nd defendant and as a portion of the purchase amount having been paid and as the deed of transfer is to be executed in favour of the plaintiff, I move to withdraw the action." That was signed for the proctor for the plaintiffs and by the proctor for the 3rd defendant, the plaintiff in the present action. The deed of transfer referred to in that Minute was executed on the following day and the 3rd defendant's proctor was a witness to the deed. It conveyed the property now in question as Elizabeth's property to the plaintiffs in the action. It is clear that the plaintiff was bound by that settlement and must be taken to have known of all its terms. For these reasons it is clear to my mind that the entirety of the property in question is vested in the defendants and the judgment of the learned Judge must therefore be set aside and decree must be entered dismissing the action with costs in this Court and in the Court below.

Drieberg J.:—I agree.

Present: Fisher C.J. and Maartensz J.

CHINNIAH vs. SUPPRAMANIAM ET AL.

165 D.C. (F) Jaffna 23451.

Decided: November 11, 1929.

Res judicata—Judgment "in personam"—Estoppel.

Held: A judgment in personam raises an estoppel only against the parties to the proceedings in which it is given and their privies—that is those claiming or deriving title under them.

Per Maartensz J.: "It is necessary to the relation of party and privy not only that the two persons should have a similar interest in the property to which the estoppel relates but the latter should derive title from the former."

Balasingham for the appellants.

Subramaniam for the respondent.

Maartensz, J.:—This is an action for the partition of a land called Vellalai, and the question for decision in this appeal is whether the judgment and decree in case 21895 of the Court of Requests of Point Pedro operates as res judicata against the plaintiff and third defendant-appellants.

The question arises in this way.

The plaintiff and third defendant claimed half the land as the only heirs of their brother Kanapathipillai. The fourth defendant claimed a one-sixth share by purchase from one Kumarasamy, who, he alleged, was a child of another sister of Kanapathipillai named Valliammai. The deed in his favour No. 1437 was executed after the death of Kanapathipillai and the vendor recited a title by inheritance from Kanapathipillai.

The plaintiff and third defendant's contention as regards Valliammai is that she is the daughter of a mistress kept by their father and therefore not entitled to any share in the land which devolved on Kanapathipillai from his mother Parupathy.

One of the issues for decision therefore is whether Valliammai was a daughter of Parupathy.

The same issue was decided in the affirmative in case No. 21895 C.R. Point Pedro, which was an action brought by Kanapathipillai against, inter alia, another purchaser from Kumarasamy named Vallinachchy for a declaration of title to half the land in dispute. Vallinachchy claimed one-eighth share by purchase from Kumarasamy on a deed executed in 1925 in which the vendor recited title by inheritance from Valliammai. In the former case the land in dispute was the same and the same issue was decided. The appellants however contend that the decision in the former case is not res judicata, because the parties were not the same and the fourth defendant is not a privy of Vallinachchy in whose favour the issue whether Valliammai was a daughter of Parupathy was decided.

The judgment pleaded as res judicata is a judgment in personam. Such a judgment raises an estoppel only against the parties to the proceedings in which it is given and their privies—that is, those claiming or deriving title under them. [13 Halsbury s. 478 p. 343]. It is necessary to the relation of party and privy not only that the two persons should have a similar interest in the property to which the es-

toppel relates but the latter should derive title from the former—[13 Halsbury s. 479; p. 345].

The estoppel must also be mutual. Only these can take advantage of an estoppel by record who, if the decision had been the other way, would have been bound by it—that is to say, in case of a judgment, inter partes, the parties and their privies. It is not enough that the person against whom the estoppel is set up was party or privy to the judgment relied on; each party to the later proceeding must nav been party or privy to the earlier one [13 Halsbury s. 485; p. 349].

The plea of res judicata in this case must in my opinion fail for want of mutuality. The appellants as the heirs of Kanapathipillai are his privies. But the 4th defendant is not a privy of Kumarasamy, his vendor.

[Sittampalam vs. Sinnapillai (1913) 1. Wijewardene's Report p. 50]. In that case Wood Renton A.C.J. said "a vendee is a privy of his vendor. A vendor is in no sense a privy of his vendee."

It follows that neither Kanapathipillai nor his successors in title could plead the decision in the Court of Requests case as res judicata against Kumarasamy if the decision had been the other way, nor therefore could they plead it against the 4th defendant. That being so the 4th defendant cannot plead that the decision operates as res judicata against the appellants.

The authorities referred to by counsel for the respondent do not affect the principle that the estoppel must be mutual.

I would set aside the decree appealed from and remit the case to the District Court for trial in due course.

The learned District Judge will consider whether Vallinachchy should not be made a party to the action for if Kumarasamy became entitled to a 1-6th share on the death of Kanapathipillai his title to the extent of 1-8th would prima facie ensure to the benefit of Vallinachchy.

The appellants will be entitled to the costs of appeal and the costs of the contest in the Court below from the 4th defendant.

Fisher: C.J. agreed in a separate judgment.

Present: Lyall Grant J.

THAMBYAH vs. VANDERPUT.

675 P.C. Trincomalie 2119.

Decided: November 13, 1929.

Ceylon Penal Code, Section 408—Mischief—Mens Rea.

Held: In a charge of mischief, the fact that the accused acted in the bona fide belief that he was acting in the exercise of a legal right negatives any intention on his part to cause wrongful loss or any knowledge that he was likely by his act to cause such loss.

Soertsz for the accused-appellant.

Subramaniam for the complainant-respondent.

Lyall Grant, J.: The accused in this case was convicted of the offence of mischief by shooting an animal, viz, a cow belonging to the complainant. The accused is the owner of an estate and it appears that cattle were in the habit of trespassing on the estate. The accused accordingly obtained from the Government Agent an order to shoot cattle issued under the Cattle Trespass Ordinance of 1876. The order recited the fact that it had been shown to the Government Agent's satisfaction that stray cattle were in the habit of trespassing upon Medway Estate and doing damage thereunto, and that such cattle could not be seized or identified so that the owners thereof may be ascertained and proceeded against. After this recital it directed the accused to proceed to the estate and if, after reasonable exertion he found it impracticable to seize or identify the said cattle then he was to cause the cattle aforesaid to be shot or otherwise destroyed in his presence.

The accused's watcher said that on the day in question there were 4 cattle straying on the estate when this animal was shot, and that he did not know to whom they belonged. He said he used to see this animal almost every day with other cattle on the estate; that he tried to chase it but that it used to run into the jungle. He denied that it was in calf as averred by the complainant. He said there were some brand-marks on it but that he did not know what they were. On the day in question he said he chased the animal

out of the premises, that it ran away into the jungle, and that it came back at about 8-30 the next morning. On this occasion he did not chase the animal but went and informed the clerk that he was unable to seize the animal as he got some thorns into his foot. On the clerk's suggestion he informed the accused that there was an animal trespassing and that he was unable to seize it. Thereupon the accused went with a gun and on seeing him the cow started to run; then the accused followed it and when the animal stood and looked at him he shot it.

The learned Magistrate in his judgment says that the question to be decided by the Court is whether the accused was justified in these circumstances in shooting the animal, and he comes to the conclusion that no reasonable exertion was made either by the accused or his watcher to seize the animal before it was shot. On this ground and also on the ground that he did not take sufficient steps to identify the animal the Magistrate comes to the conclusion that the accused was not justified in shooting it. He proceeds: "The accused thought that he had the right to shoot cattle when he was armed with an authority from the Government Agent and the destruction of the animal caused in this case was wilful and intentional and it was done with a view to instil some terror and their authority into the mind of the villagers" and he says that the circumstances of the case clearly show that the intention of the accused was to cause wrongful loss to the owner of the animal.

It does not seem clearly proved to my mind that the accused had the intention to cause wrongful loss or damage to any person. It is quite evident that he had suffered very considerably from trespassing cattle, so much so that he had succeeded in convincing the Government Agent that stray cattle were damaging his property and that the cattle could not be seized or identified. In such circumstances the Ordinance permits an owner duly armed with the Government Agent's licence or order to shoot stray cattle if he finds it impracticable to seize or identify them after reasonable exertion. If such reasonable exertion had been proved the act of the accused in shooting the cattle was quite legal and the question of wrongful loss or damage does not arise. The Magistrate however has held that in his opinion the exertion made by the accused was not reasonable and that with a reasonable amount of exertion it would have been practicable for him to seize or identify the cattle. I do not think however, that this concludes the case against the accused as the point to be considered is whether the accused was acting in the bona fide belief that he was exercising the powers conferred upon him by the order to shoot. If he had such a belief, he had no intent to cause wrongful loss or damage, nor did he know that he was likely to cause wrongful loss.

Gour, in his Commentary on the Penal Laws of India in Section 4605 dealing with mischief, says: "An illegal act done in the belief that it is legal is a good defence to a criminal prosecution for an offence in which the criminality depends upon the presence of knowledge or intention" and in Section 4606 he says, "The principle in such cases appears to be, was the act done out of malice or in the assertion of a bona fide claim of right. Of course, such a claim may be legal or illegal. If legal, the question of bona fides does not arise, for if the act was legal the question of intention is immaterial. It is only when the act is indefensible on the ground of its legality that the question of a bona fide belief arises. That plea has a place only in the case of a doubtful right or a right which a person may still believe in as his own."

In the present case there seems to me to be a presumption in favour of the accused in all the circumstances that he was acting in the bona fide exercise of a right and that accordingly he did not intend to cause wrongful loss or damage.

I cannot find any evidence to justify the Magistrate's finding that the act was done with a view to instil terror and an idea of the accused's authority into the minds of the villagers. It seems to me to have been done with the primary object of preventing damage to his own property in a manner which he believed to have been authorized by the Government Agent.

The appeal is allowed and the accused acquitted.

Present: Fisher C. J. and Maartensz J.

STEWART ET AL VS SENANAYAKE ET AL.

198 D C (F) Avisawella 165.

Decided: November 15, 1929.

Last Will—Direction for sale of immovable property and proceeds to be distributed among certain beneficiaries —Election—Trusts Ordinance No. 9 of 1917, Section 58.

HELD:—Where a Last Will contained a direction that certain immovable property should be sold and the proceeds divided among specified beneficiaries and where the beneficiaries dealt with the property as its owners, they elected to take the property in its original character within the provisions of the Trusts Ordinance No. 9 of 1917.

The subsequent acquisition of the property by a judgment debtor does not enure for the benefit of the purchasers at the sale in execution of his property.

H. V. Perera for defendants-appellants.

Ranawake for defendants-respondents.

Fisher, C.J.: Assuming that there was a trust for sale in this case, in my opinion, Section 58 of the Trusts Ordinance, No. 9 of 1917, would be applicable, but the case was argued in the District Court and the defendants-appellants' answer was drawn on the basis that the will gave the property to the beneficiaries. The questions therefore to be considered are (1) What passed under D2? (2) Are defendants entitled to the benefit of W. A. Stewart's subsequent acquisition? and (3) Have the defendants acquired a prescriptive title to the share? With regard to (1) all that passed under D2 were the interests to which C. F. Stewart, J. M. Stewart and Alice R. Stewart were entitled, that is to say, 3-5ths. W. A. Stewart's interest was then vested in his assignee and the remaining 1-5th was vested in the three grand-children of the testator who were then minors, and moreover, were no parties to the action. As to (2), in the absence of any authority I do not think that the subsequent acquisition of property by a judgement-debtor ensures for the benefit of the purchasers at the sale in execution of his property. All that they acquired is the existing right, title and interest, and this cannot include property subsequently acquired by purchase by the judgement-debtor. As to (3), there is evidence on behalf of the plaintiff of possession by Alice on behalf of the persons entitled to the 2/5th share which did not pass on D2, and further there is evidence of a direct assertion of her possession in that capacity which must have been within the knowledge of the transferees in D2. Only one witness is called for the defendants. It must be taken therefore that they were, and were treated as, co-owners and only possessed as such.

The appeal must be dismissed with costs.

Maartensz, J.—This was an action for declaration of title to an undivided 2/5th share of an estate called Belangalla.

Belangalla Estate belonged to John Theodore Stewart. He died on 29th September, 1905, leaving a last will which was admitted to probate in case No. 2497 of the District Court of Colombo.

The plaint avers that John Stewart by his last will

> "devised and bequeathed all his property to his children, Alice Rebecca Stewart, William Alexander Stewart, John Marshall Stewart and Charles Francis Stewart, in the proportion of 1/5th share each and the remaining 1/5th share to his grandchildren, John Francis Theodore Stewart, Irene St. Clare Stewart, Gladys Amelia Cyril Stewart jointly, subject however to a life interest over immovable property in his wife, who died about the year 1909, whereupon the said children and grandchildren of John Theodore Stewart became the absolute owners of the said Belangalla Estate hereinbefore described."

The three grand-children John, Irene and Gladys by deed No. 135 dated 16th February, 1920, sold their 1/5th share to William Alexander Stewart.

In execution of a mortage decree entered in case 9989 a 1/5th share was sold against William Stewart and purchased by the mortgagee Daniel Ebert upon deed No. 213, dated 7th November, 1924, executed by the Secretary of

the District Court of Colombo. Ebert by deed No. 344, dated the 18th September, 1926, sold this 1/5 share to William Stewart and R. A. Rabot.

William Stewart was adjudicated an insolvent in proceedings 2632 of the District Court of Colombo. The assignee sold the insolvent's 1/5th share of the estate with the leave of Court by public auction and it was purchased by A. L. Thiripadinayaker on the 12th April, 1916, and he obtained a transfer from the assignee No. 114, dated 19th April, 1917. Thiripadinayaker by deed No. 152, dated 9th June, 1920, sold this 1/5th share back to W. A. Stewart.

The plaintiff's claim to a 2/5th share is based on these deeds.

The 4th defendant filed answer in which he averred

"that upon a writ issued in case No. 40505 of the District Court of Colombo against C. F. Stewart, J. M. Stewart, Alice R. Stewart and W. A. Stewart the 1st plaintiff, the entirety of the land described in the plaint was sold against them on 26th February, 1916, and was purchased by M. Marigida Perera Hamine and M. G. Perera; this defendant who obtained Fiscal's transfer No. 1501 dated 17th August, 1916, and the said M. Marigida Perera entered into possession of the said premises."

Marigida Perera is said to have gifted her interests to Donald Senanayake who in turn transferred the half share to the 1st, 2nd and 3rd defendants, who are minors; these defendants said they would abide by the answer filed by the 4th defendant.

The action was tried on the following issues:—

1. Was Wm. Alexander Stewart (1st plaintiff) originally entitled to an undivided 1/5th share of the land in question?

2. Were John Fr ncis, Irene and Gladys Amelia Stewart entitled to an undivided 1/5th share jointly?

3. Did the said Wm. Alexander become owner of a further 1/5th share by purchase from the said John Francis, Irene and Gladys Amelia?

4. Was a 1/5th share belonging to the said Wm. Alexander sold on writ in case No. 9989 of the D. C. of Colombo?

5. If so, did the said share devolve again on the said Wm. Alexander and the 2nd plaintiff as set out in paras 5 and 6 of the plaint?

6. Did the sale in case No. 40505 of the D. C. of Colombo of a 1/5th share belonging to the said Wm. Alexander convey good and valid title in view of the fact that the said Wm. Alexander had been earlier adjudicated insolvent in case No. 2632 of the D. C. of Colombo. Did the assignee acquiesce in and ratify this sale to the 4th defendant and predecessors in title?

7. Was a 1/5th share belonging to the said Wm. Alexander sold in proceedings in the said case No. 2632?

8. If so, did deed No. 114 dated 19th April, 1917, convey title superior to any claimed by the defendants upon Fiscal's transfer No. 1501 of the 17th August, 1916?

9. Prescription.

10. Damages.

11. Is the 1st plaintiff estopped by his conduct in failing to disclose the fact of insolvency and thereby inducing the purchasers on Fiscal's transfer No. 1501 to purchase?

12. Did the subsequent acquisition of title by 1st plaintiff upon deeds Nos. 152 of June 9th, 1920, and 135 of February 16th, 1920, enure to the benefit of 4th defendant and covendees?

13. Did the executor have the right of dominium over the property in terms of the last will? If so, have the defendants acquired title?

The learned District Judge held that the shares of the grand-children of John Theodore Stewart were not affected by the sale in execution against his four children in case No. 40505 of the District Court of Colombo and that the defendants had not acquired prescriptive title to the 1-5 share of the grand-children of John Stewart, as Alice Stewart continued to live on the estate on behalf of the grand-children. He rejected the evidence for the defence that Alice Stewart was allowed to live on the estate as she had no other place in which to live.

As regards the shares of William Stewart the first plaintiff he heid that nothing passed at the execution sale as he was an insolvent at the date of the sale, the 26th February, 1916.

It was contended in appeal (1) that Belangalla Estate did not vest in John Stewart's children and grand-children under the will executed by him, (2) that even if the first plaintiff's 1-5 share did not pass on the sale of execution of the decree in case No. 40505

of the District Court of Colombo, the subsequent acquisition of title by him upon deed No. 152 of June 9th, 1920, executed by the purchaser at the sale by the assignee enured to the benefit of the defendants, (3) that the learned District Judge was wrong in holding that Alice Stewart continued to live on the estate on behalf of John Stewart's grand-children and Thiripandinayaker.

The last two contentions might conveniently be disposed of first.

The argument that the subsequent acquisition of title by the 1st plaintiff enured to the benefit of the defendants is based on the principle that when a person sells property to which he has no title and acquires title subsequent to the sale, the title by operation of law enures to the benefit of the vendee. [Rajapakse v. Fernando (1920) Privy Council, 21 N L R 495.] This decision proceeds upon the ground that the vendor and his privies are estopped from denying the title of the vendee. Lord Moulton at page 497 says "their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon the English doctrine applies that where a granter has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee, or, as it is usually expressed, 'feeds the estoppel.'"

Bertram, C.J., in the case of (Gunatilleke v. Fernando (1919) 21 N L R 257), held that the Roman-Dutch Law is in accord with the English Law on the subject that a person who sells property is estopped from disputing the title of his vendee.

We were not referred to nor have I been able to find any case in which the principle was applied to the case where property was sold in execution against a judgment debtor who had no title, but who acquired title subsequent to the sale. I am of opinion that no authorities can be found because the theory of estoppel is inapplicable in the case of a sale in execution.

Another objection to the argument is that the sale against the plaintiff was null and void as at the time the property was seized he had been adjudicated an insolvent.

By Section 71 of the Insolvency Ordinance 7 of 1853 when any person shall have been adjudicated insolvent all his real estate vests absolutely in the assignee. An exception is made by section 56 in favour of executions and attachments against the lands of the insolvent bona fide executed by seizure before the date of the filing of the petition for sequestration.

The exception does not apply in this case as the petition for sequestration was filed on the 15th February, 1915, and writ did not issue in case No. 40505 till the 1st of October, 1915.

The plaintiff should have moved under Section 404 of the Civil Procedure Code to substitute the assignee as defendant in place of William Stewart or add him as a party defendant to the action to render the seizure effective.

As regads the issue of prescription I see no reason to disagree with the finding of the trial Judge that Alice Stewart remained in possession on behalf of John Stewart's grand-children and Thiripadinayaker. His finding is strongly supported by the letter P14 dated November 24th, 1916, addressed to the Deputy Fiscal, Avisawella, by Messrs T D and E L Mack, Proctors, in which they asserted with reference to the order for possession issued in favour of the execution purchasers in D. C. Colombo No. 40505 that the purchasers were only entitled to three-fifths of the estate and that Mrs. Stewart, who I take it is Alice Stewart is in possession on behalf of the minors and Triripadinayaker none of whom are bound by the decree.

In any event the plea of prescription must fail as against John Stewart's grand-children as the eldest attained the age of 21 on the 3rd November, 1917, less than ten years before the action was filed.

The main question for decision, however, is whether any title vested in John Stewart's children or grand-children under the will executed by him.

The testator appointed the late Mr. Richard de Saram, executor of his will, and as regards Belangalla Estate he directed as follows:—

> "I further direct that my said executor shall as soon after the death of the said Patridumalge Nona Hami as he shall think fit sell either by public auction or private contract for such price or prices as he shall in his absolute discretion think proper my said Belangalla Estate and the furniture in the house thereon."

He devised the proceeds of sale of Belangalla Estate and his other properties as follows:—

"I give devise and bequeath the nett proceeds of all and every such sale and sales calling in and conversion and of the investments to my children Alice, William, Alexander, John and Charles and to John Francis Theodore, Irene St. Clare and Gladys Amelia Sybil, my grandchildren, the children of my late daughter, Mary, in the proportions following, that is to say, an equal fifth share to my son William Alexander, an equal fifth share to my son John, one equal fifth share to my son Charles, an equal fifth share to my grand-children the said John Francis Theodore, Irene St. Clare and Gladys Amelia Sybil or the survivor or survivors of them my said grand-children share and shares alike and I direct that the share or shares to which any of my child or children or grand-child or grand-children who shall be minors or a minor shall be paid by my said executor to and deposited in bank for the use and benefit of such minors or minor respectively to be paid to him or his or her respectively attaining the age of 21 years."

The life renter died in 1909. The executor died in or about the year 1920 without carrying out the directions in the will.

The question whether the title vested in John Stewart's children and grand-children was not raised in the issue or in the petition of appeal in the form in which it was presented to us at the argument in appeal.

The issue in the District Court at all relevant to this question is the 13th issue which runs as follows:—

"Did the executor have the right of dominium over the property in terms of the last will? If so, have the defendants acquired title?"

In the petition of appeal it was urged that:—

"They are entitled to succeed in law on issue 13 inasmuch as the last will referred to in the proceedings, conferred 'the dominium' over the property in dispute to the executor and that therefore the possession by the defendants after their purchase at the Fiscal's sale became adverse to the rights of the rightful owner, namely, the executor, as from the date of such purchase."

I think it necessary to refer to the issue and the statement in the petition of appeal because the District Judge in his judgment after stating shortly the terms of the will observed that the executor does not appear to have carried out the direction in the will that he should sell the property and that "it is not questioned that the four children of J. T. Stewart severally and his grand-children jointly shared a fifth of the property."

The argument in appeal was that the children and grand-children of J. T. Stewart had acquired no title under the will, and that the action must fail whether the defendants had title or not.

On the other hand it was argued that the will did not create a trust and that the property was vested in the heirs as the executor had not carried out the testator's directons by selling the estate.

The will, in my opinion, does not create an express trust. The property is neither bequeathed to the executor nor vested in him in trust for sale. If there is a trust it is an implied trust arising from the direction to the executor to sell the estate and distribute the proceeds of sale in the manner specified in the will.

The will is a very unsatisfactory document. No provision is made in it for the appointment of another executor to carry out the directions in the will in the case the executor named predeceased, the life renter. In the absence of any words vesting the title in the executor, I doubt very much whether it could be said that on his death the legal title passed to his legal representatives.

The title is left in a state of suspense which is intolerable.

The children and grand-children have been looked upon as the owners of Belangalla Estate from the time of the death of the testator.

They have dealt with it as owners and the defendants have purchased the shares of three of the children on the footing that they are the owners of the property.

It appears to me that if there was a trust for sale this is a case in which the heirs of John Theodore Stewart have elected to take the property in its original character.

The Trust Ordinance 9 of 1917 provides for such election. Section 53 enacts that:—

"The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest."

"And where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract, and all of one mind, he or they may require the trustee to transfer the trust property to him or them, or to such person as he or they may direct."

Illustration C to that section appears to me to be exactly in point. It runs as follows:—

"A transfers certain property to B and directs him to sell or invest it for the benefit of C, who is competent to contract. C may elect to take the property in its original character."

The only difficulty in the way of the plaintiffs is the absence of a deed for the execution to the heirs.

But whereas in this case, these heirs, 1st defendant, and Magrida Perera from whom the 2nd, 3rd and 4th defendants derive title have for many years treated the property as vested in John Theodore Stewart's children and grand-children, we ought not I think, to disturb the construction they have placed on John Theodore Stewart's title.

[Vansanden et al v. Mack et al (1895) 1 N L R p 311.]

I would dismiss the appeal with costs.

Present: Garvin, J. and Dalton, J.

MENSI NONA vs. NEIMALHAMY.

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270 D.C. Galle 21840.

Decided: May 9, 1927.

Partition—Amicable division among co-owners— Termination of common ownership—Interpretation of Deed—Prescriptive title to separate lots—Dismissal of action.

Held:—An informal amicable division of a land among co-owners followed by exclusive possession of the lots in severalty for the prescriptive period terminates the common ownership.

The fact that hereafter a person entitled to a separate lot in dealing with his interests by deed refer to those interests as a fractional share of the larger land does not have the effect of consolidating his lot with the other lots so as once again to form the common land.

Hayley with *Rajapakse* for appellants.

H. V. Perera for respondents.

Garvin, J.—This is an appeal by the plaintiff whose action for partition of the land Heenatiyabedda was dismissed upon the ground that that land had been amicably partitioned between the then co-owners as far back as 1895, and had ever since been possessed by them and their successors in severalty and exclusively. That the land as it exists to-day is divided into a number of separate allotments, each of which is being held and possessed as a separate land is beyond question.

It has also been clearly established by the evidence of the surveyor, Mr. Weeraratne, that in 1895, at the instance of the then co-owners, he surveyed and blocked out the land, and handed to each of the persons then in possession a plan of the block allotted in severalty to him.

One of these plans has been produced and is the document ID 2. It is dated April 21, 1895, and is the block allotted to Sindonona. This block is identified as the block "K" on the plan which represents the land in its present state and is claimed by the fourth defendant, Leisinona, as the separate property of her family. Moreover the deed ID 4 of 1897 shows that one Arnolis, plaintiff's own father-in-law, who was at one time a co-owner, dealt with a divided portion of this land. It is contended by Counsel for the appellant that many of the deeds by which certain of these co-owners and their descendants appear to have dealt with their interests referred to those interests in terms of undivided shares, and upon this is based the contention that those who acquired interests under those deeds cannot in the absence of proof of exclusive and adverse possession of a defined allotment for the prescriptive period to be held to be entitled to anything more than an undivided interest in the whole land. An amicable division unless it is confirmed and embodied in an appropriate notarial writing does not of itself determine the common ownership. But where each or any of the parties to such a division can be shown to have enter-

ed into possession of the lot assigned to him in severalty and to have retained possession adversely and exclusively for the necessary prescriptive period that lot ceases to be part of the land once held in common.

The evidence shows that the lot "K," "A," and "A1" and "J," at least have in this way acquired the character of separate lands no longer forming part of what was once a larger land held in common.

Once such a separation has taken place I am unable to agree that the circumstances that a deed by which a person thus entitled to a separate allotment and who has lost every interest in the other lots, purports to deal with his interests refer to those interests as a fractional share of the original larger land can have the effect of consolidating his separate lot with any or all of the other separate lots so as once again to form the common land.

It is a matter of common knowledge that there was a practice with certain notaries of following the description in some earlier deed when preparing a fresh deed, and specially so in cases where a division of one land to several allotments is not clearly evidenced by the production of a notarial document drawn up for the purpose of giving legal effect to such a settlement. But inasmuch as there is in this case evidence that four, at least, of the lots have definitely acquired the character of separate lands, the plaintiff's action for the partition of the whole of Heenatiyabedda upon the footing that it was one land fails and has rightly been dismissed.

The learned District Judge, however, proceeded to declare the plaintiff entitled in severalty to lots "H" and "HI." This is not a proceeding in which he is entitled to make such a declaration nor is it desirable that such a declaration should be made.

The action for partition having failed the proper course is to dismiss the action leaving it to the plaintiff to take such other or further proceedings as he may be advised to vindicate his title.

The appeal is dismissed with costs.

Dalton, J.—I agree.

Present: Lyall-Grant, J.

POLICE CONSTABLE RAHAMAN vs. PERERA.

604 P.C. Kandy 29639.

Decided: November 4, 1929.

Ceylon Penal Code, Section 484—Insult—Ingredients of the offence.

Held: Abuse is not punishable under Section 484 unless the person abusing gives provocation intending or knowing it to be likely that such provocation will cause the person provoked to break the peace or to commit an offence.

Rajapakse for accused-appellant.

Lyall-Grant, J.—This is an appeal from a conviction for insult under Section 484 of the Ceylon Penal Code. The complainant is a Police Constable in Kandy and the accused is a driver of a 'bus. The case for the prosecution is that on the day in question the complainant had a case against the accused for not showing him his license on a previous date. For some reason or other, on the day in question the constable wished to look at the license of the accused and stopped his 'bus for that purpose. Accused handed his license to him. The constable took down particulars and then handed back the license. The accused then used the words of abuse complained of and drove away. The constable was asked whether he was annoyed by the words used and he said "I was not annoyed. I felt ashamed. I was not angry. I was not provoked to commit a breach of the peace." The learned Magistrate in convicting the accused said: "It is not necessary for a conviction under this section for the language to have actually provoked the complainant. It is enough that the language was provocative and indecent." It is important in considering this offence to examine carefully the wording of Section 484 which runs as follows:—"Whoever intentionally insults and thereby gives provocation to any person intending or knowing it to be likely that such provocation will cause him to break the public peace or commit any other offence shall be punished, etc."

In the case of C. de S. Mataregawera vs. Yaratanepi Unnanse (1), it was held that mere verbal abuse is not by itself punishable under this section. That

was a case where the accused abused the complainant in indecent terms. There it was observed by Mr. Justice Pereira that "the question is whether it can be said that the accused intended to provoke the complainant to commit a breach of the public peace or knew that he by the words used by him was likely to cause the complainant to commit a breach of the public peace." The learned Judge there referred to a dictum by Hutchinson, C.J., in 3 Weerakoon's Reports, 80, where the Chief Justice observed that "although the language used by the accused was foul and inexcusable, mere verbal abuse, however reprehensive it might be, was not punishable under Section 484, unless it appeared from the circumstances, from the terms of the abuse itself and having regard to the person to whom it was addressed though the person who used it intended or knew that it was likely to cause the person to whom it was addressed to break the peace or to commit some other offence." He added "I do not think that I can say that the mere foulness of the language used is by itself sufficient to prove the required intention or knowledge."

It is clear from the Ceylon as well as the Indian authorities that abuse is not punishable under Section 484, unless the person abusing gives provocation intending or knowing it to be likely that such provocation will cause the person provoked to break the public peace or to commit an offence. I do not think it can be said in the present case that the accused had either the intention of causing the Police Constable to break the public peace or knew it to be likely that the abuse would make him to do so. It appears that the Police had in hand one or two prosecutions against the accused for offences against the Motor By-laws, and after the complainant, accompanied by another constable, had examined the accused's license and just before the accused was driving off, he, in a fit of temper, used the words complained of.

I do not think the accused can be convicted under this section. The appeal is allowed and the conviction quashed.

2 Crl. Appeal Rep. 49.

Present: Dalton, J.

DE SILVA VS. ISAN APPU.

159 C.R. Balapitiya 15903.

Decided 11th December, 1929.

Evidence Ordinance, Section 116—Estoppel—Prescription —Fraud—Planting agreement.

HELD:—Where the plaintiff induced defendant by a wilful and false misrepresentation of the ownership of a land to take a planting agreement under him, such possession by the defendant does not accrue to the benefit of the plaintiff.

Amarasekera for plaintiff-appellant.

Rajapakse for defendants-respondents.

Dalton, J.—Plaintiff, who is the appellant, sought to obtain a declaration of title to a land called Kapu-Ela addara owita, stated to be about one acre in extent. The land in question is the portion marked C on the plan No. 383 at p. 65 of the record.

In his plaint plaintiff sets out no title to the land, but he claims that he be declared entitled to the land and possession be given him as against the defendants on the following grounds. On May 22, 1911, he purported to give the land to the 1st defendant and to one Punchi Appu on a planting agreement. This agreement, the document P1, sets out that 1st defendant and Punchi Appu take the land in question for a period of five years from plaintiff to plant on the conditions set out. The 2nd to the 5th defendants are the widow and children of Punchi Appu who died about three years before the action was commenced. The lease expired in 1916, defendants remained in possession of the land, and this action was started on February 18, 1926, just under ten years from the termination of the case. The plaint sets out further that 1st defendant and Punchi Appu failed and neglected to plant the land in terms of the agreement, and are now disputing plaintiff's title.

The case for the defendants was that plaintiff wrongfully and fraudulently represented himself as the owner of the land described in the planting agreement of which 1st defendant and Punchi Appu were in

possession at the time, that he had no title thereto at all, and they had acquired title by prescription to the land.

The matter has been before this Court on a previous occasion. At the first trial the Commissioner held that any action on the lease was prescribed after six years from the termination of the lease. He therefore dismissed plaintiff's action. On appeal this judgment was reversed it being held that there was an undoubted conflict of title, which was the substantial issue in the case. It would seem that there was some ground for the first conclusion of the Commissioner however owing to the way the pleadings were drawn and the learned judge in appeal especially directed that the case go back for a further trial to determine the title of the parties to the land and whether plaintiff was entitled to be restored to possession, for which purpose the parties would be at liberty to amend their pleadings. The pleadings however have not been amended, although the issue have been re-framed as follows:—

1. Is the plaintiff entitled to the portion marked C in plan No. 383?
2. Did the defendants dispute plaintiff's right to that portion?
3. It being admitted that 1st defendant and Punchi Appu, father of the other defendants, got a planting voucher for this portion, are they estopped in law from questioning the right of the plaintiff?
4. Was the deed of agreement executed by misrepresentation of facts?
5. What is the value of the improvements made?
6. Were they done in terms of the agreement?

The evidence taken on the first trial was by agreement used at the second trial and amplified by further evidence. After a consideration of that evidence the Commissioner has come to the conclusion that there is no evidence that plaintiff ever had possession of the land in dispute, nor has he any documentary evidence of title. On the issue of misrepresentation he finds that 1st defendant and Punchi Appu were in possession of the land, which may have been Crown land, and that plaintiff in 1911, whilst he was Police Officer, induced 1st defendant and Punchi Appu to take the planting agreement from him, representing that he had bought the land from the Crown and that, if they did not do so, they would have to leave the land. They discovered later that plaintiff had no right to the land, and they did not keep the terms of the agreement. They remained on in possession, plaintiff doing nothing until nine years after the termination of the agreement. Plaintiff's action was therefore dismissed.

After the persual of the evidence and due consideration of all the circumstances I had it impossible to disagree with the learned Commissioner on his conclusions of fact.

It is urged for plaintiff (appellant) however that, inasmuch as 1st defendant and Punchi Appu admitted by the agreement P1 that they were tenants of plaintiff, they were precluded by S. 116 of the Evidence Ordinance from denying his title, and they were in possession for him from 1911 to the date of the bringing of the action. He had therefore prescribed for the land and was entitled to a declaration of title as against them. It seems to me a most bold argument to put forward upon the facts here and I should be surprised indeed if my support could be found for it in any legal authority. Plaintiff's claim is based upon a fraudulent act. 1st defendant and Punchi Appu in 1911 had at that date been in possession of the land for some years although they had no title. In that year plaintiff induces them by a wilful and false misrepresentation of the true position to take a planting agreement under him. He never put them into possession at any time. At the termination of the agreement in 1916 he does nothing and they remain on in possession. There had been a partition action in 1915 in which plaintiff was an intervenient and in which 1st defendant and Punchi Appu supported him, but a partition was found to be impossible and in any case it would seem that this was prior to the discovery of plaintiff's fraud.

Plaintiff has not had possession for a day, unless it can be said defendants possessed for him. In view of the fraud committed plaintiff is in my opinion unable to obtain the benefit he seeks from the agreement, or to say that the character of the earlier possession of 1st defendant and Punchi Appu changed thereby to possession under him. They entered into possession some years before 1911 and have remained in possession ever since, on Punchi Appu's death his widow and children remaining in possession. The conduct of plaintiff in delaying his action for nine years after the termination of the agreement itself supports the conclusion that after the discovery of the fraud, the parties regarded the agreement as of no force.

I can find nothing in Section 116 of the Evidence Ordinance that debars defendants from proving plaintiff's fraud, whilst, if the decision in *Lal Mohamed v. Kallanus* (11 Calcutta 519) is good law, inasmuch as plaintiff did not put 1st defendant and Punchi Appu into possession, Section 116 does not help him. Support for this conclusion can also be found in *Silva v. Kumarihamy* (25 N.L.R. 449), although the facts in *Fernando v. Menika* (3 Balasingham 115) are not exactly the same as the case now before me it does afford support for the proposition that where a person purports to possess as lessee land by mistake included in the lease, the lessee having in fact other right thereto, such possession by the lessee does not accrue to the benefit of the lessor. I would dismiss this appeal with costs.

Present: Dalton, J.

PATHUMMA vs. IDROOS.

214 C.R. Colombo 49932.

Decided: December 6, 1929.

Mohammedan Law — Divorce—"Kaikuli"—Is it recognised in Ceylon?

Held:—"Kaikuli" or the 'dower' paid by the bride's parents to the bridegroom is recognised by custom in Ceylon and has been the subject of judicial decision.

S. A. Marikar for appellant.

M. F. Pulle for respondent.

Dalton, J.:—The parties to this action are Mohammedans and were husband and wife, who have been divorced.

The plaintiff, the wife, is now claiming the sum of Rs. 300 from her former husband, this sum being made up of three items:—

(1) A sum of Rs. 97-50 by way of 'Maggar,"

(2) a sum of Rs. 211 by way of "kaikuli," and

(3) a sum of Rs. 100 being costs of maintenance for three months after the divorce whilst she observed the 'iddat."

These sums amounted to Rs. 408-50, but plaintiff restricted her claim to Rs. 300 to bring the case within the jurisdiction of the Court. She was successful and obtained judgment in the sum of Rs. 293 and costs, from which judgment defendant appeals.

The facts shortly are that the parties did not live happily together; plaintiff left her husband and claimed maintenance from him. It was found that he was guilty of ill-treating his wife, and he was ordered on September 7, 1928, to pay her maintenance. On September 19 following he divorced her by uttering 'tollok.' The learned Commissioner is inclined to the opinion that the divorce is a 'khula' one, uttered by the husband at the instance and consent of the wife. He states that there was a question to be determined as to whether the defendant was entitled to double 'maggar.' There is, however, no such claim put forward by defendant in his answer, although the question is raised in the issue. I am not satisfied on the facts that it can be said the divorce was "at the instance of" even if it was "with the consent of" the wife. The wife had good ground for leaving appellant, and he was ordered to pay maintenance. He, nevertheless sought to get her to return to him, and he informed the Lebbe at the Mosque, who celebrated the marriage, and who was a witness in this case, that, as she refused to come, he would utter 'tollok.' It is true that the witness states the wife consented to this being done, but I can see nothing on the record to suggest that the wife was not satisfied to continue as she was with her order for maintenance. It was rather the appellant

who wished to change the position in which they were and divorce her if she did not come back. These circumstances do not justify a finding that the divorce was at the instance of the wife. A 'khula divorce is defined in "Tyabji's Muhammedan Law p. 155," Section 162, as one where the wife alone is desirous of having the marriage dissolved. Here both parties were on the evidence so desirous, the husband clearly playing the principal part and the wife offering no objection. I have come to the conclusion therefore that it was not a 'khula' divorce, and no case for any claim by defendant for double 'maggar' can arise.

With regard to the claim for 'maggar,' a term admitted to be the same as 'maskawien' in Section 86 of the Code of Muhammedan Law, Vol. 1 of the Ordinance p. 42, and which was examined and defined by Jayewardene, J., in "Beebee v Pitche (1), the argument for appellant has been on the basis that the divorce is a 'khula' divorce. Even on the trial Judge's finding, with which, as stated above, I do not agree, the learned Judge has given authority to support his conclusion that on the facts found here the wife was entitled to the payment she claims. On the footing that it was not a 'khula' divorce her position is of course much stronger, and it has not been contended for the appellant that in such a case plaintiff is not entitled to the 'maggar' she claims.

With reference to the claim for 'kaikuli,' it is conceded for the appellant that the authorities are against him, but it is urged that the same authorities have erred in regarding 'kaikuli' as the same as 'maggar'. 'Kaikuli' is stated to be a present received by the bridegroom from the bride's father in consideration of marriage. In the course of his judgment in Pathumma v. Cassim (2), De Sampayo, J., does appear on more than one occasion to use the two terms as almost synonymous, but when referring to Counsel's argument he clearly distinguishes between the two, whilst if the facts in that case which he sets out be read, it is clear the 'maggar' he refers to is a payment by the husband to the wife on the marriage which he calls "dowry money" and which remains in the husband's hands, whilst the 'kaikuli,' which he calls 'dower,' is a payment by the parents of the bride to the husband. This he says is held in trust by the husband for the wife, both 'maggar' and 'kaikuli' being recoverable by the wife in the eventualities set out. Counsel has stated that 'kaikuli' is unknown to the Muhammedan Law and is not mentioned in the text books. However that may be, it is not suggested it is not recognised by custom in Ceylon, whilst there is no doubt that it has been the subject of judicial decision. Counsel has cited nothing against those decisions to show that 'kaikuli' is not recoverable by the wife in case of such a divorce as we have here.

With regard to the third item, maintenance during seclusion, it is provided by Section 89 of the Code of Muhammedan Law above referred to that the husband, after the divorce, must furnish the wife with a dwelling place for a space of three months It has been urged for appellant that during that period plaintiff did not observe seclusion and that therefore he is not liable for the sum. I am informed that there is no reported case dealing with this question of 'iddat, but I have been referred to the "Manuel of Muhammedan Law, Minhaj et Talibin," where at p. 372 it is set out how this seclusion must be observed. I can find no evidence here to show that the seclusion has not been observed so far lay in plaintiff's power. It is true she had to move from one house to another during the period, but that was for the very good reason that the house where she was living was demolished and she had to go to her uncle's house I see no reason to differ from the Commissioner with regard to his finding on this point.

For those reasons the appeal must be dismissed with costs.

(1) 26 N.L.R. 277
(2) 21 N.L.R. 221