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*Ceylon. Reports. Supreme Court. (Digests)*

# JUDGMENTS

AND OTHER

## DECISIONS AND DIRECTIONS

OF THE

### SUPREME COURT

OF THE

#### ISLAND OF CEYLON,

FROM THE

PROMULGATION OF THE NEW CHARTER,

*1st Oct. 1833 to March 1836.*

ARRANGED ACCORDING TO THE RESPECTIVE SUBJECTS OF THEM,

BY

SIR CHARLES MARSHALL.

LATE CHIEF JUSTICE OF CEYLON.

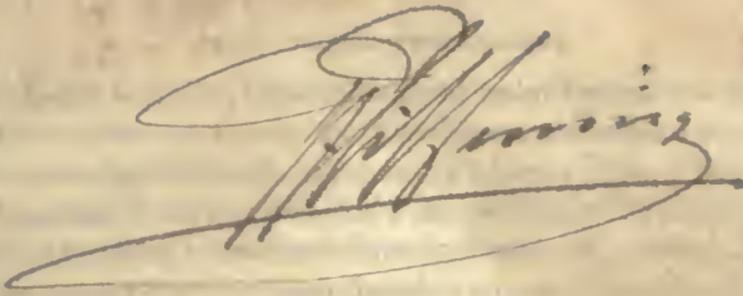
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## EXPLANATORY OBSERVATIONS.

THE following notes consist of the recorded decisions of the Supreme Court of Ceylon, whether in the shape of judgments, letters to District Judges, answers to petitions, or in any other mode in which its opinions may have been expressed, on points of law or practice, from 1st Oct. 1833, when the new Charter of Justice came into operation, up to March 1836. My inducement in occupying myself, since my relinquishment of office, in arranging these decisions, and throwing them into a digested form, arose out of the interest, which every one must naturally be supposed to take, in the continued success and reputation of any institution, in the formation of which he has taken any part. In making use of this expression, however, let me guard myself against the supposition, that I am assuming any merit, as regards the original construction of the present system of judicature in Ceylon. I feel bound on this occasion, as I have done on every former one, to admit that, so far from being entitled to claim any share in the paternity of that system, I entertained at first sight great doubts of its applicability to Ceylon; though, when once its introduction was decided upon, I considered it my duty to give my humble assistance, as far as that was called for, towards maturing and improving its details, and to apply myself to the task of bringing it into operation, with a zeal which should leave no room for supposing that my doubts had any tendency to diminish my exertions.

Most completely, indeed, have those doubts been dispelled, and most sincerely and warmly do I congratulate those who de-

1836-1837

signed and framed this scheme of judicial policy, in which simplicity of structure and uniformity of operation form the striking features, on the complete success of this new and interesting experiment; the working of which has attracted no small attention among the inhabitants of continental India, who, it is said, would gladly see introduced among themselves so speedy, so uncumbered, and so unexpensive a course for obtaining legal redress. Nor will it, I trust, be thought unreasonable that those, on whom has devolved the humbler but more laborious task of bringing the machine into practical use, and of guiding it through the first difficulties of novelty and consequent opposition, should claim some merit for *their* exertions. Some credit will, it is hoped, be awarded to the industry and vigilance which, after clearing away the somewhat formidable arrears of former tribunals, have preserved the records of the new courts clear from a single case in arrear, and have, besides, so regulated the order and dispatch of the ordinary business, that every case must (without the intervention of peculiar circumstances requiring delay) be finally decided, even though carried in appeal to the Supreme Court, in less than twelve months; much less than half that period being sufficient to bring the generality of cases to a termination. And I have never yet heard it imputed to these courts, whether of original or appellate jurisdiction, that the primary objects, thorough investigation, patient hearing, and mature consideration, have ever been sacrificed to the desire of making a display of speedy decision.

As head of the Court, which was to direct and correct the proceedings of all the other tribunals in the island, the task of framing new Rules of Practice, and of answering the very numerous questions, which the District Courts, by our own express invitation, were in the habit of putting to the Supreme Court, for a considerable time after the Charter was brought into operation, naturally fell upon myself. While, therefore, I claim but little merit for the prominent part I took in launching the Charter, I feel anxious, on the other hand, that these decisions, for which I am so deeply responsible, should be put in such a shape as, considering them as authorities, may not only be useful to the Ceylon public, but will the more easily subject them

to criticism and correction, where, after more mature consideration by sounder and wiser heads than my own, they shall be condemned as erroneous (1). My earnest hope is that this publication, presenting itself in a shape which will enable any one to lay his finger, without difficulty, on the recorded decision or opinion of the Supreme Court, on any subject which has been brought under its consideration, will promote discussion of the freest and severest kind. My wish would be, that no courtesy be shewn to me, or to my decisions;—that though, like those of every competent tribunal, they will probably be considered as law unless and until they are overruled, they may be impugned and contested with the most perfect freedom and unreserve, and in the District Courts no less than in the Supreme Court, whenever they may appear assailable. Any little mortification which I might be weak enough to feel, at finding my judgment on any question condemned, would be amply compensated by the recollection, that the error had been productive of more intelligent consideration, and the establishment of sounder principles. The fanciful reputation of infallibility as a Judge,—a consummation as remote as the perfection of human nature,—would be dearly bought by persistence in error, sanctioned only by having been conceived and put forth *ex cathedra*.

But if I might presume to speak prospectively, I would venture to express an ardent hope, that the present Judges of the Supreme Court may so far agree with my view of the subject, as to take measures that this compilation may be kept up, by the addition of all decisions, which may have taken place since the period when these cease, or which may hereafter be passed. I feel persuaded that those learned persons will concur with me in thinking that, whether as regards courts of justice or the public, it is always most desirable that decisions, involving questions of law or of general interest, should be not only recorded, but published. Such publications furnish at once a

(1) I should observe that, on all questions of serious doubt or difficulty, I took the opinion of the learned Puisne Judges, before they were decided; and that wherever any of the judgments, contained in the following pages, have been pronounced by either of the Puisne Judges, it will be so stated.

check on the errors and vacillations to which Judges, as well as other men, are subject ; and an assurance to suitors (always sufficiently inclined to be sceptical, as to the correctness of decisions unfavourable to themselves) that their cases have met with due consideration, and have been ultimately decided on grounds, open to all the world for criticism. Nor can I imagine any means, more likely to attain the objects already adverted to of the framers of the Charter, simplicity and uniformity, or to assist the Judges in the work of assimilation which, by the 48th clause of that instrument, they are so pointedly directed to pursue, than an authenticated and digested record of the decisions of the Supreme Court of Judicature, easy of access, as well as intelligible, to all who wish to have recourse to it, and regularly and speedily published. It has been matter of great regret to me, that I did not foresee how numerous would be the decisions and opinions, which the Supreme Court, in its close and immediate superintendance of nearly thirty subordinate courts, exercising totally new judicial powers, would be called upon to pronounce ; and that I did not, by classing them as they were successively delivered, according to the respective subject matter of them, save myself the labour of the present search through the somewhat voluminous records, from which the selection and arrangement must be made, and so avoid the consequent delay in the publication of them. I sincerely hope that these notes may be found not unworthy of being taken as the nucleus of such a periodical publication, by the present Judges of the Supreme Court.

The alphabetical order, in which I have disposed the following notes, appeared the arrangement the most unpretending, and the best qualified to attain the desired object, facility of reference. I have not scrupled to introduce observations of my own of a general nature, whenever I thought they might be of advantage to those for whose use they are more immediately intended ; namely the District Judges, and the practitioners in the different courts. In some instances, in which the subject has required and admitted of it, I have endeavoured to give a compendium of the entire law, as practically applicable to Ceylon : Of these, I will mention the title " Evidence," as one on which

I have bestowed some pains, in the hope of making it generally useful. Some of the points, recorded on the different subjects, may appear at first sight trifling or insignificant: The best proof that they are not to be considered altogether useless is, that they have, all of them, arisen out of questions, either actually contested, or put to the Supreme Court by District Judges, in moments of doubt or perplexity. And it is to be recollected that, generally speaking, the decision of the Supreme Court on any one point, whether it be of an apparently trifling nature, or of general interest and importance, would only be made known, unless by means of a publication like the present, to the particular District Court, in which the question has arisen. And this reason, and the difficulty which the District Judges and practitioners, residing out of Colombo, must experience in consulting the records of the Supreme Court, at the moment when such reference becomes necessary, will account for the length, at which some of the following decisions and letters are given. The facts of each case have been compressed into as small a compass, as was consistent with the intelligibility of the point decided.

Those whose eyes have been accustomed to dwell on our English Reports, whether of law or equity, may probably exclaim, with somewhat of contempt, at the absence from these pages of the niceties of construction and hair-splitting distinctions, with which those learned authorities abound. Most willingly do I confess the inferiority of this unassuming production in that respect, because it furnishes the most convincing proof that the system itself is sound;—that directness of procedure and general intelligibility are substituted for the fictions, subtleties, and refinements, which, however they may serve to exhibit the learning and acuteness of our advocates, have long been a subject of reproach to the administration of justice in England, pure and admirable as it is in other respects. The object of the following little Digest is, not to dazzle and confound by the intricacies of the labyrinth, but to prevent aberration from the plain, straight, and open road, which the Charter, and it is hoped the Rules of Practice also, have chalked out. And while on this part of the subject, I cannot omit an observation on the mate-

rials, of which the District Courts are composed, as reflecting very great credit, both on those courts themselves, and on the system of judicature, under which they are sitting. It is well known that very few of the District Judges have enjoyed the advantages of any thing like a regular legal education. I certainly am not so far weaned from early impressions, as not to consider this, generally speaking, as a great and serious inconvenience. The necessity of the case, however, that is the want of regularly-bred lawyers, left no other alternative but that of appointing the best *un*-learned persons to be found. It is no small praise to those gentlemen themselves, to reflect on the way in which the whole machine has been, and I have no doubt still is, in operation. But that any thing like this result could have been expected, if the plan of procedure had been less simple, will at once be declared impossible, by all who recollect that as much of English litigation, and of its continual difficulties, arises from the intricacies of practice, as from the uncertainty of the law to be administered.

I have only to add a few words,—and indeed I have already indulged in a prolixity, which will call for all the patience of those who may look at these preliminary pages,—to account for this apparently trifling work being, after more than two years, still incomplete. Circumstances, which occurred soon after my return to England, but which it is unnecessary here to enter into in detail, made me doubt whether I had not greatly over-rated the value of the proposed collection; and whether indeed it would be worth the expense of publication, or the trouble of transmission to Ceylon. Under that impression, I laid aside my materials, not I confess without regret, but preferring the disappointment of my own wish, to the imputation that I was thrusting myself vainly and uselessly on public notice in Ceylon. Some conversation, however, which I had with Sir R. Wilmot Horton, on his return to England, has reassured me on this point, as regards public opinion in that island; and the wish which His Excellency was good enough to express, that the work should be completed, at once determined me to resume the task. And in order to repair, as far as lies in my power, the delay which has already taken place, and the prolongation of which

must proportionably diminish any value which the publication may possess, I now transmit the first part, forming perhaps about one half of the notes; the remainder of them, it is my intention to complete, as quickly as other avocations will permit. It is no small gratification to me, to think that this employment of my time will renew, to a certain degree, my connexion with an island, which is associated in my mind with many pleasing recollections; and that it may serve to recall me to the remembrance of those gentlemen, who were fellow-labourers with me in the same vineyard, and whose expression of kindness, when I took leave of them, will never be obliterated from my memory.

CHARLES MARSHALL.

*Paris, 1st January 1839.*

### ERRATA.

Page	Line	
55	10	.. For "or," read "for."
56 (Summary)	1	.. — "212," read "2½."
61	20	.. — "demonstration," read "observation."
66	9	.. — "recorded," read "received."
71	11	.. — "text," read "test."
74	6	.. — "casts," read "costs."

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### ABBREVIATIONS.

The following abbreviations of words of constant recurrence have been copied from the MS. of these notes, and been allowed to remain, for the sake of compression and expedition. The explanation, though scarcely perhaps necessary, will prevent the possibility, it is hoped, of mistake.

S. C.	.....	Supreme Court.
C. J.—P. J.	.....	Chief Justice.—Puisne Justice.
D. C.—D. J.	...	District Court.—District Judge.
L. B.	.....	Letter Book of the Supreme Court.
plt.	.....	plaintiff.
deft.	.....	defendant.
adm. — admor.	.....	administration.—administrator.
exor.	.....	executor.
exn.	.....	execution, and at p. 137, last line, examination.
par exn.	.....	parate execution.
declon.	.....	declaration.
reg.	.....	regulation.
ordce.	.....	ordinance.
par.	.....	paragraph.
fid. com.	.....	fidei commissum.

## ACTION.

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See title False Claim, and other heads.

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## ADMINISTRATION, EXECUTORS, WILLS, ETC.

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Administration not to be too rigidly enforced at first, page 1—Cases prior to 1 Oct. 1835, p. 2—Interests of parties consulted, 2—All deaths reported, 2—Military men, 3—Priority of right to admn., 3—Discretionary power in D. C., 3—Widow joined with others, 3—Widower neglecting to apply, 4—Or to give security, 4—No prescription of admn., 4—Right of widow or brother (Moors), 4—Son or daughter, 5—Can adm. go to a pauper? 5—No one can be forced to take, 5—Security, when required from executors, 5—Deposits received, 6—Appraisalment, list amended, 6—Appraisers put in possession, if necessary, though widow appeared, 6—Property wrongfully put in list, 6—Percentage, 7—Suit for probate transferred from district where testator died, 7—Renunciation by, and liability of, executors, 7—Contract as to division of estate, void, 8—Claims to be made before final account, 8—Monies ordered to be paid over, though account not filed, 8—Vigilance of courts, 9—Personal liability of exors., etc., 9—Differences between, 9—Admn. to secretaries of D. C., 9—Removal of admor., Sequestration, 10—Exors., etc., not witnesses for the estate, 10.

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THE 27th clause of the Charter gives the District Courts jurisdiction in matters of intestates' estates, and wills: And the 4th section of the rules of practice prescribes, with some minuteness, the course of proceeding to be followed in the exercise of that jurisdiction.

In many of the districts of Ceylon, the system of administration is a novelty, or nearly so. The Supreme Court has therefore, on several occasions, recommended the District Courts not to force the system into operation too suddenly or inflexibly, in those districts which have not already become familiar with it. And where a suit was dismissed after the pleadings

and evidence for the plaintiff had been gone through, on the ground that the plaintiff had not taken out letters of administration to the estate of his relations, whose property he sought to recover, the S. C., on appeal, directed the case to be restored to the list, and proceeded with, as soon as the plaintiff should have taken out administration. No. 14,333, Caltura, 14 May, 1834. See also Mr. Justice Norris's judgment in No. 11,498 from the same court, 27 Aug. 1834. And in another case the S. C. held that the want of administration furnished no ground of appeal against a decision on the merits; No. 4874, Colombo South, 5 Feb. 1834: For the objection should have been taken in the very first instance, in the written pleading of the party making it.

With respect to those cases, in which the death occurred before the 1 Oct. 1833, the practice of each district, as it existed before that period, modified in the discretion of the D. C. by the rules of the 4th section, should be resorted to. For those rules, it must be remembered, are prospective; and therefore are not necessarily binding on the courts, in cases antecedent to their promulgation. Letter Book, 27 Dec. 1833.

On the other hand, where it has appeared obviously for the interests of the creditors and heirs, that administration should be taken out, the S. C. has ordered that step to be taken, either by the next of kin, or, if they refused, by the secretary of the D. C. No. 1157, Kornegalle, 21 Oct. 1833. So, where a widower was about to enter into a second marriage, the court required him to take out administration to the estate of his deceased wife, and in default thereof, ordered that the secretary of the D. C. should do so, in order that the interests of the children of the first marriage should be protected. No. 1502, Caltura, 1 July 1835. So, it is often necessary to appoint an administrator, as representative of the estate, in order that questions between different claimants may be brought to issue; which cannot regularly be done, while the estate is unrepresented. L. B. 30 May 1834.

The 9th rule of the 4th section directs that all deaths shall be reported to the District Courts by the Police Officers: And it is intended that *all* deaths shall be so reported, without reference

to age; though the rules, generally speaking, are of course only applicable to persons dying of an age which renders them capable of making a will, or of possessing property. L. B. 29 Oct. 1833.

The testamentary jurisdiction of the D. Courts does not apply to military men, dying intestate in Ceylon; this being otherwise provided for by stat. 6 Geo. IV. ch. 61. L. B. 15 Nov. 1833.

As regards the priority of right to administration, it may be observed that the English law, which adopts the computations of the Civil Law, in regulating the propinquity of kindred, may safely be followed, at least as regards Europeans, and their descendants, and the Cingalese inhabitants. And the order of precedence may briefly be stated thus:

1st. The widow or widower of the deceased; in default of whom—

2dly. The children.

3rdly. The parents.

4thly. Brothers.

5thly. Grandfathers.

6thly. Uncles or nephews.

7thly. Cousins.

} And the females of each  
class respectively.

This is the general rule; but it is a rule, which peculiar circumstances, or the relative situation of the parties claiming administration, frequently make it necessary to depart from. Questions indeed are constantly arising, as to the parties best entitled to be chosen administrators: And on this point, the District Courts, by analogy to the office of ordinary, by which functionary this authority is exercised in England, must be allowed to exercise a certain latitude of discretion, with a view to the safety and due distribution of the property. Thus, where the District Judge expressed doubts of the safety of leaving the estate under the sole control of the widow, the S. Court authorised the joining of such other persons as the D. C. should consider right. No. 1, Amblangodde, 3 May 1834.

So, where the intestate left two adopted sons, to whom he bequeathed property, the D. Court of Ratnapoora directed administration to be granted jointly to the adopted sons and to the widow. On appeal by the widow, who disputed the fact

of the adoption, and, even admitting that fact, claimed to be sole administratrix, the S. Court, having directed the fact of adoption to be ascertained, affirmed the decree; considering, with the D. C., that it would be safer to unite the two parties in the office. No. 4, Ratnapoora, 13 Jan. 1836.

Where certain relations of the intestate applied for the usual citation three years after her death, on which the widower came in and claimed administration, the D. C. decreed the letters to him, but ordered that he should pay the costs. On appeal by the widower, the S. C. affirmed the decree, on the ground that, if he had applied for administration in the first instance, as it was his duty to do,—or if, when he found the relations suing for it, he had waived his preferable claim, no costs of contestation would have been incurred. No. 14, Galle, 6 March 1835.

Where the widower appeared to the citation, and administration was granted to him on the usual conditions, but he neglected to comply with them by giving the necessary security, and afterwards applied to have the letters cancelled as being unnecessary, and on the ground that they had been granted too late, the D. C. refused the application: And the S. C., on appeal, affirmed that decision, observing that there was no term of prescription as regarded applications for, or the issuing of, letters of administration; that as the D. C. had directed administration to be taken out, and as indeed the widower had himself applied for it, the necessity for the measure must be presumed, and could not now be retracted by the widower, except as far as his own right was concerned, which he had forfeited by the nonfulfilment of the conditions; and therefore, that the D. C. was called upon to grant administration to some other and fitter person. No. 1923, Chilaw and Putlam, 3 June 1835.

A somewhat singular question arose between Moorish parties: The widow of the deceased married his brother, and afterwards each claimed administration, adversely to the other. The D. C. decided in favour of the widow. On appeal to the S. C., it was agreed by Moorish assessors at Colombo, that by the Mahomedan law, if there be a son, or two or more daugh-

ters, the widow is entitled in preference to the brother, because the joint interest of the widow and children is greater than that of the brother; but if there be no children, or only one daughter, then the brother, having a greater interest than the widow, has a preferable claim. No. 20, Matura, 23 Feb. 1835.

A daughter claimed the exclusive right to administer her mother's estate, as being the eldest child. The D. C., and in appeal the S. C., decided that her brother was at least equally entitled; and therefore, that the administration should be joint. No. 42, Galle, 2 Dec. 1835.

Where a Buddhist priest applied, in formâ pauperis, for administration to the estate of his predecessor, of considerable value, the S. C. expressed great doubts whether admn. should ever be granted to a pauper, at least where the amount was considerable; this being inconsistent with the necessity of the administrator finding valid security. No. 32, Matura, 9 Dec. 1835.

From the foregoing cases, and from the generality of those which come before the courts, it will be seen that administration of the estates of intestates is an object, for the most part, eagerly sought after, and keenly contested. On the other hand, no person can be *forced* to take out administration, unless where his doing so is imposed as a condition; as, for instance, to his being allowed to substantiate his claim against the estate. L. B. 25, 31 Oct. 1833. Ibid. 31 Oct. 1834.

With respect to the security required for the due performance of this most important trust, it is to be observed that the 27th clause of the Charter "authorises District Courts to take "proper securities from all executors and administrators." To an inquiry by a D. Judge, whether security should be taken from an executor named in the will, no directions to that effect being contained in the rules of the 4th section, the S. C. returned for answer, That as regards *executors*, a discretionary power is left to the D. C. to require security, if the particular circumstances of the case, or situation of the parties, should render such precaution necessary; that according to the practice of the late S. C., which was founded on that observed in the diocese of London, security was, in general, only required

from *administrators*; that the selection of *executors* by a testator denoted a degree of confidence in their integrity, which would render it superfluous to demand security from them, except in extraordinary cases; that the Rules of Practice, therefore, being framed for cases of ordinary occurrence, and not for those which form exceptions to the general rule, take no notice of security from *executors*, leaving it to the D. C. to exercise the discretionary power vested in them by the Charter in this respect, when any special case may arise to make it necessary, for the safety of the estate, that the executor should find security. L. B. 3 Dec. 1834.

The security pointed out by the fourth rule of the 4th section, is that of two sureties, to be carefully examined by the Court as to their solvency. But the S. C. has expressed its opinion that title deeds, and other valuable deposits, being often very preferable to personal security, ought not to be refused, when offered. L. B. 18 Sept. 1835.

Where the appraisers had, by mistake, omitted to insert certain property in their list of appraisement, the D. C., with the sanction of the S. C., permitted the list to be amended, though some years had elapsed since the appraisement. L. B. 26 April 1834.

The 7th Rule, and Form No. 13, contemplate authority being given to the appraisers to take possession of the property, only in the event of their being no will, and no widow or next of kin appearing: The S. C., however, sanctioned the adoption of the same course, though the widow had appeared to claim administration, where circumstances rendered the precaution necessary for the security of the estate. L. B. 8 May 1834.

Administrators, being sued for the restoration of property, which they had unlawfully, as it was alleged, inserted in the list of appraisement, pleaded that the property was still in the plaintiff's possession, and moved that this suit might be dismissed, in order that they might institute proceedings for the recovery of the property in dispute. But the S. C., on appeal, observed that this course could only have the effect of delay and unnecessary expense;—that the insertion of the property in the list might naturally be considered as only the first step towards getting

possession ;—that the plaintiff was therefore justified in resisting this act, on the same principle that a survey of land, including disputed property, is often resisted ;—and that there was no reason why the right to the property should not be tried in this action, the libel being amended by praying that the articles be struck out of the list, instead of that they be restored to the plaintiff. No. 333, Amblangodde, 9 May 1835.

The percentage allowed to appraisers is one-half per cent. on all immoveable property; and on bonds, money, or other property, of which the value is fixed and ascertained; and one per cent. on all other moveable property. L. B. 5 Feb. 1834.

Where executors represented that the testator had been domiciled in the district of Hambantotte, but that the executors, witnesses to the will, and heirs, resided in Matura, and that inconvenience would therefore be occasioned, if probate must be taken out in the Court of the former District; the S. C., in pursuance of the 36th clause of the Charter, ordered that the suit for probate should be transferred to Matura; with a reservation; however, that this order should not be construed to give jurisdiction to the D. C. of Matura, in any suit to be instituted by the executors, in which that Court would not have had jurisdiction under the 24th clause of the Charter. Civil Minutes, Colombo, 9 Oct. 1835. And see L. B. 27 Jan. and 2 Feb. 1836, from which it appears that the S. C. considers the district in which an intestate was last domiciled, and in which his property is situated, to be that in which administration should be sued out, rather than the District in which he died, under the 6th and 7th Rules of the 4th Section.

An executor sued his co-executors, to be relieved from a judgment obtained in a former suit against the executors generally, for a share of the estate, as sworn to in the final account, to which account the present plaintiff alleged that he was no party, having never acted, or interfered in the estate. The defendants contended in their answer that, as the decree was against all the executors, generally, the plaintiff was equally liable with themselves. The D. C. directed evidence to be gone into. On that order being appealed against by the defendants, the S. C. affirmed it, and directed evidence to be adduced, first,

whether the plaintiff had actually renounced the office of executor, and if so, in what manner that renunciation had been expressed; which would be for the plaintiff to show: On the other hand, for the defendants to prove that the plaintiff had acted, or taken any part in the management of the estate: And also whether he had been served with a summons in the former case, and whether he had appeared, or taken any part in that suit. No. 406, Amblangodde, 6 May 1835.

A widow, before obtaining administration to the estate of her deceased husband, executed an agreement, by which she engaged to assign certain lands to her three sons, after she should have obtained letters of administration. An action was brought on that agreement, and dismissed by the D. C., as contrary to the law of inheritance, according to which the lands should be divided equally among the heirs. On appeal, the S. C. affirmed the decree of dismissal, observing that such an agreement must be either superfluous, or illegal: For either it must be an engagement to administer the estate according to law, which the administrator binds himself to do by bond to the Court on receiving administration; or it must be an undertaking to deviate from such course, which would be fraudulent and illegal. No. 2291, Batticaloa, 17 June 1835.

Claims against estates should be brought forward, before the final account filed: And where the brother of the deceased sued the widow and administratrix for the funeral expenses paid by the brother in 1824, the final account having been filed in 1834, but before this action was brought, the D. C. dismissed it, and the dismissal was affirmed by the S. C. No. 1965, Chilaw and Putlam, 2 May 1835.

A widow and administratrix being sued by the nephews and nieces of the deceased for their shares of a sum of money, which she had admitted by her provisional account to be in her hands to the credit of the estate, the D. C. dismissed the action, on the ground that the time for filing the final account had not yet arrived. The S. C., however, on appeal, referred it to the Registrar to say what sum was due to the plaintiffs, observing that the administratrix must either pay their respective shares, or pay the whole amount into Court, if it was intended to dispute

the justice of the claims. No. 565, Manar, 6 Jan. 1836. It may here be observed, that the frequent frauds practised in Ceylon in the administration of estates, have compelled the Courts to exercise the greatest vigilance in watching the conduct of executors and administrators, and the utmost strictness in enforcing the fulfilment of their duties. And it is hoped that the 14th and following rules of the 4th section, which were framed with a view to this necessity, are strictly enforced.

Where an executor, being sued by a creditor of the estate, was ordered to credit the estate with certain sums, which he had omitted to insert in his account, but the executor failed to comply with that order; the S. C. expressed its opinion that the creditor, who had previously obtained judgment and execution against the estate, was entitled to execution against the property, and even the person, of the executor himself. For it is a rule that, when the property of an estate proves insufficient for the payment of the debts, the executor or administrator, if he have misapplied the assets, becomes personally responsible for the deficiency. And the order to credit the estate with the sums omitted, was tantamount to a declaration by the Court that the executor had, *pro tanto*, misapplied the assets. L. B. 11 Dec. 1835.

A District Judge having applied to the S. C. for instructions how to act, when administrators differed from each other, was advised to decide between them, as between two litigants, it being taken for granted that one of them had complained to the D. C.; leaving the dissatisfied party to appeal, if he thought proper, against the order, whether interlocutory or final. A reference to arbitration, both parties binding themselves to abide the award, would often perhaps be the least ruinous and best mode of settling such disputes: Or it might become necessary to revoke the letters of administration, and grant them to some one or more persons, who had no interest in the estate. L. B. 10 Aug. 1835. It is to be remarked that the 7th and 8th rules of the 4th section contemplate administration being granted to the secretary of the D. C., in default of parties legally entitled to claim it. In some of the courts, however, the secretaries have unfortunately been found unfit for the office, and have some-

times indeed expressed themselves unwilling to undertake it, from a consciousness of their unfitness.

An administrator having failed to file his final account, or to settle the estate, and being in a precarious state of health, the D. Judge applied to the S. C. for instructions how to proceed: Whether the administrator should not be removed; his property and that of the sureties, together with that of the estate under his administration, sequestered, and a new administrator appointed? To this, he received for answer that the first step should be to remove the administrator and appoint another, under the authority of the 27th clause of the Charter;—that it might probably be found necessary to put the estate itself under sequestration, till the new administrator should have given the requisite security;—but that, as regarded the property of the administrator and his sureties, the administration bond should be regularly put in suit, for the recovery of any deficiency which might be found in the estate, before their property could be held liable to sequestration. L. B. 21 Oct. 1834.

Executors and administrators should not be allowed to give evidence in favour of the estates. No. 6863, Colombo North, 16 Dec. 1835. For even though they should have no beneficial interest as heirs or legatees, still their liability for costs, and still more their claim for commission, would render them improper as witnesses.

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## AGREEMENT.

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See Titles—Commission, Debtor and Creditor, Fraud, Land, Husband and Wife, Interest, Marriage, Minority, Obligation, Partnership, Renter, Ship.

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## AMENDMENT.

Of list of appraisement ;—see title Administration, supra, page 6.

Of Judgments, etc. ;—see titles Judgment, and Execution, parate.

## APPEAL.

All judgments and orders appealable from, without exception, page 12—And awards, 13—When a case should be stopped on interlocutory appeals, 13—Prevention of appeals for mere delay, 14—By hearing interloc. appeals immediately, 14—And making appellant pay costs, 14—Or the proctor, in case of malpractice, etc., 15—Distinction between demurrer and answer, 16—Objections to questions no ground for stopping trial, 18—Appeal must be from a judgment, etc., not from a mere suggestion, 19—And in a suit, etc., pending, not from a decree of a former court, 19—Nor from an order, regulating duties of an officer of D. C., 19—Nor against the general conduct of D. C., 20—Nor will S. C. receive a secret petition of appeal, 20—Nor one sent direct to S. C., without the necessary steps taken in D. C., 20—Prosecutors may appeal, but without prejudice to the accused, 20—Complaints therefore to be recorded, though rejected, 21—S. C. will not give extrajudicial opinions, 21—Security ; sequestered property taken pro tanto, 21, 2—Certificate always necessary, 22—If suit dismissed, security to prosecute, and for costs, sufficient, 22—On appeal as to costs, etc., merits cannot be gone into, 22—Solvency of sureties, how reported, 22—Periods for appeal, etc., extended, 23—As for want of stamps, or negligence in D. C., 23—Or if respondent consent, 23—Or if only one day too late, 23—Or a first appeal from a new court, 24—Or to correct an error, 24—Allowed in blank, secretary having embezzled the stamps, 24—Appeal heard immediately, to defeat delay, 25—Rejected on repeated neglect ; but allowed, though too late, where decision bad on the face of it, 25—On reference to S. C., circum-

stances to be stated, 25—How far appeal stays execution, 25—Criminal appeals received at any time, 26—Without stamps or security, 26—But execution not stayed, unless ordered, 26—No inconvenience from criminal appeals, 27—To prevent prosecution, rejected, 27—Speedy transmission of proceedings, 27—Advantage of sending originals, 27—D. J. to explain delay, 28—Responsible for his officers, 28—Excuses for delay, 28—Place of hearing, 28, 9—Consent necessary for Colombo; duty of proctor on this subject, 29—Appeal once heard at Colombo will be there decided, 29—Arrangement of proceedings, 30—Appeal postponed, till after trial for forgery, 30—Decrees of S. C. how to be executed, 30—D. C. to record its opinion on fresh evidence, 31—Appeal to H. M.; After review, fresh evidence not received, 31—Suits for divorce, etc., appealable to H. M. 32.

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THE 31st clause of the Charter makes the S. C. “A court of  
 “ appellate jurisdiction for the correction of all errors, in  
 “ fact or in law, which shall be committed by the D. Courts;  
 “ with sole and exclusive cognizance, by way of appeal, of  
 “ all causes, suits, actions, prosecutions, matters, and things,  
 “ of which the D. C. may take cognizance, by way of original  
 “ jurisdiction.” And the 35th clause gives the most extensive  
 power to the S. C., “To affirm, reverse, correct, alter, or vary  
 “ all sentences, judgments, decrees, or orders of the D. C., ac-  
 “ cording to law; or to remand for further hearing, or fresh  
 “ evidence; or, upon hearing the appeal, to receive or reject  
 “ such fresh evidence.” These very general terms would  
 make it difficult to imagine any decree or order, interlocutory  
 or final, against which an appeal would not lie. But it would  
 seem that some of the D. Judges have been misled by those di-  
 rections, which often occur in Ordinances and the Rules of  
 Pract., by which certain points are to be decided *according to the*  
*discretion* of the D.C. It has been imagined that such discretion-  
 ary power, when exercised, is final, and not subject to appeal.  
 Thus: Opposition having been made by a defendant to the  
 plaintiff's application to be allowed to sue as a pauper, as di-  
 rected by the 45th rule of the 1st section, the D. C. overruled  
 the opposition, and on the defendant filing a petition of appeal  
 against that decision, the D. Judge indorsed on it that this was  
 an order overruling the defendant's objections, against which  
 there was no appeal; but most properly transmitted the petition

so indorsed to the S. C. for instructions. The S. C., after referring the D. Judge to the 31st and 35th clauses of the Charter, observed that the answer given by the D. Judge to the appellant, if allowed, might be equally given to an appeal against any other order; for on any contested point, the decision of the Court might be said to “overrule the objections” of the unsuccessful party: That it might, with equal correctness, be said that the decision of the D. C. under the 28th rule, as to the sufficiency of evidence, was one “against which there was no appeal.” In neither rule was the right of appeal expressly given, for any such provision would have been superfluous; but by neither was such right taken away, nor could it have been taken away, by any order of court. L. B. 28 Aug. 1834.

A question was proposed by one of the D. Judges, whether, when the parties have submitted to arbitration, either of them be at liberty to appeal against the award? To which the S. C. directed an answer to be returned in the affirmative. For the award might be contrary to law, or to the terms of the submission to arbitration. L. B. 20 Aug. 1834. And vide *infra*, title Arbitration.

But a question which must constantly be recurring, and which often requires nice consideration, is, whether on an appeal from an interlocutory order, the case should be stopped till the decision of the S. C. is obtained, or should be proceeded with. This question was submitted to the S. C. by one of the D. Judges in a case in which, after the parties had consented to go to trial, and several witnesses had been examined, the defendant objected to the case being proceeded with. The D. Judge at first refused the application, but afterwards, in his anxiety not to go wrong, postponed the further hearing, and on reference to the S. C., requested specific instructions, as to what orders might be appealed against, and what might not. He was informed in answer, that every order of the D. C., of whatever nature, might be appealed against, either by a separate and distinct appeal at the time of making the order, or by general appeal, after the decision of the case. In considering whether a case should be stopped in its progress, in order to allow the appellant to be heard at that stage of the case before the S. C.,

the question would naturally be, is it necessary that this point should be decided in appeal at once, or will the justice of the case be more effectually promoted, by leaving the dissatisfied party to his ultimate appeal, after judgment in the D. C.? The order, rejecting the postponement, was one which the defendant would have had a right to appeal against, if the objection had been taken in proper time; but the evidence having been entered into, the D. C. would have been justified in refusing to postpone the continuation of it. L. B. 27 Oct. 1834. And see No. 2939, Galle, 6 March 1835.

It is indeed of the utmost importance that D. Courts should well consider the necessity of postponing a case, on an appeal from an interlocutory order; because otherwise, these appeals might be used by dishonest suitors, as the means of almost interminable delay. Serious apprehensions were entertained at first, and by no one more than by the writer of these notes, that the very general power of appeal against every order, coupled with the option given to the appellant by the 50th clause of the Charter, to have the appeal heard on circuit, would tend to defeat the ends of justice, by the frequent interposition of appeal, and the consequent postponement of the proceedings. It may, however, be confidently said that these apprehensions have not been realised, and that the inconvenience will never exist to any alarming extent, as long as the object of groundless and vexatious appeals is frustrated by speedy decision, and parties are discountenanced, as far as may be done with propriety, from having recourse to such a mode of obtaining delay.

As one step towards the first of these modes of preventing appeals for mere delay, the S. C. has always decided appeals from interlocutory orders at Colombo, under the 50th clause of the Charter, unless where the nature of them required that they should be heard and considered on circuit. And by an order of 9 May 1835, on all appeals against interlocutory orders, the registrar is directed to send the proceedings forthwith to one of the judges, without keeping them eight days in the registry as in other cases, unless the judge shall order otherwise. And in order to discourage the practice itself, the S. C. has taken occasion to censure the party appellant in the order of

affirmation, and to direct him to pay the costs of the appeal, without reference to the ultimate decision of the case, where the appeal was obviously only for delay. The excuse for the length, at which some of the following decisions and observations of the S. C. are given, will be found, it is hoped, in the great importance which the writer attaches to whatever tends to uphold and improve the character of the practitioners on the one hand; and on the other, to repress all unnecessary expense and delay, and any thing resembling unfair practice.

Thus, where a defendant pleaded that he resided in another district, to which the plaintiff replied that the act, in respect of which the suit was brought, was done in the district in which the suit was commenced, and the D. C. ordered the parties thereupon to proceed, against which order the defendant appealed: The S. C. affirmed, and directed the defendant to pay all costs of the plea and of the appeal. It observed, "The Charter gives every party the fullest power of appealing against any order, interlocutory or final: But it must be the endeavour of the S. C. to prevent this privilege, so largely given for the purposes of substantial justice, from being perverted to the end of fraudulent delay. It does not appear whether the defendant moved to appeal by his proctor, or in person. If the former be the case, the proctor must either have neglected to read the 24th clause of the Charter, which gives jurisdiction *either* according to the residence of the defendant, *or* to the place where the cause of action arose; or, having read it, must have had recourse to this expedient to gain time, knowing, as he must or ought to have done, that the ultimate decision must be against him. It has been matter of consideration whether parties, who avail themselves of Courts of Justice in this island vexatiously or improperly, shall or shall not be liable to punishment, beyond their liability for costs. (Vide *infra*, title False Claim.) But it is clear that no proctor can be permitted to have recourse to practices on behalf of his client, which, if resorted to by the client himself, might render *him* liable to punishment. If, therefore, the proctor, who drew this plea, also advised the appeal, he ought to pay all costs which may have been incurred by either side, in consequence of a step so utterly useless, to say the least

of it. And the D. C. is recommended to resume the hearing of the case immediately, in order to prevent the encouragement of similar defences, by allowing the party to gain his obvious object of delay." No. 13,236, Negombo, 30 Oct. 1833.

The following case and the judgment may serve to illustrate this part of the subject, and to show the anxiety of the S. C. to discountenance chicanery and vexatious practice, under colour of technical language. A widow sued for certain lands, as the property of her deceased husband. The defendant filed what he called a "demurrer," alleging, 1st, that the land was service parveny, and therefore could not be held by females; and 2dly, that the plaintiff had not taken out letters of administration to her husband's estate. After some further interchange of pleading, the D. C. ordered the parties to proceed to trial. Against this interlocutory order the defendant's proctor appealed, entering into a long discussion to show that, as he had "demurred" to the action, the Court should have dismissed it without further inquiry. Upon this appeal, the S. C. made the following order: "That the interlocutory decree be affirmed;—that the D. C. do forthwith proceed to the hearing of the case upon the merits, after answer filed as hereinafter directed;—and that the defendant's proctor do pay all the costs, which shall have been incurred on either side, by this most useless and vexatious appeal. The S. C. observes with regret that an attempt has been made in this case, on the part of the defendant, to mislead the Court, and to divert it from the real question in dispute, by the use, or rather the abuse, of certain terms of art, wholly inapplicable to the state of pleading as it exists in the courts of this island, and of which, even if they had been applicable, it is plain that the proctor does not understand the meaning. The confusion which has arisen in the pleadings of the parties, and of which the proctor has now endeavoured to take advantage, is attributable to the misapplication of the word *demurrer*, which the defendant, or the person who drew his defence in the first instance, misapplied to that defence;—a misapplication which the defendant's proctor has adopted; and repeated in his petition of appeal. That proctor, before he attempted to write a dissertation upon law pleadings, by which he has consumed the

time of the court in the shape of a petition of appeal, would have done well to inquire the meaning of the term *demurrer*. He would then have found that, by demurring, a party objects that the facts alleged by the opposite side, supposing them to be proved, would not establish his case; and therefore, that there is no necessity for answering such allegations. Whereas, in the present instance, the defendant asserts two facts, neither of which form the subject of the plaintiff's libel, but both of which are capable of proof, and which the defendant was bound to prove, before they could avail him as a defence to the action. This, therefore, was to all intents and purposes an answer, upon which the parties might at once have proceeded to trial; the issues raised by the defendant being, first, whether the land be Service Parveny, so as to preclude the plaintiff from even the right of occupancy, and secondly, whether the plaintiff have or have not taken out letters of administration, and whether such letters be indispensable, to enable her to maintain this action. These are the two points upon which the defendant, by what he calls a demurrer, but which is in truth a plea or answer, has rested his defence. This court, however, is unwilling to preclude the defendant, in consequence of his proctor's blunder, from establishing any claim which he may himself have to the land in question. And it is therefore further ordered that the defendant be allowed to file an answer to the real merits of the case, provided the same be filed within four days from the day of promulgating this order in the D. C. No. 130, Pantura, 13 Aug. 1834.

And in another instance, where a plaintiff's proctor appealed against an interlocutory order, by which appeal the suit was needlessly delayed for five months, the S. C. directed that the proctor should pay the costs. No. 296, Amblangodde, 8 April, 1835.

So, where the D. C. directed a decree in a former case to be filed for its own satisfaction, and the defendant, whose answer had made the production of the decree necessary, appealed against the order: The S. C. affirmed the interlocutory order, with costs against the appellant, and directed that his

proctor should not be allowed his costs in appeal. No. 231, Amblangodde, 7 March 1835.

In another case, the plaintiff's proctor having objected to the cross-examination of the plaintiff's witnesses by the defendant, the D. C. overruled the objection, and the plaintiff appealed; on which the judge stopped the trial, and sent the proceedings up to the S. C., where the decision was affirmed with costs of appeal, and of all the witnesses in attendance on the day of trial on both sides. The judgment of the S. C., after observing on the greater degree of latitude permitted on cross-examination, proceeded thus: "But whatever may have been the weight attached to the objection, it ought not to have been allowed to stop the progress of the case, by an express and immediate appeal to the S. C. The 27th rule of the first section directs that 'If any objection be made to the relevancy or admissibility of a question, or to the terms in which it is put, the court shall decide upon such objection, making a note thereof, and of the decision, if either party require it.' By this course, the objecting party has the opportunity reserved to him, of appealing after the decree is passed, should that be unfavourable to him, against any evidence improperly received: And if the evidence, independently of such testimony as should be found to be objectionable, would not be sufficient to warrant the decision, it would be a good ground of reversal. But to allow a party to stop the case, and put the opposite party to all the expense of a new hearing, for the purpose of appealing against the admissibility of a particular question, would enable him to postpone the final decision to an indefinite period, and to increase the costs equally without limitation. The S. C. has had occasion to animadvert on the frivolous and vexatious appeals against interlocutory orders, so frequently resorted to in some of the D. C. And in some instances, where the appeals have been instituted by the proctor, this court has felt itself called upon to direct the costs to be borne by the proctor himself. That course is not adopted in the present instance, because the proctor appears to have been actuated by zeal for his client, and not from motives of vexatious delay, which indeed could only prejudice his own case, supposing the claim to be well founded. But it is hoped

that appeals, on grounds so untenable, will not again be made against interlocutory orders; especially where the rules of practice prescribe a different mode of proceeding." No. 706, Calcutta, 9 May 1835.

General as the terms are, by which the appellate jurisdiction is given to the S. C., the appeal must be from some judgment or order, in a suit, prosecution, or other matter, pending before the D. C.

1st. It must be *against a judgment or order*: Therefore, where a plaintiff was obliged to abandon his case, owing to the neglect of duty on the part of a headman, and the D. C. recommended the plaintiff to recover his costs against the headman, and the headman appealed, the S. C. rejected the appeal, observing that the recommendation of the D. C. was no decree; nor did it make it obligatory on the headman to comply, without an action: It was a mere expression of opinion by the D. C., and of advice to the plaintiff. No. 442, Jaffna, 20 Feb. 1835. See also No. 1652, Negombo, 6 Jan. 1836. And vide *infra*, as to appeals in criminal cases.

2dly. The judgment or order must be in a suit, prosecution, or other matter, *pending before the D. C.* Therefore, where to an action on a decree, obtained in a late Provincial Court, the only defence was, that the decree was not well founded, and ought never to have been pronounced, though it had never been appealed against; the D. C. gave judgment on the decree, and the S. C. affirmed that decision, observing that the defendant ought to have appealed against the original decree, and that if he were allowed to question the propriety of that decree in the present action, the D. Courts would be made to sit in appeal on the judgments pronounced by those tribunals which had preceded them. No. 1486, Jaffna, 20 May 1835.

So, where an officer of a D. C. appealed against an order made by the D. Judge, directing certain duties to be performed by the officer, which the latter considered ought not to have been imposed upon him, the S. C. rejected the appeal, observing that this was no judicial decision by the D. C., but an act done by the D. Judge, in the exercise of that control, which the head of every court, and of every office, must possess, in regu-

lating the conduct of the subordinate officers. *Petition Book*, 1835, page 165.

A complaint was made by a salt-renter, that the D. C. was in the habit of rejecting his complaints against persons infringing the salt regulations: In answer to which, he was told that the S. C. would receive an appeal from any decision of the D. C.; but could not listen to any general complaint like the present. If the renter considered that the D. C. took an erroneous view of the regulations, he had only to appeal against any one decision, whether in the shape of a rejection of the complaint, or in any ulterior stage; and the disputed point would at once be set at rest. *Petition Book*, 1834, page 103.

An appelliant presented a supplementary petition to the S. C., praying that the contents of this, and of former petitions, might be kept secret from the D. Judge, lest he should be displeased and dismiss her claim, which, as she said, would deter her from prosecuting her appeal. This petition was referred at once to the D. C., "as the best means of convincing the petitioner, that the S. C. can neither believe nor listen to such imputations." And it was added that the D. Judge would no doubt assure the petitioner, that she was under the protection of the Court, as long as she was a suitor there; and that she had nothing to apprehend, either in conducting her suit in the D. C. or in appeal. *Petition Book*, 1835, p. 110.

The S. C. is under the daily necessity of rejecting petitions of appeal, on the ground of their being sent direct to the registrar's office, instead of being filed in the D. C., and the other preliminary steps taken, as directed by the rules of the 8th section. And the court has frequently animadverted on the conduct of petition-drawers, in receiving fees for preparing petitions, which they must well know, and are bound to inform their employers, cannot regularly be received by the S. C. *Petition Book*, *passim*.

The question was proposed by one of the D. C., whether a prosecutor on a criminal charge was entitled to appeal? The S. C., on consideration of the very extensive words of the Charter, answered this question in the affirmative: But added that this right of appeal must not operate as any hardship or incon-

venience upon parties accused ;—that as, on the one hand, the Charter provides that appeal from conviction shall not operate as a stay of execution, unless by order of the D. Judge, so an appeal by a prosecutor, whose complaint is dismissed, ought not to subject the defendant to any personal restraint, or even to the necessity of finding security for his re-appearance ;—and that it would only be necessary to send up the proceedings, which would be decided upon forthwith at Colombo, unless the S. C. saw reason to reserve the case for circuit. L. B. 10 June 1834 ; and see circular letter to the D. Judges, 21 June 1834.

Where a complaint was made before a D. C. which refused to entertain it, but made no record or entry of such refusal, the S. C. directed a re-hearing, in order that the complainant might have the benefit of appeal, which he could not have, if no record of the complaint and of its dismissal existed. L. B. 13 June 1835.

The S. C. is naturally cautious, not to express any extra-judicial opinion, by which its consideration of any case, when regularly brought before it, might be fettered : Thus, where a D. Judge, in his laudable anxiety to know whether one of his decisions, just pronounced in a civil case, was according to law, referred the proceedings to the S. C. of his own accord, for opinion, the S. C. was compelled to decline receiving them ; observing that, though the judges would willingly give advice to a D. Judge as to the course *to be* adopted, they could not pass an opinion on a matter actually decided, and which might be brought before them in appeal, without giving the party, to whom such opinion might be unfavourable, a just right to complain that the case had been prejudged in the appellate court, without his having had an opportunity of being heard. L. B. 6 Nov. 1835. But where a criminal conviction was, in like manner, referred for their opinion, the judges, not feeling the same objection, did not refuse to consider and state their respective views of the case. L. B. 8 July 1835.

The security to be given by appellants, and the mode of giving it, are prescribed by the 4th and 6th rules of the 8th section ; and it does not appear that many disputed points have arisen on this subject. Vide *infra*, title Bail,—in appeal.

Where a defendant's property had been sequestered at the beginning of the suit, on account of his non-appearance, and after judgment for the plaintiff, the defendant appealed, but omitted to give security, considering that the sequestered property was available for that purpose: The S. C. directed that he should only be called upon to give security for so much of the amount of the debt and costs, as well those of appeal as in the court below, as the sequestered property should be insufficient to cover. No. 318, Kandy, 17 May, 1834.

A certificate from the secretary, as directed by the 10th rule, should always accompany the proceedings, whether the decree appealed against be interlocutory, or final: And in all appeals from final decrees, a security bond, as required by the 3d and 4th rules, should be entered into; though where a suit is dismissed, and the subject in litigation is not endangered by the delay, it is sufficient to take security for the due prosecution of the appeal, and for the payment of costs, already incurred, or which may ultimately be awarded. L. B. 29 April 1835.

Where a defendant, on an appeal against the award of costs against him, endeavoured to obtain a revision of the whole case upon the merits, the S. C. expressed its opinion against the adoption of such a course: It observed that either the appeal must be against the decree generally, in which case security must be given to the amount of the subject in litigation and costs;—or it must specify the precise object to which the appeal is limited, whether costs or any other matter, in which case the amount of security would be limited to the precise object of appeal, and the S. C. would not allow the appellant to go into any other subject. L. B. 29 Sept. 1834.

On one occasion the S. C. was obliged to censure the conduct of a head-moorman, who had certified the solvency of proposed sureties, on the mere report of the *Comisteer*, and had even affirmed it as of his own knowledge, when in fact he knew nothing personally about them. Such report should be made by the headman, or other person really acquainted with the circumstances of the sureties; and not by a superior officer, wholly ignorant on the subject, and whose name therefore could only

be used for the purpose of lending a fictitious character to the persons proposed. L. B. 16 Sept. 1835.

The period for appealing, fixed by the 1st rule of the 8th section at 10 days after judgment, is the same as that observed in the late High Court of Appeal, and is as much as can be necessary to enable a party, generally speaking, to decide on the expediency of appealing, without giving the appellant an unreasonable power of harassing the successful party. The 3d rule gives 10 days more for finding security: And the supplementary rule, No. 3, 25 April 1834, requires the appellant to furnish the stamp for the secretary's certificate at the same time. But the 5th rule allows a relaxation of these periods of prescription, provided the appellant can satisfy the D. C. that his omission was not imputable to negligence. On this latter rule, many references have been made to the S. C., as to the propriety of the admission or exclusion of appeals, notwithstanding the lapse of time; on which questions the S. C., and in most instances the D. C., have shown a disposition to let in the party to his appeal, whenever any reasonable excuse appeared for the delay.

Where the delay has been occasioned by want of stamps in the office of the D. C. (L. B. 21 Dec. 1833, and 25 Aug. 1834), or by the negligence or misconduct of the officers of the court (L. B. 21 Dec. 1833), it is scarcely necessary to say that the appeals were admitted without a moments hesitation. And where a party presented an unstamped petition of appeal to the D. C., which was not returned to him till 9 days afterwards, and he afterwards filed a petition of appeal in regular form, but out of time; the S. C. ordered it to be received, observing that the appellant might not unnaturally have concluded that, if unnecessary delay were permitted to the officers of the D. C., his own want of punctuality would not be too severely criticised. L. B. 18 Aug. 1835.

The object of the rules of limitation being the protection of respondents, and not the sparing the time or trouble of the courts, the S. C. ordered an appeal to be received, *with the consent of the respondent*, though no satisfactory reason was assigned for the appellant's delay. No. 6975, Kandy, 30 June 1835.

Where the petition of appeal was filed one day too late, the

S. C. considered that this omission could scarcely be imputable to wilful negligence, and admitted the appeal. L. B. 10 July, 1835. It may be doubted, however, whether this case ought to be drawn into a precedent, where no ground is shown for the delay; for the line must be drawn somewhere.

A first appeal from a D. C., newly established, was received by the S. C., though the time for appealing had elapsed, on the ground that parties, to whom litigation was comparatively a novelty, might very possibly have remained in ignorance of, or have misunderstood, the rules by which the prosecution of appeals is regulated. L. B. 13 Jan. 1835.

A D. Judge applied to the S. C. for authority to amend a decree, which had been erroneously drawn up, and which the defendant, who was thereby decreed to pay more than was intended, had only acquiesced in from not perceiving the purport of it. The S. C. observed that the amendment of judgments, once pronounced and recorded, was a power which ought to be exercised as rarely and cautiously as possible; but that as the acquiescence of the defendant in the decree had arisen from his having mistaken the nature and effect of it, the case might safely be considered as falling within the 5th rule; viz. "an omission to appeal, not imputable to negligence:" And as the necessity for appeal arose, not from the defendant's feeling dissatisfied with the decree, as it was *intended* to be pronounced, but from that decree having, by mistake, varied in its terms from the real intention of the D. C., the appeal was allowed without stamp. L. B. 9 Sept., 1835. This course, it should be observed, was adopted in deference to the opinion of one of the learned Puisne Judges, who entertained strong doubts of the power of the D. C. to amend its judgment, even though authorised to do so by the S. C. The majority of the Judges would otherwise have adopted the latter course. *Vide infra*, titles Execution, parate, and Judgment, amendment of.

So, where the appellant had furnished money for stamps, which the secretary of the D. C. was supposed to have embezzled, the S. C. directed that the appeal should be allowed with the necessary documents on blank paper; observing that it would be in the highest degree unjust, to make the suitors bear the

loss occasioned by the dishonesty of the recognized officer of the court, against which dishonesty they had no means of guarding. L. B. 12 Sept. 1835.

An appellant, the defendant in an action on a bond, having been allowed by the D. C. to give security after the time prescribed, and the proceedings being referred to the S. C., to decide on the allowance or rejection of the appeal, in pursuance of the 5th rule, the S. C. presumed that it had been proved to the satisfaction of the D. C., that the omission was not imputable to negligence, and proceeded forthwith to consider the merits of the case, to see if any good ground existed for the appeal;—in other words, for the defence set up: And it appearing that there was no good ground, the appeal was at once rejected. For if the case had been allowed to remain the usual time in the registry, before final decision, the probable object of the appeal, viz. delay, would not only have been attained, but the defendant's own neglect in giving security would thus have been allowed to assist him in that object. No. 152, Matele, 20 May 1835.

Where sureties were rejected as insufficient, and time was given to the appellant to procure others, which he neglected to do, though frequently admonished by the court on the subject, the S. C., on reference, declared the appeal rejected. L. B. 16 Sept. 1835. So, with respect to furnishing the stamp for the certificate of appeal, under the supplementary order No. 3. L. B. 2 April 1835. But where a D. Judge referred to the S. C. under the 5th rule a case in which a party had appealed too late, but the decision appeared obviously untenable, the S. C. recommended the reception of the appeal, notwithstanding the lapse of time. L. B. 16 Sept. 1835.

In transmitting proceedings under the 5th rule of the 8th section, the D. Judge should always state explicitly, whether any and what reasons have been assigned for the omission, and whether those reasons were or were not satisfactory to the D. C., as proving that the delay had not arisen from negligence. *Ibid.* and L. B. 19 Jan. 1836.

Appeal does not operate as a stay of execution, except as regards the removal and sale of the property. See 6th, 7th, and

8th rules of the 8th section: And L. B. 17 and 19 Oct., 1833, and 22 and 26 July 1834.

With respect to the time for appealing in *criminal* cases, the rule in that behalf at the end of the 8th section directs the application to be entered at the time of conviction, or a petition to be transmitted to the D. Judge within 10 days afterwards. This rule, however, was intended to induce a speedy reference to the S. C., but not to debar defendants, nor does it in fact debar them, from appealing at any time against convictions. Accordingly, these appeals have never been rejected on the ground of their having been made too late. As no stamps are required in any criminal proceedings, and no security on appeal from them (L. B. 17 June 1835), the order for the transmission of the proceedings issues immediately on the petition of appeal being received, and the conviction is decided upon, almost invariably, on the court day next after the receipt of the proceedings. A representation was made to the S. C. by a D. Judge, soon after the promulgation of the new Charter and the rules of practice, of the evils likely to arise from allowing appeals from all convictions; and especially pointing out that, if the execution of punishment were postponed pending appeal, as to which no provision was made by the rules of practice, the great object of example would be lost, while the immediate infliction of it, in the case of corporal punishment at least, would render the appeal useless. The S. C. observed in reply, that the 39th clause of the Charter had provided that no appeal in a criminal case should have the effect of staying the execution of any sentence, unless by order of the D. Judge;—that a repetition therefore of that provision in the rules would have been superfluous, and indeed improper, as implying that the Charter stood in need of such confirmation;—that as to the apprehended inconvenience from the frequency of criminal appeals, the S. C. would hope that this would not prove very extensive, but that, at all events, it had no power to restrict the right of appeal in the slightest degree;—that the Charter conferred this right in criminal cases, as fully and universally as in civil matters, this being indeed the avowed intention of those who framed that instrument;—and that though the remedy would be a very useless one, as regarded

the appellant, where corporal punishment was awarded and not suspended during appeal, still one great object, that of bringing the correctness of the decision under review, would be effected. L. B. 7 Nov. 1833. It is gratifying to be able to add that, after more than two years' experience, no inconvenience had been observed by the S. C., or expressed by the D. C., to have arisen from the frequency of criminal appeals; though a scrupulous and most laudable delicacy has been observed on the part of the D. Judges, in postponing corporal punishment, wherever the shadow of a doubt might be supposed to exist, as to the propriety of the conviction.

The appeal, however, as we have seen with respect to civil cases, must be against some judgment or order in a prosecution actually in existence. Thus, where a deft., about to be prosecuted under a Kandyan law, for having forcibly taken possession of land, appealed against the mere reception of the prosecution, the S. C. rejected the appeal as premature; observing that no order had as yet been made, from which the defendant could regularly appeal; and that, till the facts of the case appeared, it would be impossible to say whether it fell within the local law or not. L. B. 26 Nov. 1835.

One of the most important objects in the administration of justice being final and speedy decision, as far as expedition is compatible with full inquiry and due consideration, and it being well known that the object of the majority of appellants in this island is to gain time, it is obvious that the transmission of the proceedings to the S. C., as shortly as possible after the appeal is instituted, becomes an object of the highest importance. With this view, and in order to save the time formerly consumed in copying the depositions on stamps, the originals are now transmitted in appeal to the S. C. And in answer to a D. Judge, who suggested that the revival of the old course, of requiring the depositions to be copied on stamps, would tend to prevent vexatious litigation, the S. C. expressed its hope that the celerity, with which cases might now be transmitted immediately after security is given, and the subsequent dispatch in deciding them, would go further to check vexatious litigation, than any additional tax which could be imposed, and which, it

might be feared, would offer too great an obstruction to the honest litigant; and that moreover, the limited establishment of many of the D. C. would render such copying utterly impracticable. L. B. 12 Dec. 1833.

The S. C. accordingly never fails to call on the D. Judges for explanation of any delay: There seems indeed no good reason, why a single day need intervene between the giving security and the transmission of the proceedings. L. B. 14 Feb. 1835. In many instances, the delay has been accounted for by the negligence of the officers of the D. C.; but the S. C. has never failed to state explicitly, in answer to such reasons, that it is the D. Judge, as head of the Court, and not the subordinate officers, who must be held immediately responsible to the S. C. for the performance of the several duties attached to the D. C. L. B. 14 Feb. 1835:—That the D. Judge is the authority, to whom alone the S. C. can look for the due execution of its judicial orders; and that it is one of the most important duties of the D. Judge to keep his officers to their respective posts, and to ascertain, by his personal superintendence, that their several functions are punctually and faithfully discharged. L. B. 25 April, 1835: And that if his officers proved negligent, it was the duty of the D. Judge to lose no time in representing such negligence to government, and requesting the appointment of efficient officers. L. B. 24 Aug. 1835.

Among other excuses for delay in the transmission of proceedings, the want of a bookbinder, to bind them together, has more than once been urged. And where the business of any court is so extensive as to furnish actual occupation for such an officer, no doubt he ought to be provided. But as a general principle, the S. C. considered that it was the duty of the secretary of the D. C. to see that each pleading and document is bound up, from the very commencement of the suit, as each is filed; and that if that duty were performed, nothing would remain for him to do at the last, but to annex his own certificate, and transmit the proceedings, on the very day on which security was given, to the S. C. L. B. 15 May 1835.

Another very fruitful source of delay, as regards D. Courts, situated within either of the three circuits, has been the omission

to ascertain from the parties their wishes as to the place of hearing; the 50th clause of the Charter making the consent of all parties necessary to enable the S. C. sitting at Colombo, to dispose of appeals from any of those courts. The 9th rule of the 8th section directs how this point shall be ascertained; and the circular letter to the D. Judges, of the 15th April 1835, points out the necessity of ascertaining the wish of the respondent at the time of decision, lest he should not be found afterwards. It is matter of regret, however, that this precaution is frequently omitted, and delays are very unnecessarily incurred in consequence. The attention of the D. C. has frequently been called to this point, and to the form in which the wishes of the parties ought to be recorded. L. B. passim; circular letter to the D. Judges, 15 April 1835. And it is to be observed that even where the wish of one or both of the parties is, that the case should be heard on circuit, the proceedings should nevertheless be forthwith transmitted to the S. C. at Colombo. L. B. 23 Oct. 1834. And see the 10th rule of the 8th section.

Where an appellant complained that, though she had expressed her wish that the appeal should be heard and decided at Colombo, it had nevertheless been disposed of at Jaffna, without notice to herself or her proctor; the S. C. returned for answer that as the respondent had not concurred in wishing the case to be heard at Colombo, it had necessarily been decided on circuit;—that with respect to notice, it was the duty of the proctor, who had drawn the present petition as well as the petition of appeal, to have acquainted his client with the rule laid down by the Charter, as referred to in the 9th rule of the 8th section, and that the case would therefore be heard at the session at Jaffna, of which due notice had been given by proclamation;—and that if the petitioner had sustained any loss, in consequence of the proctor's negligence, or ignorance of the law, she must seek her remedy against him. *Petition Book, 1835, p. 91.*

Where parties have once expressed their wish that the case should be heard in appeal at Colombo, and after such hearing it has been referred back for further inquiry; the S. C. will not, in general, allow either party to retract their wish, and remit

the case for final decision to the circuit: For this would, very probably, be to leave the ultimate decision to a judge of the S. C., who may not have taken the principal part in the previous consideration of the case at Colombo. No. 5,276, Kandy, 14 Oct. 1835.

Previously to the transmission of the proceedings, the secretary of the D. C. should examine them carefully, to see that they are arranged in proper order, as directed by the circular letter to the D. Judges of the 5th June, 1834. The trouble, and what is of infinitely more importance, the loss of time, occasioned to the judges in appeal by neglecting this rule, is too serious to be passed over without notice. L. B. 14 March, 1835, and *passim*. The secretary, also, should never fail to note on petitions of appeal, and indeed on all other documents received by him, the day of the month and year, at the moment of receiving them. L. B. 20 May 1835. The inconvenience of recording orders, or other proceedings, on the back or cover, has been observed upon, and it is hoped, is now abolished. L. B. 12 June 1834. And see circular of the of Jan. 1836, and the form accompanying it.

Important, however, as speedy decision has been considered, generally speaking, to be, special circumstances may sometimes make it desirable that the hearing of a case in appeal should be postponed. Thus, where a defendant was appellant, and it was discovered that a deed filed by the plaintiff was a forgery, on which he was committed for trial: The S. C., on reference by the D. Judge, considered that, though the verdict of the jury on the criminal prosecution would not necessarily be conclusive in the civil action, it would be more satisfactory not to decide the latter, till the former had been disposed of. L. B. 27 April 1835.

In carrying a decree of the S. C. into execution, the D. C. should be careful to make no order, if possible, from which the party may appeal; for that would, in effect, be admitting an appeal against the decree of the appellate court, which is final. The proper course is to let the fiscal follow the very words of the decree of the S. C., taking care that he be furnished, in cases affecting land, with all plans and other documents, necessary to

enable him to fulfil the directions. And if it should become necessary to explain such decree, care must be taken, in so doing, not to vary it. L. B. 12 Aug. 1835.

When a case is referred back to the D. C., for further evidence, that court should never fail to record its opinion on the case, as it presents itself after such new evidence has been gone through, even though the order of reference by the S. C. should not expressly so direct: For otherwise, the S. C. would often be obliged to decide on the value of evidence, and the credit due to witnesses; without having had the advantage of seeing and hearing them give their evidence. L. B. 6 May 1835.

The course to be pursued, in appealing to the Queen in council, is laid down with great particularity by the 52d clause of the Charter. One case only has occurred of such appeal, since the institution of the present courts. And the only point of any general interest, which was decided in that case, was that after the judgment of the S. C., forming the subject of appeal to H. M., has been brought by way of review before the three Judges collectively at Colombo, according to the first rule and limitation prescribed by that clause, it is too late for the party appellants to move for fresh evidence to be heard: The judgment of the court upon that point was delivered and recorded at considerable length; but it is sufficient for the present purpose to state shortly the grounds on which it proceeded; premising, however, that the value of this decision, as an authority, must depend on that of H. M. in council, with the result of which, the writer of these notes is unacquainted. Those grounds were, That the very expression of bringing the judgment “by way of review before the three judges,” who are “thereupon to pronounce judgment according to law,” seems to exclude the idea of fresh evidence, the admission of which would give the proceeding a character of a new trial, rather than of a “review” or criticism of the decision already pronounced by the appellate court:—That a distinction has been obviously and intentionally made by the Charter, between cases in appeal immediately from the D. C., and those in review from the decree of one of the judges of the S. C.; the 35th clause, which regulates the course in appeal, giving the S. C. the most ample powers, not merely to confirm, reverse, or

vary decrees, but to remand for further hearing or fresh evidence; whereas the 52d clause confers no such power on the S. C., sitting in review:—That not only is no such power given, but, if given, it would have been unnecessary and productive of inconvenience and injustice; for though fresh evidence may often be found necessary, when a case is transferred from the D. C. to the S. C., still it must be presumed that all defects in the proceedings in the court below will be discovered while the case is in appeal, and will not be reserved till the decision, not of the original court, but of that of appellate jurisdiction, is under review, as the last preliminary to the case going before the King in council:—And that if this were permitted, the main object of appeals, delay, might always be attained, by keeping back some piece of evidence, till the case came up in review. No. 6,047, Kandy, 20 June 1835.

In a suit instituted before a D. C. for a divorce, one of the grounds on which it was contended that the D. C. possessed no matrimonial jurisdiction, was that no appeal from the decision of cases of this nature could be carried home to England, inasmuch as the second condition of the 52d clause of the Charter limited such appeals to decisions involving property to the amount of 500*l.* or upwards. The S. C., however, in deciding that this branch of jurisdiction did reside in the D. C., observed, as regards this ground of objection, That though it might appear at first sight, that parties would be without appeal to H. M. in council, where no value appeared as the measure of the injury sought to be redressed, the S. C. would certainly supply that apparent omission, by considering every case of the description like that before the court, as above the value of 500*l.*; since questions of this nature could scarcely be measured, as to their importance, by money to any amount. No. 11,016, Colombo, 6 Feb. 1836, given more fully under tit. Jurisdiction.

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## APPEARANCE.

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See titles, Contempt, Practice, Proctor.

## APPRAISERS.

See Administration.

## ARBITRATION.

Reference to arbitration common in Ceylon, page 33—May be before action, verbal or written; or pending action, by order of C.; but must be voluntary 33—Reference to “commissioners,” without consent, illegal 34—And decrees, founded on their reports, void 34—Such reports not evidence, 35—Any subject of action may be referred, 35—But criminal charges ought not, 35—Order of reference to be duly recorded, 36—Arbitration, or *Gangsabé*, should not be allowed after decision in D. C., 36—Award, duly made, conclusive, quoad D. C.; 37—But appealable to S. C., 37—*Gansabés*, how enforced, 37.

THIS mode of settling matters in dispute, by referring them to the decision of one or more arbitrators, is very common in Ceylon; and that particular kind of arbitration called *Gangsabé*, by which, in some districts, the matter in dispute is referred to the inhabitants of a village, generally, is specially reserved by the 4th clause of the Charter from the effect which the exclusive jurisdiction, conferred on D. C. by that clause, might otherwise have had, in preventing the continuance of that custom. The submission, as it is called, or reference to arbitration, may either be made without any suit pending between the parties,—and then, either by verbal agreement, or, which is a much preferable course, by written bond or contract;—or it may be made after action brought, at any time during the progress of it, by order of the court. But this expression, “by order of the court,” must by no means be taken as giving the courts autho-

rity, of their own mere will, to *order* the arbitration. The reference, to be legal and binding, must be strictly voluntary, and should indeed be so expressed to be, in the order of reference itself. A court of justice may *recommend* the adoption of this course, not for the purpose of saving its own time or trouble, but where the subject in dispute, and the facts to be inquired into, are of a nature to convince the court that arbitrators would be more likely to come to a satisfactory conclusion than the court itself could do. But if the parties, or either of them, be unwilling to accede to this proposal, the court is bound to proceed with the case to a decision, however difficult it may appear to be, to form a correct conclusion. And so completely unfettered ought parties to be left in this respect, that even the *recommendation* of the court to refer ought not be pressed upon them too warmly; for the party who was dissatisfied with the award would rarely fail to endeavour to set it aside, on the ground that he had been persuaded to go to arbitration against his own judgment.

It has been considered the more necessary to make these observations, because a practice formerly existed to a considerable extent in the courts of Ceylon, of referring cases, especially where land formed the subject of litigation, to persons who were styled "commissioners," and frequently without any wish, or even consent, of the parties to that effect being expressed. These commissioners inquired into the matter in the best way they could, made their report, and that report became in fact the decree of the court. This mode of proceeding, if permitted, would be, in reality, a delegation by the court of its judicial powers to irresponsible deputies. No. 91, Tenmorachy and Patchelapally, 30 July 1834, and see L. B. 27 Nov. 1834. Now, though parties may choose their own judge or umpire, and bind themselves to abide by his award, the court has no power to appoint a substitute, nor any right to compel parties to submit to the decision of such substitute. Accordingly, where the decree of a D. C. was founded, not on evidence, but on the report of commissioners appointed by the court, no agreement or consent by the parties to a reference appearing on the proceedings, the S. C. referred the case back for evidence; observing that

the report or award, not being made by a Gangsabé, or by arbitrators chosen or consented to by the parties, was not binding on either party. No. 5173, Kandy, 6 Dec. 1833. And to show how little the report of these commissioners ought to be relied upon;—in another case, in which the S. C. made a similar order to hear evidence, the witnesses who were called to prove the possession of the parties, and who must therefore have been supposed to be the persons best acquainted with the subject, stated that they had no knowledge of the survey, on which the report of the commissioners was founded, not having been present when it was made, and never having heard of it. No. 13,962, Galle, 3 Sept. 1834.

As these reports and surveys are not binding as decrees, or as forming the foundation of decrees, so neither ought such reports to be received in evidence: For the facts so reported ought to be sworn to, in open court, by the persons stating them. The only, or at least the chief, use of these references by the court, without the consent of the parties, is to ascertain what the precise object of litigation is; so that the court may be sure that the parties and witnesses, having been present at the inspection, are speaking of the same object. And thus a plan or survey may be prepared, pointing out the spot in dispute, to the correctness of which the parties, having been present when it was made, cannot refuse their assent. No. 5173, Kandy, and 13,962, Galle. See also to the same effect L. B. 13 and 16 Dec. 1833.

Supposing, however, the parties to be desirous or willing to refer their matters in dispute to arbitration, there seems to be no subject, which can form the object of a civil action, which may not be so referred. The subjects most proper for arbitration are said by Mr. Kyd, in his treatise on the Law of Awards, to be “long and intricate accounts; disputes of so trifling a nature, that it is of little importance in whose favour the decision may be given, provided there *be* a decision; and questions on which the evidence is so uncertain, that it is much better to have a decision, whether right or wrong, than that the parties should be involved in continual litigation.”

With respect to criminal prosecutions, the courts in England

have allowed these also, for the minor offences, as assaults, nuisances, and the like, in which the injured party has his choice of remedy by action or prosecution, to be referred to arbitration. But in this island, in which false and malicious prosecutions are so frequent on the one hand, and fabricated defences on the other, it would be highly inexpedient and dangerous to permit of any mode of disposing of criminal charges, except by judicial decision, or by compromise in cases of “trifling assaults, or other petty offences of a purely personal nature,” as allowed by the 3d rule of the 2d section: and only then, with the express sanction of the court, or of the crown officer.

When a civil action is to be referred to arbitration by consent, it is strongly recommended to the D. Judges not to content themselves with making a bare entry of such consent in the proceedings; but, if there be no regular bond of submission executed, to record the terms of reference plainly and explicitly, but without unnecessary language, and to cause the parties, after explaining to them the entry so made, to sign it.— Thus:—

“It is ordered, by and with the consent of both parties, that the matters in dispute between them in this action be referred to the award and final determination of [insert the names of the arbitrators], whose award the said parties do hereby agree and consent to abide by, provided the same be legally made on or before the day of next, or such other day as this court, on motion, may order.”

The terms of the order, as suggested above, may easily be varied according to circumstances.

It is scarcely necessary to say that a party must not be allowed to take his chance of a decision in his favour in the D. C., and on failure, to ask to go to arbitration; though this is a practice which has been often attempted. No. 1780, Chilaw and Putlam. And where a Gangsabé was applied for under similar circumstances, and was refused by the D. C., the S. C. affirmed that refusal; observing that the Charter, which directed that the decisions or awards of Gangsabés should be respected, could never be supposed to have contemplated a party having recourse

to that jurisdiction, after proceedings had been instituted before a more regular tribunal. No. 1780, Chilaw and Putlam, 29 Dec. 1834: No. 5871, Kornegalle.

But when the matter in dispute has been legally and regularly submitted to arbitration, the award should be held conclusive by the D. C., unless some very strong circumstances, as fraud, partiality, or the like, should appear to vitiate it. In No. 4462, from Kandy, 30 Oct. 1833, the S. C. set aside a decree of the court below, which had been passed in opposition to the award of arbitrators and umpire, where no sufficient grounds had been adduced for impeaching the award.

Where a Gangsabé had fixed certain boundaries to the property in litigation, and one of the parties had taken upon himself to remove the boundaries so placed, the S. C. animadverted severely on his conduct, ordered him to replace the boundaries at his own expense, and referred it to the consideration of the D. Judge, whether he ought not to be proceeded against criminally for the offence of removal. No. 256, Matelle, 22 Nov. 1833. As the Gangsabés have no power to carry their awards into execution, it may not be irrelevant to recommend the D. C. to enforce such awards, when they appear to have been duly and regularly made.

But though an award, when duly made, is to be considered final as regards the D. C., it is not so with reference to the S. C. On reference on this point from one of the D. C., the S. C. returned an answer to that effect, L. B. 20 and 26 Aug. 1834; and recommended the award being made a rule of court, so as to give it the effect of a judgment, by an entry to the following purport:—

“ On motion of the above-named [plaintiff or defendant]—  
“ It is ordered that the award of the arbitrators made in this  
“ case on the            day of            be made a rule of  
“ court.”

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### ARRACK.

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See Prosecution.

## ARREST.

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See titles, Bail, Contempt, Debtor and Creditor, Process.

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## ASSESSORS.

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Success of the experiment, and advantages of assessors, page 38—Sec. 7 of Rules of Prae., 39—Former rules at variance with, must yield, 39—Apprehended difficulties as to cast, etc., not realized, 40—Permanent assessor, 40—Borghers and Villales have sate together, 40—But violent or premature abolition of distinctions deprecated, 40—Exemptions from serving, 41—Penalty for non-attendance; discretionary with, and may be remitted by, D. C., 41—Assessors must be present at all proceedings to render them valid, 42—Their names should appear, and that they were sworn, 43—And two only insufficient, 43—On questions of fact, S. C. leans to the opinion of assessors; of law, to that of D. J., 43—Course, when D. J. and assessors differ, 44.

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ONE of the most striking novelties of the new system being the intervention of assessors in the proceedings of the courts of original jurisdiction, except indeed in the Kandyan provinces, where assessors have always formed a constituent part of the courts, considerable anxiety has naturally been felt as to the success of an experiment, of which serious doubts were entertained in various quarters. As far as the experience of the writer of these notes, and all that he has heard since he left Ceylon, will enable him to judge, he should say that the experiment has succeeded as fully as could reasonably have been anticipated by the warmest advocates of that part of the system. It would be absurd to expect that all the classes of natives, from whom assessors are in rotation chosen, should be found at once gifted with all the requisites for pronouncing sound opinions on the various questions submitted to them. But that they are

already of considerable use in the decision of questions of fact is incontestable; and it is equally clear that it is impossible for men to be called upon periodically to serve in this capacity, assisting personally in the daily administration of justice to their fellow-citizens, without having their ideas enlarged, and their feelings of independence and self-respect improved, or without mutually creating and imbibing some degree of confidence in each other's integrity, the want of which has been one of the greatest misfortunes and stains of the native character.

The 7th section of the rules of practice is devoted exclusively to the mode of selecting, summoning, empannelling, swearing, challenging, and taking the votes of, assessors. The following are the points, which the S. C. has been called upon to decide, or to express an opinion upon, relative to this subject.

Soon after the promulgation of the Charter, a difficulty suggested itself to the D. Judge of the Four Korles, arising out of the proclamation of 20 Aug. 1831, by which it was directed that when a superior chief was defendant, one half at least of the assessors should be of equal rank: And as the number of superior chiefs resident in the Four Korles might often be insufficient to fulfil this direction, and as the 6th rule of the 7th section prohibits all objection to an assessor on the ground of cast or rank, it was feared that great dissatisfaction might be created among the superior chiefs, by having assessors of inferior rank, sitting in judgment on their cases. To this objection the S. C. returned for answer, That the rules of practice were framed, in pursuance of H. M. express order to that effect, for all the districts of Ceylon, Kandyan as well as maritime;—that when it unfortunately happened that the new rules conflicted with former practice, the latter must necessarily give way;—but that the anticipated inconvenience, it was hoped, would never arise, because, three being all that were required to sit at once, it would only be necessary that two, at the most, should be of equal rank with the defendant;—that if there should not be two of that rank on the list of assessors for the week, the parties might agree on a set of three, in pursuance of the provision to that effect in the 6th rule;—that if they failed so to do, or the D. Judge had not received sufficient notice to enable him to pro-

cure the attendance of the persons required, the parties must submit to the inconvenience;—and that, as regarded cases, in which the plaintiff was of inferior rank or cast to the defendant, there seemed to be no good reason, why the defendant should have the casting vote in his favour, any more than the plaintiff. L. B. 17 and 19 Oct. 1833.

It may however be safely said that this, and other apprehended inconveniences of a similar nature, arising out of the jealous and exclusive feelings of the natives on the subject of cast, have never shown themselves in any formidable manner; or, where they have appeared, have been overcome by the good sense and discretion with which they have been combated by the D. Judges and the Fiscals. In those districts, in which permanent assessors have been appointed, the very example of that officer, who is always chosen from among the higher classes, and who must, from the very nature of his office, sit with assessors of all ranks and classes, has no doubt contributed very much to efface these prejudices. In more than one district, juries,—and there can be no distinction between jurors and assessors in this respect,—had been, before the writer left Ceylon, empannelled of burghers and first-class villalles, who sat together promiscuously, and with the most perfect cordiality; and a jury, similarly composed, was struck at Colombo, by consent of both sides, for the trial of persons charged with treason, at Kandy in 1835.

On the other hand, the S. C., from the conviction that the total eradication of these mistaken but long-cherished feelings can only be effectually brought about by time, aided by the good sense and more enlarged views of those who entertain them, has felt opposed to any violent or premature amalgamation of classes, which have hitherto been kept distinct:—The D. Judge of Matelé, in Sept. 1834, forwarded to the governor an application from two persons of the first class of assessors, requesting, for themselves and others of the first class, that the assessors in Matelé might no longer be separated into 1st and 2d class, but that all the *Ralé* assessors might be summoned and sit indiscriminately: And the D. Judge recommended a compliance with this application. On the matter being referred to the Judges of

the S. C., the answer returned was, That this application by two persons, "for themselves and others," appeared much too vague a term to afford safe ground for adopting the suggestion of mixing the first and second classes of assessors indiscriminately;—that a very material question would be, who those "others" were, both numerically, and with reference to their weight and respectability;—that unless a decided majority of the first class signified their express desire that the separation should cease, the Judges would not take upon themselves to recommend a union, which would be doing violence to the feelings of the dissentients;—that on the other hand, if a majority of the first class, both in numbers and respectability, were to join in signing a requisition to the effect proposed, the Judges, if such a requisition were brought judicially to their notice, might feel themselves called upon to direct at once, under the authority vested in the S. C. by the 21st and 51st clauses of the Charter, that the two classes should be united; unless indeed His Excellency the Governor should communicate to them any reasons of a public or political nature, which would render such a junction improper. L. B. 4 and 21 Oct. 1834.

For obvious reasons of general convenience, it has been thought right by the S. C. to exempt from the duty of serving as assessors, the registrar and deputy-registrars of that court, and the secretaries of the D. C., L. B. 20 June 1834; and also the several medical sub-assistants, and the pupils of the vaccine and military department in the several districts. Ibid. 9 Aug. 1834.

The question was put to the S. C. by one of the D. Judges, whether any penalty was to be levied, and to what amount, and in what manner, upon assessors who failed to attend in obedience to the summons, without sufficient cause; to which an answer was returned, That according to the form generally used by fiscals, for summoning jurors or assessors, no specific penalty is inserted for non-appearance, but the court should impose such fine, as the nature of the default and the circumstances of the defaulter would seem to call for;—that if any penalty were inserted in the summons in use in any particular district, it would be discretionary with the court to impose the whole or

any part thereof, in the same way as the penalty of 5*l.* imposed on a witness for non-attendance might be mitigated by the court, though the subpoena did not mention any such discretionary power. L. B. 8 and 11 March 1834. And see L. B. 17 Feb. 1834, where it is said that the penalty imposed by the S. C. on jurors for non-attendance is wholly discretionary, varying according to the circumstances of the neglect, or the necessity of enforcing obedience;—that the usual fine was from 5 to 10 RD. which the court however was frequently in the habit of remitting, on good ground shown for non-appearance; from which an analogy might be drawn as to assessors. And where a person, who had been summoned as assessor in one of the D. C., presented a petition to the Chief Justice, complaining of his having lain three months in jail, from inability to pay the fine imposed upon him for non-attendance, the C. J. referred the petition to the D. Judge, intimating to him that, if he concurred in thinking that the man had been sufficiently punished for his contumacy, it was open to the D. C. to have him brought up and discharged, without any formal remission of the fine by government, because this commitment (like that of witnesses, on which subject a circular letter was sent on the 21 Feb. 1834 to the D. Judges) being merely in vindication of the authority of the court, stood on a different footing from a penalty, given by a specific regulation to the crown; and the enlargement of the prisoner would come with a better grace from the D. Judge, than from any other quarter. The D. Judge concurred entirely in this view of the case, and discharged the person in contempt without delay. L. B. 26 and 30 April 1834. It is scarcely necessary to add, that the order imposing such fine may always be appealed from, like an ordinary conviction.

As regards the functions of assessors,—the question was proposed to the S. C. by one of the D. Judges, immediately after the promulgation of the Charter, whether it was intended that assessors should sit and decide on criminal matters of a petty nature, or whether such offences should be disposed of by the D. Judges alone? The answer of the S. C. was, That as the 20th clause of the Charter directed that the D. C. “should be holden before one Judge, and three assessors,” the assessors formed an essen-

tially component part of the court, and their attendance was necessary during the whole of the proceedings, civil or criminal, and whether of a serious or petty nature, in order to render them valid ; that the 30th clause of the Charter had pointed out the description of orders, on which the opinion of the assessors should be required, and that any orders of mere course, or not included in that description, might be granted without the intervention of the assessors ; as indeed they might by the D. Judge out of court. L. B. 2 Oct. 1833. See also L. B. 13 Feb. 1835. Thus, an indorsement by a D. Judge on a mandate of arrest, directing the discharge of the defendant, as having been irregularly arrested, has been considered not to require any mention of assessors. L. B. 11 and 17 Aug. 1835 ; infra, title Debtor and Creditor.—The S. C. has sometimes returned proceedings to the D. C. on the ground that the names of the assessors were not recorded at the head of the proceedings of each day, and also that no entry had been made of their having been sworn ; it being necessary to the regularity of the proceedings that both these points should be recorded. L. B. 21 Oct. 1835. And where it appeared, on appeal to the S. C. on the merits, that on the day of the decision of the case, only two assessors were present, the S. C. drew the attention of the D. Judge to that circumstance, observing that, as three assessors were absolutely indispensable to the very existence of the D. C., it was incompetent, without that number, to hear or decide any case whatever ; But as the evidence adduced on the day of decision was of very secondary importance in the consideration of the case, the S. C. considered it sufficient to direct, that its confirmation of the opinion expressed by the D. Judge and the two assessors (for it carefully abstained from calling this defective record a *judgment*) should be publicly recorded in a court duly constituted. No 5159, Badulla, 4 June 1834. Vide infra, title Contempt of Court, on which offence assessors should give their opinion at the time of its commission, to justify a conviction.

On matters of mere fact, and especially where the credit due to the evidence of native witnesses is in question, the S. C. has always felt inclined to lean to the opinion of the assessors (see

No. 11,850, Colombo, 30 April 1834, *infra* title Debtor and Creditor); and has sometimes referred cases back, in order that the assessors might be asked their opinion as to the probability of a particular transaction, and whether they considered it consistent with the habits of the class of persons supposed to have been engaged in it: As in No. 216, Tenmorachy and Patchelapally, 3 Dec. 1834. And where a D. Judge had given judgment for a debt, alleged to have been contracted under circumstances of extreme improbability, and the assessors had expressed their disbelief of the witnesses called in support of the claim, the S. C., on appeal, adopted the view of the assessors, and reversed the judgment of the D. C. No. 2552, Ruanwelle, 3 June 1835. On the other hand, on questions of legal difficulty, or of evidence requiring nice discrimination, the S. C. naturally inclines to the opinion of the D. Judge; especially where that functionary has had the advantage of a legal education and attainments: As in No. 39,931, Colombo South, 8 Oct. 1834. As to the course to be adopted, where a difference of opinion exists between the D. Judge and one or more of his assessors, see the 30th clause of the Charter, which provides that if the whole, or a majority, of the assessors differ from the D. Judge, the opinion of the Judge shall prevail, but the opinion of the dissentient assessors shall be recorded: And see also L. B. 24 April 1834, where it was observed that, though the Charter did not require a difference of opinion between one of the assessors only and the rest of the court to be recorded, yet that the mention of even one dissentient voice was highly proper and convenient, as furnishing fuller information to the S. C., if the decision were appealed from.

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## ATTACHMENT.

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See title, Contempt of Court.

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## ATTORNEY.

See titles, Appeal, Practice, Proctor.

## AUCTIONEER.

Restrictions, privileges, and responsibility of auctioneers, page 45—In disputes with, English or Civil law may be resorted to, 46—Auctioneer, desiring the buyer of land to pay the seller, promising to get a good title, which he fails to do, liable to the buyer for the price and expenses, 46—Query, if he had not so promised? 47—General liability for deposit, till title made out, 47—Should execution of transfer by seller, or payment to him of the price, have precedence? 48—Recommended that the two acts be simultaneous 48.

THE regulation of government, No. 12 of 1825, prescribes the mode by which, and the restrictions under which, any person shall be appointed to act as auctioneer in Ceylon, the duties payable to government for his license and on sales effected by him, the charges and expenses which he shall be entitled to receive from his employers, and the periods within which he shall pay over to the seller the value of the property sold;—it also authorizes him to refuse to deliver goods sold, till the purchase-money is paid, and gives him the privilege of parate execution on his own affidavit, which now is reduced to simple affirmation, for the recovery of purchase-moneys, after the expiration of certain periods. Vide infra, title Execution, parate.

As the licensed auctioneer, therefore, has the exclusive privilege of exercising that calling, and is besides invested with this great and extraordinary advantage of parate execution, the public has a right to look for somewhat more than ordinary

fidelity, zeal, and vigilance, in the discharge of his duties ; and courts of justice, accordingly, have inclined to consider any negligence on his part as calling for the utmost strictness, in seeing that the consequences of such neglect fall on himself, and not on his employers.

In matters of dispute between auctioneers and their employers, whether buyers or sellers, recourse may, generally speaking, be had, for the guidance of the litigants, to the English or the civil law, indifferently. For, as was observed by Mr. Serjeant Rough in the following case:—“The principles on which such questions must be decided are similar in their nature, whether derived from the usage and practice of the Roman Dutch law, or of the English law : The rules, binding on an auctioneer, are not less strictly laid down in the Dutch civil law, than they are by English decided cases : If there be any difference, it is that, by the former, the auctioneer is to be yet more considered a public responsible officer, than he is by the latter.” No. 411, Colombo, 25 Nov. 1835.

In that case, the plaintiff had become the purchaser of certain land, at an auction held by the defendant, Mr. Gambs, who afterwards called on the plt. to pay over the purchase-money to the vendor of the land, promising, according to the evidence of one of the witnesses, that he, the auctioneer, would get the titles for the plt. in a month. This payment was accordingly made by the plt. to the seller ; and the deft. sued for and recovered from the plt. the amount of stamps and other expenses necessary for the transfer. No title, however, was ever made ;—it turned out that the seller had no right to the land, and the plt. was eventually ejected therefrom by the lawful owner, and thereupon brought the present action, to recover both the purchase-money and the sums paid for expenses. On the part of the deft., it was contended that the payment by the plt. to the vendor was his own sole, well-considered act, and that as he had thus settled with the seller of his own accord, he had taken upon himself the task of procuring a good title, and the deft., as auctioneer, was not liable for the amount. The D. C., however, gave judgment for the plt., and the S. C. affirmed that judgment. The Senior Puisne Justice, before whom the case

was argued in appeal, requested the Chief Justice and second Puisne Justice to give their consideration to it, and they fully concurred in the judgment pronounced by Mr. Serjt. Rough, which was, in substance, as follows:—"The general rule of law is that the auctioneer is privileged to receive and retain the deposit or purchase-money in his own hands, till the contract is fully completed between the seller and buyer: In the present case, no doubt can be entertained of the purchase-money having been paid to the seller by the plt. ; since the deft., in another action, has filed the receipt from the seller to the plt. for that sum. Now, though it may, at first sight, appear a hardship, that the auctioneer should be compelled to refund monies, which have never actually reached his hands, yet as the payment to the seller by the plt. was made in reliance on the trustworthy direction of the deft., and on a consideration which has wholly failed, since no title has been or could be made out; and as there is nothing in the Reg. No. 12 of 1825 which in any way exonerates the deft. from the duty of seeing that the conditions of sale were duly performed on both sides (a duty of which he ought to be perfectly aware) he cannot be permitted to divest himself of his liability. And considering the negligence of the deft., and the early demand made by the plt., the decree must also be affirmed as regards interest and costs against the deft." The Chief Justice, in assenting to this judgment, observed that, if the deft. had simply told the plt. to pay the money to the vendor, without saying more, and the plt. had then followed that advice, instead of depositing the amount with the deft. as the safer course, it might perhaps have been considered that the plt. had taken upon himself the risk of ultimately getting a good title: But that, as the deft. went on to promise expressly that he himself would get the titles for the plt., it must be supposed that the plt. paid over the money to the vendor, trusting to that assurance by the deft. The learned Senior Puisne Justice, referred, in the course of his judgment, to the following English cases. *Burrough v. Skinner*, 5 Burrough, 2639—*Edwards v. Hodding*, 5 Taunton 815, and 1 Marshall, 377—*Horsefall v. Handly*, 2 Moore, 7—and *Lee v. Mann*, 1 Moore, 481: The substance of which cases is, that an auctioneer, receiving from a purchaser

a deposit on land sold by him, is liable for the amount of such deposit till the contract is completed and ended ; and if a good title be not made out, must refund the deposit to the purchaser, even though he should have paid over the amount to the seller.

In another case, the auctioneer sued the seller of the land, for not executing a deed of transfer, the purchase-money having been paid into his, the auctioneer's, hands, and he being ready to pay it over to the deft., on the latter executing the deed. The deft., on the other hand, insisted on the money being paid over before the transfer, or at least at the same time. Each party thus declaring himself ready to perform his part of the contract, as soon as it was performed on the other side, little difficulty could exist as to the arrangement of the material parts of the case : But the D. C. having awarded costs to the plt., the deft. appealed against the decree on that ground. The S. C., after making some inquiry as to the custom,—whether the execution of the deed of transfer ought to precede or to follow the payment over of the purchase-money,—modified the decree, and directed that each party should pay his own costs : It then took occasion to observe, “ There appears to have been rather more pertinacity on both sides than the circumstances called for, arising perhaps from the uncertainty which seems to exist as to the practice on similar occasions. The more general rule is stated to be, that the seller of the land signs the deed of transfer first, and that the auctioneer then pays over the purchase-money ;—the deed meanwhile remaining in the hands of the notary. But this, though the more usual practice, is not universally so. Where there is any want of confidence between the parties, it is not unusual, as this court is informed, for the seller to withhold his signature, till the moment when the money is actually produced, and ready to be paid over to him : And on consideration, it seems but just that the seller should have that right. The confidence, or the right of withholding confidence, ought to be mutual. The auctioneer is entitled to detain the purchase-money, till the transfer is completed ; the seller ought to be equally entitled to refuse that completion, till the payment of the money. It is true, the detention of the

title-deed by the notary may, to a certain degree, be a security to the seller ; but it is not a *perfect* security, for he must trust to the integrity and firmness of the notary for the detention. The far better course, therefore, would be to make the signature of the deed of transfer, and the payment of the purchase-money by the auctioneer, simultaneous acts. If the auctioneer and seller would agree to meet at the house of the notary at an appointed hour, for the performance of these mutual acts, much unnecessary delay, and many disputes and law-suits, would be avoided." No. 4599, Colombo, 24 June 1835.

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### BAIL—IN CIVIL ACTIONS.

Arrest allowed, only on suspicion of flight, or in cases of enormous wrong, page 49—Reasons for change from former rule 50—Change in the law of England, and late decision upon it; intended absence, though compulsory, justifies arrest 51—Discretion with D. C. in cases of wrong 52—Bail for appearance, performance, or surrender 52—Surrender, no discharge of bail, action against bail being ripe for judgment 52—Surety in appeal 53—Case referred back to D. C. to hear fresh evidence *and decide*; surety liable for performance of that decision, as that of S. C. 53—Bail in criminal cases 54—No bail after conviction 55—Surety for good behaviour 55.

THE new Charter of Justice, it is to be observed, does not, like that of 1801, give any directions as to the arrest of defendants in civil actions ; but by the 51st clause, directs the Judges of the S. C. "to frame such general rules and orders of court as to them shall seem meet, touching" (among a variety of other matters) "arrest on mesne process, or in execution, the taking of bail," etc. The 2d rule of the 1st section, accordingly, directs that a warrant of arrest shall issue, instead of the usual summons, if the plaintiff state to the court that the deft. is indebted to him (without reference to amount) and that he has no adequate security, and also that he believes (the ground of such belief being verified by the oath of a third person) that the deft. intends to abscond, or leave the jurisdiction of the court ;—or if the plt. states a case of such enormous personal wrong, as, in the opinion of the court, renders such security necessary. This, it will be seen, made a material alteration, as regards the first class of cases, from the law of arrest, as it stood antecedently

to the introduction of the new Charter. For the practice in the S. C., as directed by the Charter of 1801, was that a man might be arrested on a naked affidavit of debt exceeding RD. 100 (7l. 10s.) without any suspicion of flight or other circumstances. In the provincial courts, the debt required was RD. 100 or upwards, and an affidavit was necessary, verifying a suspicion of flight. The writer of these notes is not sorry to have an opportunity of explaining thus publicly the grounds which induced him to suggest, and the learned Puisne Judges to concur in, this change in the law regulating arrests. There appeared no good reason why an arrest should be allowed, solely on the ground of the largeness (let the amount be fixed at what it might) of the debt. If there were no fear of the debtor's leaving the jurisdiction, it was difficult to see why he should be deprived of his liberty, whatever might be the amount, till judgment and execution had been obtained against him. On the other hand, it seemed to the Judges, that the arrest ought to be allowed in any case, without regard to the amount, in which the court was satisfied that the defendant was preparing to quit, or had the intention of soon quitting, the jurisdiction; and that no sound objection could exist to the principle of this rule in any district. If the debt. had no intention of flight, he could have no difficulty, it might be presumed, in finding security; and besides, would have his remedy against the plt. for the malicious arrest. If he really did intend to leave the jurisdiction, then he ought to be compelled to give security, whether the debt were great or small. In the maritime districts, this rule appeared particularly called for. An instance had occurred in 1833, a short time before the arrival of the Charter,—and such instances were by no means of rare occurrence,—in which this power of arrest operated very beneficially, and prevented a flagrant act of injustice. The master of a ship, (the *Seppings*, it is believed) had permitted his crew to order a quantity of shoes, which were hastily supplied by the person to whom the order was given, having been made by different workmen employed by him, and on his own responsibility. The whole amount was small, though, fortunately for the plaintiff, it was something above 100 RD.;—the ship was on the eve of sailing for

England;—the master denied that he was in any way liable, and referred the plt. to the crew, each of whom was perhaps liable for a few Rix-dollars, and which was therefore nearly the same thing, under the circumstances, as telling him that he should go unpaid. The master was arrested, gave security, and it appearing on the trial that he had made himself responsible for the goods, the plt. got judgment, and recovered his just debt. But for the interposition of the process of arrest in this case, which could not have been had recourse to under the system then existing, if the debt had not exceeded 100 RD., the chance would have been very small of this poor man ever being paid.

It is gratifying to find this view of the subject, thus taken in Ceylon in 1833, confirmed in great measure by the alteration lately made in the English law of arrest, which, it is believed, (the writer has not the Act before him) reduces the grounds, on which arrest on mesne process can be permitted, to those of meditation of flight, or fraud.—At the moment of these notes going to press, two questions have arisen in Westminster Hall, which may not improbably occur in Ceylon,—one as to the discretionary power given by the Act to a Judge, to hold a defendant to bail on an affidavit of his being about to quit England;—whether this power applied to cases, in which the intended departure of the debtor was not for the express purpose of delaying the creditor, though it might have the effect of doing so. The deft. was an officer in a regiment stationed in Ireland, had come to England on leave, which would have expired in a few days, but was arrested before that period. It was endeavoured to set aside the arrest, on the ground that the deft's. departure, to return to his military duties, would have been compulsory, and not with the view of delaying the plt. The Judges, however, held that the arrest was perfectly legal; that it was impossible to say how long the deft. might be detained in Ireland by his duty, and that the intention of the Act was to invest the Judges with a discretionary power, to be exercised in any case, in which the absence of the party would have the effect of delaying a creditor. *Earnhin v. Willan*, Exchequer, Mich. Term 1838.—The other question relates to the facts necessary to be disclosed

by the affidavit to hold to bail. The Common Pleas has decided that the grounds, on which the belief of the intended flight is founded, should appear, in order to enable the court to exercise a sound discretion. *Bateman v. Dunn*, C. P. Nov. 1838.

In the second class of cases contemplated by the 2d rule, that of “enormous personal wrong,” the question of arrest is left very much, and necessarily so, to the discretion of the D. C., according to the circumstances of the case. The same discretion was given to the former S. C., by the Charter of 1801.

The 3d rule of the 1st section directs how bail shall be given;—whether to the fiscal for mere appearance, or bail above, to perform the judgment of the court, etc. In point of practice, it is believed that the security is often given in the first instance, according to the form No. 5, by which the bail undertake at once, both for the appearance of the defendant, and for his performance of the judgment, or surrender.

To judge from the results, it would seem that but few litigated or disputed points have arisen upon this branch of practice; for there is but one case which presents itself, as having been decided in appeal, on the subject of bail in civil actions before the D. Courts. The question in that case was, at what time bail should be allowed to surrender a defendant in their own discharge. The bail-bond, which was according to the form No. 5, that is engaging for the performance of the judgment by the deft., as well as for his appearance, was entered into the 3d Feb. 1834;—judgment having been obtained against him, execution against his person issued on the 27 June, and was returned *non est inventus* on 7 July;—action was commenced against the bail on 10 July, and judgment was obtained against them on 30 Sept.;—but on the 20 Sept. they produced the body of the principal deft., in order to their own discharge. The D. C. considered that the bail were liable, and gave judgment against them, from which judgment they appealed. The case was heard before the C. J. on circuit at Galle in March 1835, and he held that the surrender was too late to operate as a discharge of the bail, not having been made till the case against them was ripe for judgment. The English rule was that the principal

must be surrendered within eight days after the return of the process against the bail, or the latter would be fixed; and even that was a relaxation of the strict rule, according to which a surrender would be no discharge of the bail, after the writ of execution against the person of the principal had been returned *non est inventus*. It would be an injustice to allow the bail to put the plt. to all the expense, inconvenience, and delay of an action against them, and then to exonerate themselves by the bare surrender of their principal at the eleventh hour. No. 1154, Galle, 6 March 1835.

Analogous to the subject of bail, is that of the security required by the 3d, 4th, and 6th rules of the 8th Section to be given for the due prosecution of appeal, performance of the judgment, and payment of costs. On this subject, also, only one case presents itself on the records of the S. C., of sufficient importance to deserve notice. The facts of that case, as far as they bear on the present subject, were these: The plaintiff had obtained judgment against one Mahamado Tamby, who appealed to the S. C., and the present defendant, who had been bail for him in the court below, in getting a sequestration taken off, became his surety in appeal, entering into the usual bond according to the form No. 2, attached to Sect. 8 of the Rules. The S. C., after hearing the case on the merits, referred it back for further evidence and decision; and the D. C., accordingly, after hearing fresh evidence, gave judgment against M. Tamby, which was not appealed against. M. Tamby, however, not being able to satisfy that judgment, the plt. sued the present deft., as the surety in appeal, and obtained judgment against him. The deft. appealed, contending that he had only bound himself for the performance of the judgment of the *Supreme Court*, and for the payment of such sums as the *Supreme Court* should decree; and therefore, that he was not liable for sums decreed by the *District Court*. The S. C., however, affirmed the decision, observing—That the deft., in becoming surety in appeal for M. Tamby, engaged that that person should “well and truly perform and abide by the judgment which should ultimately be pronounced by the S. C.,”—that as the order of the S. C., in referring the case back, directed that the D. C.,

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“should receive such further evidence as might be offered by either party, and should thereupon give judgment as justice might require,” the decree ultimately pronounced by the D. C., and not appealed against, became virtually, though not literally, the judgment of the S. C.;—that it was impossible that it ever could have been the intention of the parties to draw the distinction attempted to be established by the deft., since the return of the proceedings back to the D. C. for further evidence, without any order to return them to the S. C., was a matter arising out of peculiar circumstances, and could not have been contemplated by the deft., when he entered into the engagement.—The S. C., however, might perhaps have felt some doubt whether, in the strict construction of the bond in question, the deft. could have been held liable, if that liability had not been supported by a decision of the Court of K. B. in a case strongly analogous in principle to the present. *Nares v. Rowles*, 14 East, 510. In that case, the deft., as surety for a collector of duties under 43 Geo. III. ch. 122, entered into a bond, the condition of which was that the collector should duly demand and pay over “the duties in the said act mentioned.” The act authorized the collection of duties under any other act passed in the same session; and the duties actually collected and not accounted for, and for which the action was brought, were collected under some other act so passed. It was objected that the bond did not extend to duties, collected under any act except the 43 Geo. III. ch. 122. But the Court held that the duties, being assessed under and by virtue of an act referred to in the act in question, might be considered as assessed by that act. In that case, then, as in the present one, the surety undertook that his principal should perform whatever should be directed by a certain designated authority: In each case, the power of direction was legally transferred to another quarter: In the present case, therefore, as in that cited, the substituted authority became binding on the surety. No. 6220, Kandy, 20 May 1835.

With respect to bail in criminal cases:—The 12th rule of the 2d section directs That every D. Judge shall, within three days after a person is charged with any offence, commit him for trial, or admit him to bail; except in cases of murder or

other grievous offences, in which additional evidence is expected: In which cases the Court may commit for further examination. It was suggested by one of the D. Judges, on the promulgation of the Charter, that though the rule might be easily complied with inailable offences, it might frequently occur that, in cases notailable, the evidence could not be so far completed within the three days, as either to establish such a suspicion of guilt against the accused, as would warrant his commitment, or to justify his discharge for want of evidence. The S. C. returned or answer, That the inconvenience apprehended would be obviated, it was hoped, by the concluding part of the rule; for though the exception only expressed "murder or any other very grievous offence," there could be no objection to the D. Judge, in his discretion, applying the provision to any offence notailable;—that generally speaking, indeed, "grievous offences," and "offences notailable" might be said to be nearly convertible terms, but that it was considered desirable, when the rules were framed, to limit the exception as strictly as possible, in order to discourage the delays which used so frequently and so unnecessarily to occur in the preliminary proceedings; and that the rule itself was not new, for it formed the 7th instruction for magistrates, promulgated by Reg. No. 8 of 1806.—L. B. 2 and 5 Oct. 1833.

A question was put to the S. C. by another D. Judge, whether, after a person had been convicted and sentenced by the D. C. to imprisonment, he had authority to discharge him on bail; and was informed that the D. C. had no power to bail a party convicted, unless where the prisoner had appealed, and the D. Judge, having considered a stay of execution desirable pending appeal under the 29th clause of the Charter, should see fit to allow him to remain on bail till the decision of the S. C. was known:—Sentence once passed, and either acquiesced in, or affirmed by the S. C. on appeal, could only be remitted or mitigated by pardon from the Governor. L. B. 11, 17 Oct. 1834.

As to the mode in which security for good behaviour, required by a sentence to be entered into at the expiration of the term of imprisonment, should be given, where the defendant is out of his own District at that period, see Petn. Book of 1834, 95.

**BOND.**

See Obligation.

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**COMMISSION OR PERCENTAGE.**

Merchants allowed 2 1/2 per cent. for debts sued for, though not recovered, page 56—A shroff, keeping the private accounts and money of his superior, is not entitled to commission, no promise or demand having been made for it 53—No analogy between shroffs and merchants, as to commission 57.

AN English merchant at Colombo, as attorney of the assignees of Messrs. Palmer and Co. at Calcutta, sued another English merchant for the balance of monies recovered by the defendant from the estate of Messrs. Beaufort and Huxham, to the use of Palmer and Co. The only, or principal, question in the case was, as to the right of the defendant to charge a commission of 2 1/2 per cent. on certain debts due from Beaufort and Huxham to Palmer and Co., which the deft. had attempted, but without success, to recover by actions at law. Judgment having been given by the District Court for the deft. on this point, the plt. appealed to the S. C. The chief arguments on the part of the plt. and appellant went to show that the actions by the deft. were unnecessary and unjustifiable, and therefore that the commission ought not to be allowed. The deft., however, to show that the actions had been brought *bonâ fide*, adduced letters received from Palmer and Co. acknowledging his zeal; and he relied further on the notice published by the merchants of Colombo, and on the general usage which was established by evidence, as to the commission usually charged by them. The S. C., seeing no reason to doubt that these actions were brought in good faith, and being satisfied that the claim was supported by the general custom of merchants in Ceylon, admitted the claim, and affirmed the decree of the D. C.—*Jeffery v. Read*, No. 214, Colombo, 25 Feb. 1834.

In an action against the Shroff of the Kandy Cutcherry, by

the Government Agent of the Central Province, on a balance of accounts, one of the questions was; whether the defendant, who had kept the private cash and accounts of the plaintiff, was entitled to one half per cent., which he claimed on the monies so received by him, as the private cashier of the plt. The facts of the case, as far as they bear on this question, appear in the following judgment of the S. C., as it was delivered by the Chief Justice, and concurred in by the Puisné Judges. The frequent disputes, arising out of the confidence, often too implicitly reposed in these subordinate officers by their superiors, and by which the former are exposed to a degree of temptation which can scarcely be justified, will perhaps be considered a sufficient reason for the length at which this judgment is inserted:—

This claim to a commission of  $1/2$  per cent. on monies received by the deft. on the plaintiff's private account, is stated to be made by analogy to the commission charged by merchants on the receipt of money;— $1/2$  being charged by the deft., instead of 1 per cent. as charged by the merchants: And it is contended that, by law, and without any express agreement, the deft. is entitled to this percentage, as his *quantum meruit* (1) for his services. It seems impossible to support the claim for commission, in the mercantile sense of the word; because the chief consideration, on which the right of a merchant or banker to commission is founded, is wanting in the present instance;—the expense, namely, of providing a place of safe custody, and other incidental expenses, and the risk of loss. The expense is borne in the present instance by the Government; and the risk, provided the deft. availed himself of the place of security which his office leaves at his disposal, would have been nothing. For it by no means follows, as has been contended on the part of the defendant, that because the Government has

(1) To those unacquainted with English law terms, it may be useful to explain that this expression signifies the remuneration which the law, in the absence of any express agreement as to amount, implies that every one is entitled to, for work or services performed for another; “as much as he has deserved.” So the term “*quantum valebat*” for goods, etc., furnished, without express stipulation as to price; “as much as the thing was worth.” See further as to this implied contract of remuneration, under title Obligation.

declared that it would not be responsible for private deposits; therefore the deft., a mere depositary, would have been liable for any loss, not arising from gross negligence. But is the deft. in a situation to demand, as a matter of right, any remuneration from the plt., whether in the shape of commission, or of monthly stipend, or of any other mode of payment? The contract, which the law implies in the absence of any express agreement, that every one shall receive what he has justly earned, which is the contract on which the defendant relies, is certainly one of the most equitable nature, and ought therefore to be most liberally construed. But the law will not raise this implication, unless it may be fairly inferred from the circumstances, that remuneration was contemplated at the time the services were performed. Then the question naturally suggests itself, what may be supposed to have been passing in the minds of these parties, when the deft. first entered upon the duties of his office? As far as custom has been proved,—the custom not of merchants, but of shroffs,—there appears nothing to justify the supposition, that the deft. expected remuneration. Two gentlemen, who have filled many situations connected with the revenue, swear that they never heard of such a claim being made, or of any payment for these private duties being even offered: Nor has any such instance been adduced by the deft. It is quite true that no custom of the service could make it incumbent on the deft. to perform these extra duties, if he had thought proper to refuse them: And it is equally true that, if he had stipulated for additional payment, and the plt. had agreed to make it, the plt. would have been bound to fulfil his engagement; however objectionable it might be to allow a public servant to act as a private banker, mixing up the money of individuals with that of the public, for hire. But if the deft. had ever intended to claim such remuneration, he ought to have so stated, and in all probability would have done so, to the plt., if not when he first found these private duties imposed upon him, at least on some subsequent occasion. Instead of which, it appears that he held the situation of Shroff for two years and a half, during which period he kept the plt.'s accounts as his predecessors had done, balancing them at the end of each month,

and yet never advanced this claim till after his dismissal from office. If the claim had been made at first, or after a reasonable period, the plt. would have had an opportunity of considering whether he would accede to the terms proposed, or provide himself with another clerk, who had no public duties to perform. As the case presents itself, the court cannot believe that the idea of claiming this percentage ever entered the deft.'s mind, till he found that he was no longer to be retained in his office: Or, as one of the assessors in this court has expressed his opinion, in language somewhat homely, but strongly marked with probability, "The deft. hoped to gain the heart of his superior by compliance, and did not think of being paid till they had quarrelled." On this point, therefore, the S. C. is of opinion that the decree of the D. C. should be affirmed. No. 7184, Kandy, 2 Dec. 1835. For a further report of this case, as to the validity of a note or check produced by the deft. against the plt., vide *infra*, title Promissory Notes, etc.

As to commission to appraisers, vide *supra*, title Administration, p. 7.

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## CONDITIONS.

See title Renter.

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## CONTEMPT OF COURT.

Rule that a day must elapse before convicting for contempt, strictly enforced, page 59—Assessors should give their opinion on the contempt, when committed 60—Obstruction of *any* order of Court is a contempt 60—If committed out of C. it must be proved, and the accused may offer counterproof; interrogatories, however, always useful 61—Attachment for not appearing, etc., a criminal, rather than a civil proceeding 61—Batta, etc. 62—Attachment may be omitted, and order taken for general denial 62—Attacht. v. fiscal; previous explanation should be demanded 62.

THE 19th rule of the 2d section, following a former and most wholesome regulation, No. 15 of 1820, on that subject, directs that in all cases of contempts of the D. C., their process, or officers, the party charged with the offence shall be committed to

prison, or give security, till the next day, when he is to be called upon to answer touching the contempt; and if he fail to satisfy the court that no contempt was intended, judgment shall be passed upon him, as therein directed. This rule, by which one day must be allowed to elapse, before the court decides on an offence, of which it is itself in truth the prosecutor, has been strictly enforced by the S. C.; and whenever it has appeared that the conviction has taken place, without the requisite delay having intervened, that court has never failed to set such conviction aside. Criminal Minutes, 10 May 1834, and several other cases.

A case came before the S. C. in appeal, in which the *conviction* had taken place regularly, on the day after the alleged contempt; but it did not appear from the proceedings, that any assessors had been empannelled at the time the contempt was actually committed. The proceedings were referred back to the D. C., in order that it might be stated whether this had really been the case; or whether the clerk had merely omitted to insert the names of the assessors. It was observed by the S. C., That if no assessors had been empannelled, the court was not sitting,—it was not legally in existence according to the 20th clause of the Charter;—and therefore the defendant could not with propriety be said to be guilty of a “contempt of court:”—That if indeed a person, desirous of insulting a D. Judge, were to seize the opportunity of his first taking his seat, before the assessors could be sworn, such an offence ought not to go unpunished;—but that in such case, it would be the duty of the D. Judge to have the assessors sworn immediately, or, if the regular assessors happened not to be in court, any three persons who had witnessed the insult, and then to take their opinion as to the intention of the person offering it;—but that in the present instance, as far as appeared from the proceedings, the assessors who gave their opinion on this point on the day of decision, were not present the day before when the offence was committed, and if so, their opinion could be of little value. Criminal Minutes, 20 Aug. 1834.

Forcible obstruction having been offered to a surveyor, while endeavouring to execute an order of survey, issued from a D. C.;

the D. Judge applied to the S. C. for instructions on the two following points:—First, whether this was to be considered a contempt of court, and so to be treated under the 19th rule;—secondly, if so, whether the party accused of the contempt had a right to offer evidence in his own vindication. To these questions, the S. C. directed the following answer to be returned:—On the first point, That the forcible obstruction of the execution of any order of the D. C., whether it were “process” in the more limited sense of the word, or an order of any other description, provided it were legally issued, and legally attempted to be carried into effect, was a contempt of the court out of which it issued;—that a surveyor, or any other person, to whom such order was directed, became, pro tanto, an officer of the court, within the meaning of the rule:—On the second point, That a distinction was to be made, and had indeed been made by the rule, between contempts committed before the D. Judge himself, in his own view, and those committed against his process or officers; the latter class requiring to be established by “due proof,” in the former class all proof being obviously superfluous, beyond the ocular demonstration of the Judge himself and the assessors, unless he should wish, for his own satisfaction or that of the assessors, to take the opinion of any of the bystanders;—that in the present case, as the contempt was alleged to have been committed out of court, and as proof would therefore be necessary to substantiate the charge, the defendants must decidedly be at liberty to meet that charge by counter-evidence;—that the proceeding by interrogatory, however, might still be found convenient in either class of cases; for though in cases like the present, the answers would not be conclusive, still they might often go some way to show whether any real disrespect had been intended to the orders of the court. L. B. 18 and 19 Aug. 1835.

As regards the proceedings against a defendant by attachment for contempt in not appearing:—A fiscal, shortly before the promulgation of the new Charter, applied to the S. C. for instructions; whether he could carry the mandate of attachment into execution, without provision being made for the subsistence of the defendant by the plaintiff in the action, according

to the 33d section of proclamation of 22 Jan. 1801: To which the S. C. directed an answer to be returned, That the writ of attachment was a proceeding, not at the suit of the plaintiff, but in vindication of the authority of the court;—that the defendant in such case was not taken either in mesne process or in execution, but as having been guilty of a contempt of court;—and therefore, that the proclamation alluded to did not apply. L. B. 29 July, 5 Aug. 1833. And see further, as to the mode of confinement of, and the allowance of batta to, a defendant, under such circumstances, L. B. 13, 19 Nov. and 3 Dec. 1833. See also L. B. 1, 11 March 1834, and Nos. 7 and 11 of the Supplementary Rules for the D. C., by which it is declared that there is nothing in the Rules of Practice, as originally framed, to prevent the court from omitting the proceeding by attachment, and issuing instead thereof the order *nisi* for the general denial, whether on default of appearance or of answer, unless the plaintiff insist on the more rigorous course, or unless the court consider the attachment necessary for the vindication of its own authority. And this course was recommended, where a defendant, against whom an attachment had issued, was reported by the fiscal to be lame and unable to travel. L. B. 5 and 8 Aug. 1835. By the Mutiny Act, a soldier failing to appear to an action for debt under 30*l.*, cannot be proceeded against as in contempt; *infra*, title Debtor and Creditor.

On the subject of motions for attachment against fiscals: It was brought to the notice of the Chief Justice by the fiscal of Colombo, that many hasty and unnecessary motions were made against him and his officers to this effect, occasioning much vexation and loss of time in his office, which would be obviated, if parties, in all cases in which the returns to writs of execution appeared unsatisfactory or not sufficiently explicit, or where doubts arose as to the due performance of any other of the fiscal's duties, would call on that officer or his deputy for explanation; and if such explanation were refused or insufficient, would then move the court against the officer, when such explanation or the want of it would enable the court to decide whether he had been in contempt or not. The C. J. considered that it would be better to bring this subject to the notice of the

bar, and to leave the matter to the good sense of the members of it, than to propose any general rule or order on a subject, in which much must necessarily be left to their discretion, according to the circumstances of each case. He accordingly mentioned it in court on 8 April 1835, when the proctors of Colombo at once signified their acquiescence in the suggestion; which seems indeed so fair and reasonable in itself, that the adoption of it throughout the island could scarcely prove otherwise than beneficial. L. B. 8 April 1835.

A witness, juror, or assessor, committed for non-payment of a fine imposed for non-attendance, may be discharged by the court which committed him. L. B. 26 and 30 April 1834; *supra*, Assessors, p. 42. A Buddhist priest fined for a contempt in refusing to give evidence, see title Evidence, witnesses.

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## COPIES.

Of civil proceedings; who entitled to, page 63—Mode of applying for and granting; stamps; no fees demandable 64—If a proceeding be not forthcoming, documents which best supply its place should be furnished 64—In criminal matters, greater caution used; but granted on good ground, as vindication of character 65—Where the object was action or prosecution; S. C. directed a written motion to be referred to K. A.; if he assented, copies granted; if he objected, parties to be heard 65—Reasons for that course 66—Copies of depositions, unnecessary on appeal 69—Of process, to be furnished by D. C. to fiscal 69—Of lost document, how given in evidence 69.

THE S. C. has not unfrequently been applied to by D. Judges for instructions, as to the propriety of granting or refusing copies of their proceedings. With respect to those of a civil nature, the S. C., in answer to an application of that description, observed, That as a general rule, the best mode of deciding whether a party was entitled to the copy applied for, was to consider the relative situation in which he stood with respect to the proceedings in question, and whether the alleged or probable use to be made of the copy afforded a fair and reasonable ground for the application;—that a mere stranger to a suit, for instance, having no interest in the subject-matter of it, would have no right to make any such application;—while on the other hand, a party

to the suit, wishing to appeal (as was the case in the present instance) would often be unable to frame his petition of appeal, or to support it by argument, unless he was in possession of the decree, and of the opinions of the assessors, if they were opposed to the decree; and that to deny him copies, therefore, might be to deny him the means of obtaining justice. L. B. 7, 13 Oct. 1835. With respect to the mode in which such copies should be applied for and granted, the S. C. on another occasion, observed that they might be obtained, either by common motion made orally in court, or by application in writing, if the object proposed required, in the opinion of the D. Judge, the latter more formal requisition;—that the stamp necessary for each “office-copy” must be regulated by the table of stamps promulgated on 1 Oct. 1833, and not by any former order or practice;—that as regarded the persons by whom such office-copies should be furnished, this must depend on the number of clerks in each court, with reference to the quantity of business;—that on one occasion, the S. C. had recommended that the party himself should be allowed to furnish a copyist and the necessary stamps, but that this course should only be resorted to when the time of the secretary and clerks was really and fully occupied; and even then, that the copy must be examined with the original by the secretary, in order that he might certify it to be a true copy. L. B. 25 June, 2 July 1834. But where a D. Judge recommended that when the clerks of his establishment were insufficient for this duty, a supernumerary should be employed, and should charge certain fees for his labour, the Judges of the S. C. declared that they should not feel justified in sanctioning this arrangement, by which parties would in effect be subjected to the payment of a fee not enumerated in the table: That table was framed in the supposition that it was to include all that a suitor ought to contribute, towards defraying the expenses of the administration of justice; whereas, by adopting the course proposed, suitors would in truth be paying for the establishment of another officer of the court. L. B. 18, 23 April 1834.

Application was made to a D. C. by a defendant in a suit in the late Sitting Magistrate’s Court, for the copy of a decree of

dismissal passed in that court, but which decree had never been recorded by the S. M. It appeared that the case had been carried up in appeal by the plaintiff, but the appeal had been declared abandoned by the court above, in consequence of the death of the plaintiff and appellant. The D. Judge, having applied to the S. C. for instructions, received for answer, That as the defendant's application could not be literally complied with, the decree in question having never been recorded, the best information which could be substituted would be the copies of the plaintiff's petition of appeal, and of the order of the appellate court thereupon; that from the first of those documents, it would appear, in the plaintiff's own words, that the late court had "dismissed the appellant's case with full costs," and from the second, that the appeal had been dismissed on the ground of the plaintiff's death; and that, though these documents might not be as satisfactory as the original decree would have been, still the production of them would probably be equally efficacious in a court of justice, or on sale of the property, since the decree of dismissal itself would scarcely appear to amount to more than a nonsuit, by which the plaintiff's representatives would not be absolutely barred from bringing a fresh action. L. B. 7, 12 Oct. 1835.

With respect to criminal proceedings, a greater degree of caution is no doubt necessary in granting copies, than of civil matters. But the S. C., as well that now existing as its predecessor, has inclined to grant such copies, whenever a good ground has been shown. Thus, where the applicant had been acquitted, his identity not being proved, and he was desirous of obtaining a copy of the acquittal, preparatory to his application for the office of Police Vidahn, the S. C. granted the application. Petition Book of 1835, p. 6. Where this application has been made for the purpose of action or prosecution, the course adopted by the present S. C., as well as by the former one, will appear from the following judgment in a case of *The King v. Achland and another*, which was delivered on 16 Dec. 1835 by the Chief Justice:

"The defendant in this case applies for copies of the proceedings and depositions, had and taken before the D. C., in order

to enable him to consult counsel, as to proceedings for conspiracy and perjury against the witnesses, who have given evidence on the part of the prosecution. The question involved in this application is one of no small importance, as regards the practice which is to be observed in future, on similar occasions: And we are therefore anxious that our opinions upon it should be known and recorded. For myself, individually, I am not presumptuous enough to suppose that any decision of mine should be necessarily recorded as binding on future judges. But there is this advantage attending the practice of recording all judgments, with the reasons on which they are founded; that future parties have a right to avail themselves of such judgments, at least to the extent of urging that, if the reasoning on which they are founded be sound, they ought to be received and acknowledged as law. If the reasoning can be shown to be fallacious, that person must be a very weak man, and not a very conscientious judge, who would feel sore at his doctrines being combatted; who would not rather desire to see them refuted, if capable of being so, and his decision overruled. We do therefore think it highly desirable that the opinion of the court, upon every question of general importance, should be fully stated and recorded; the unanimous opinion, when the court is undivided, the individual opinions of the judges, when, unfortunately, they disagree.

When this subject was first brought to my consideration, by the application originally made by Mr. H. Staples to the Registrar, it appeared to me that the proper course to be pursued was as follows: First, that the application should be made by regular motion in writing, setting forth the grounds on which it was made: Secondly, that the motion should be referred to the King's Advocate, in order that that officer might state if he had any objection to offer to it; this being the course which it seems was pursued by the former S. C.: Thirdly, that if no objection were offered on the part of the K. A., the application should be at once granted: Fourthly, if the K. A. did object to it, then that the parties should be severally heard in support of, and in opposition to, the motion. In this view of the subject, the learned Second Puisne Justice expressed his entire

concurrence; the learned Senior Puisne Justice expressed his dissent, on the grounds which I shall presently notice. In consonance, however, with the opinion of the majority of the court, the course suggested has been pursued; the two first steps have been duly taken; and at the third stage, at which we have now arrived, the K. A. states that he has no objection to offer to the motion. According to the opinion of the court, therefore, we should have nothing more to do than at once to grant the application. But we could not feel satisfied with that naked acquiescence in the motion. We feel bound to notice the objections which the learned Senior Puisne Justice has recorded, both from respect to himself, and also lest it should hereafter be supposed that we had overlooked them, or had not given them full consideration.

As a general principle, we have always felt most anxious that every person, against whom a well founded case of perjury was presented, should be prosecuted. In a country where this offence is so fearfully common, Courts of Justice are bound to facilitate, rather than to offer any impediments to, such inquiries. The Senior P. J., however, “not only thinks that the K. A. should be consulted, but that the D. Judge, before whom the proceedings, *in originali* were had, should also be referred to;—that it would be to give up the natives to the utmost oppression, if, though believed by a D. Judge as a magistrate, they should be liable to an after prosecution before the D. C.” In the present instance, the K. A. has been referred to, and he makes no objection to copies being granted. With regard to the D. Judge, with all our respect for the gentleman holding that office, we cannot discover the necessity or propriety of consulting him on the subject. Cases do sometimes occur of so glaring a nature, that the D. C. feels bound, of its own motion, to commit parties for perjury: But we are very far from saying that prosecutions should not in many cases be instituted, without any such expression of opinion on the part of the court. How can the D. C., or the S. C., or the King’s Advocate, know what evidence may be adduced to contradict the witnesses, whose testimony is about to be impugned? Then the proceedings, in the course of which the perjury is alleged to have been

committed, become absolutely necessary to enable the prosecutor to frame his accusation. In England, it seems, the authorities are conflicting, on the subject of compelling the production of records, in order to enable parties to initiate proceedings (1). But it must be remembered that in England, the same necessity does not exist, at least as regards the depositions of witnesses; because the employment of a short-hand writer would obviate all difficulty. In this country, it would be dangerous to trust to anything but the notes of the Court, and the correctness of the interpreter. The proceedings, therefore, form the necessary materials, out of which the complainant must construct his accusation, as much as stolen property, or marks of violence on the person, furnish the groundwork of prosecutions for theft or assault. And it cannot be said that a person accused of perjury should be allowed any greater advantages, because he has given evidence on the part of the crown; or that any obstruction should be thrown in the way of his prosecution, more than in other cases.

But it is said that it would be oppressive upon the natives, if they were to be liable to a prosecution, after having been believed by the D. Judge. We cannot understand how the belief of the D. Judge can or ought to operate to screen a witness

(1) The practice is said to be in England, that the judges will refuse a copy of an acquittal to a person intending to bring an action thereon, if there were a probable cause for the prosecution. Carthew's Rep. 421. And see Leach's Hawkins, ch. 23, sect. 142, etc. But with all deference, this rule seems to involve more than one fallacy. First, almost every case which goes before a common jury in the ordinary course may be said to have had, *prima facie*, a probable cause; inasmuch as, without a probable cause, the grand jury would not have found the bill: Secondly, the judges, by this rule, take upon themselves to decide in a great measure the very question between the parties, and that, after hearing only one side of the question; for the party acquitted complains, not that he has been put upon his trial without an *apparently* probable cause, for that is scarcely possible, but that the cause or foundation of the prosecution, however probable in appearance, has been fabricated or perverted by the prosecutor: And the means of substantiating this complaint, that is, that the evidence has been fabricated, etc., will often not present themselves, or be attainable, till after the conclusion of the trial, the very evidence in which the judges take as their test for deciding on the propriety of granting or refusing the copies.

from trial, or at least from preliminary inquiry, whose testimony is alleged to be false. If this proposition could be maintained, prosecutions for perjury would be limited to those cases, in which the attempt at deception had failed: The unpractised and unsuccessful swearer would be brought to justice, while the more consummate and accomplished villain would find impunity in the very excess of his guilt, which had enabled him to deceive the court into a belief in his truth: According to this doctrine, Titus Oates, and his confederates in his most detestable conspiracy, ought to have escaped prosecution, because they succeeded so completely in working on the credulity of the Judges and Juries, whom they made the instruments of their wickedness."

It was accordingly ordered that the copies be allowed. Criminal Minutes of 1835, 16 Dec., p. 487. And on the next court-day, the learned Senior Puisne Justice expressed his assent to the decision of the majority of the Court, on the ground that parties might be situated differently in Ceylon from what they would be in England. The above judgment may therefore be considered as unanimous.

We have seen, under title Appeal, *supra* p. 27, that copies of depositions are no longer necessary for that proceeding, the originals being now always transmitted to the S. C.

A doubt having been started, whether the copy of process, required by the first rule of the first section to be served by fiscals on defendants, ought to be furnished by the D. C. or by the fiscal, the S. C. directed inquiry to be made, as to what had been the practice at Colombo; and finding that it had been usual for the late Provincial Court, and was now the practice for the D.C., to furnish the fiscal with the copy together with the original, recommended the adoption of the same course in the court where the difficulty had arisen; observing that if this should occupy too much of the time of the officers of the court, application should be made to government for printed forms of copies, as well as of the originals, of the summons. L. B. 11, 14 Nov. 1833.

Copy of a document which a witness has been subpoenaed to produce, but which is stated at the trial to be lost, may be

given in evidence, though such copy was not filed according to the 20th Rule of the 1st Section. L. B. 5th, 6th Oct. 1835. Vide *infra*, title Evidence, and the reasons there given.

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## COSTS.

Of what costs consist; are between party and party, or proctor and client; and interlocutory, or final; page 70—In general, costs follow decision 71—Plt. getting judgment against one deft. only, liable for costs of the others 71—Costs should fall on the party occasioning the action 72—So, unnecessary costs, whatever be the decision 72—On each party 73—Interlocutory, cannot be claimed, unless expressly awarded 73—Only paupers exempt; course where pauper successful 74—In Ceylon, crown receives and pays costs, 74—Costs classed according to the judgment, 75—Double costs, imposed as a condition of rehearing, or as a fine for deceiving D. C., but not for groundless action, 76—Security for costs, if plt. reside out of, or be a foreigner to Ceylon, but not for poverty, 77—Taxation; duplicate bills to S. C. 78—Decisions on taxation; 10 p. cent. in 1st and 2nd classes; retaining fee; fee on trial; copy of decree; list of property; drawing bill of costs; party conducting his own case 79—Appeal from taxation; order to refund 80.

THE expenses to which parties are put in the prosecution and defence of actions, and which are commonly called “costs,” consist in Ceylon of the sums paid for stamps, and of Proctor’s fees; both of which heads are regulated by the respective tables of 1st Oct. 1833, and the supplementary rule of the 9th Oct. 1834. No fees are demandable from the officers of the Courts. It is sometimes necessary to distinguish costs, as between party and party, which signify, generally speaking, those which are allowed to the successful party against his adversary, from costs as between proctor and client, which are those which the client must pay to his proctor at all events, whether he succeed or not. See Supp. Rule, 9th Oct. 1834, art. 5. It may not be irrelevant to the present subject, though falling more properly under the head of “Proctor,” to observe that any agreement, by which the payment of the proctor’s fees is made to depend on the success of the suit, is highly reprehensible, and has never failed to be strongly animadverted upon by the S. C., whenever such an arrangement has been brought to its notice. Costs also are either *interlocutory*, that is given by special order on some

particular proceeding in the progress of the suit; or *final*, being the general costs, awarded at the termination of it.

Costs being, in England, the creatures of Acts of Parliament,—for they were not recoverable by either party at Common Law,—the decisions of English courts on this subject have reference chiefly to those acts, and do not furnish much guidance, except by analogy, to courts out of that country. The general rule, though not an absolutely universal one, is that the successful party is entitled, on obtaining judgment, to receive his taxed costs from the losing one, the legal merits of the case thus being the text. See Rule 40 of Sect. 1, by which it is left to the discretion of the court to modify this rule, by making each party pay his own costs, or in such other way as the justice of the case shall seem to require. But this discretion, as in every other instance, must be exercised on good and solid grounds, and not on a merely fanciful view of the case by the D. C. Thus, where in an action for the breach of a promise of marriage, the D. C. gave damages, and not merely nominal ones; but being unfavourably impressed with respect to the action, decreed the parties to pay their own costs: The S. C., on appeal, directed the costs to be paid by the defendant, observing that there appeared no reason why the plaintiff should not be allowed her costs, as in any other case in which a party is ultimately successful;—that the defendant had it in his power to prevent any costs being incurred, beyond those of the libel and summons, by admitting his having been under an engagement to marry the plaintiff, of which the evidence left no doubt, and by offering to pay such moderate damages as the court should award. No. 1134, *Caltura*, 26 Aug. 1835. And see No. 1514, *Matura*, 18 Sept. 1835.

Where a prosecutor sued for penalties on the civil, instead of the criminal, side of the D. C.; and obtained a judgment, which the S. C. reversed; it is scarcely necessary to say that the plaintiff or prosecutor was ordered to pay all the costs, No. 2578, *Ruanwelle*, 15 July 1835.

In an action against two defendants, for damage done to the plaintiff's dhooney, it appeared on the trial that the second defendant alone was liable, and that the first was wholly blameless.

The D. C. gave judgment against the second defendant, with costs, generally. On appeal against this decree, the S. C. directed that the costs incurred by the first defendant should be borne by the plaintiff, since it was his fault, and not that of the second defendant, that the first defendant had been needlessly joined in the action. No. 633, Negombo, 20 May 1835.

Of several losing parties, he who has made the action necessary, should bear the costs: As, where two persons brought an action for land, which the defendants claimed as their own property; a third person, who had sold it to the plaintiffs, intervened as third plaintiff, and avowed the sale, and on the trial it appeared that the defendants were the legal owners, on which the court gave judgment against all three plaintiffs, with costs, generally: The S. C., on affirming the decree as regarded the merits, directed that, as the first and second plaintiffs appeared to have acted without fraud, and to have purchased the land from the third plaintiff, in the supposition that that person was legally entitled to dispose of the property, the costs should be paid by the third plaintiff alone, unless she could show cause to the D. C., why the other plaintiffs should be obliged to pay any part thereof. No. 3200, Matura, 11 Nov. 1835. See also No. 1472, Caltura, 28 Oct. 1835, where, a breach of contract having been clearly proved, though no actual damage, the D. C., and in appeal the S. C., directed the costs to be borne by the second defendant, at whose instigation her daughter, the first defendant, had been induced to break her promise of marriage. The S. C., however, awarded nominal damages, in order to avoid the inconsistency of giving costs without damages.

Each party, whatever may be the ultimate decision, ought to pay the costs which he has unnecessarily occasioned. Supp. Rule, 9 Oct. 1834, Art. 5. And this rule, which is founded on obvious justice, makes it sometimes necessary to give special directions in final judgments as to costs. In an action on bond for 100 RD., by which bond the defendant mortgaged his field, covenanting to cultivate it and to pay half the produce to the plaintiff in lieu of interest, till he should repay the principal; the defendant admitted the debt, but averred payment of the produce for certain years, and failure of the crops for others.

The defendant having proved his averments, the D. C. gave judgment for the plaintiff for the principal, but decreed him to pay the costs up to judgment. The S. C., on appeal, modified this decree as to costs, as follows:—The plaintiff is clearly entitled to costs up to the time of filing answer, because till then, he could not know whether his claim would be admitted, or resisted. But he is also entitled to subsequent costs, except such as were unnecessarily incurred, in consequence of his own act. He is entitled to those of the judgment and of any ulterior proceedings, because, though the answer admits the debt, that admission was not accompanied by payment of money into court, or even by a tender of the amount. On the other hand, the expense incurred by the defendant's witnesses should be borne by the plaintiff, because it was by his refusing or neglecting to admit the facts stated by the defendant's answer, and which appear to have been truly stated, that any such evidence became necessary for the purpose of establishing these facts. No. 918, Negombo, 1 April, 1835. We have seen that parties are often decreed to pay the costs of vexatious or unnecessary appeals from interlocutory orders, without reference to the ultimate decision. *Supra*, title Appeal, page 14 et sequ.

It will, however, sometimes happen that the justice of the case requires each party to pay his own costs, though the decision is against one of them: As where the plaintiff had caused property to be sequestered, as belonging to the defendant, but on a third party intervening and claiming it, the plaintiff failed to prove it to be the defendant's property, on which the D. C. gave judgment for the intervenient with costs, but recorded its opinion that there were circumstances of suspicion sufficient to justify the sequestration: The S. C. considered that it would not be just, in a case where collusion was suspected, to let all the costs fall on the plaintiff, and accordingly directed that each party should pay his own. No. 6555, Kandy, 20 May 1835.

With respect to costs on interlocutory orders, these are sometimes given at the time when the orders are issued, as already mentioned. But it must be observed that, if they be not expressly so given, the party, in whose favour the interlocutory

order is made, cannot claim them as a matter of course, but they must be left to abide the result of the action, or such order respecting costs as may ultimately be made. No. 955, Caltura, 28 Sept. 1835. A late Sitting Magistrate dismissed a suit, without saying anything as to costs: The defendant applied to the D. C. to amend the judgment, by awarding costs: On reference to the S. C., it was considered that the amendment sought could not now be allowed. No. 9585, Galle, L. B. 2 and 9 Oct. 1835. Vide *infra*, title Judgment, and the reasons there given for this opinion.

As regards the parties liable to costs,—it would seem that no persons can claim exemption from this liability, except paupers. The mode in which persons shall be allowed to sue or defend in formâ pauperis, is prescribed by the 42d, and four following rules of the first section. On this subject, one of the D. Judges applied to the S. C., to know whether costs were to be recovered against a party, who lost a suit with a pauper: To which the S. C. returned for answer, That the indulgence was granted to the pauper alone, and was not to be extended to the adverse party, unless he also had proved himself a pauper, and had obtained permission to appear as such;—and therefore, that when a pauper party succeeded, the failing party, if costs were awarded against him, was liable for those which the pauper must have incurred, had he sued or defended in the usual form. L. B. 28 Feb., 7 March 1834. Other doubts, however, having arisen; and a diversity of practice existing as to the mode, in which a successful pauper party should proceed, to obtain the benefit of his judgment, a supplementary rule of practice was passed, 4 Aug. 1834, by which the pauper is allowed to sue out execution without stamp; but precautions are added, as will be seen by reference to the rule, by which both the costs of the proctor, if one has been employed, and the court fees, are directed to be first satisfied out of the amount levied. L. B. 30 July and 6 Aug. 1834.

An application for a similar privilege was made on behalf of another class of persons, those namely engaged in litigation with government, one of whom claimed to be allowed to defend without stamps, on the principle of the English maxim, That

the King neither pays nor receives costs. The S. C., on the question being submitted, directed an answer to be returned, That the principle of the King neither paying nor receiving costs, even supposing that principle to have been acted upon in Ceylon, would scarcely bear upon the question of the necessity of defendants at the suit of the Crown proceeding on stamps;—that the system of stamps was in truth a tax imposed upon all litigants, for the purpose of defraying, in some measure, the expense of the judicial establishments, and as no exception was made in favour of any class of suitors, except paupers, there seemed no reason why parties litigating with govt. should be exempted more than any others;—that the rule, however, that the King neither pays nor receives costs, had not been acted upon in Ceylon, at least that costs had always been paid when the Crown was successful;—that it was but reasonable that this practice should be mutual;—and that, though there would be an impropriety, and indeed a difficulty, in decreeing costs against the King in the usual manner, as between party and party, since execution could not go against the King, still the S. C. could entertain no doubt that whenever a party was successful in a suit by or against the Crown, and the D. Judge granted a certificate to that effect, and also to the effect that the successful party would have been entitled to costs, if the suit had been with a private person, such costs would be paid by government, without the least hesitation. L. B. 16 March and 28 April 1835. And on a subsequent court-day, the Chief Justice acquainted the bar, that on the first occasion, in which a defendant at the suit of the Crown should be successful in appeal, the S. C. would recommend to govt. the payment of his costs.

The class, in which costs ought to be charged, sometimes becomes a matter of doubt: A plaintiff having obtained judgment in the 5th class, the defendant made a payment in part, thereby reducing the balance to the amount of the 4th class;—execution afterwards issued for that balance, and when the question of costs arose, the D. Judge was at a loss to know whether the proctor ought to charge his costs in the 5th class, in which judgment was originally obtained, or in the 4th, to

which the case had been reduced by the payment. On application to the S. C. for instructions, he received for answer, That the proctor was entitled to costs in the class in which judgment was recovered;—that the test, by which this question, as a general principle, should be tried, was, whether the plaintiff was justified, by the result of the suit, in bringing his action in the higher class;—that of this there could be no doubt in the present case, since judgment had been recovered in the 5th class, and the present proceeding seemed to be only a continuation of the original action;—that if indeed a fresh suit had been commenced upon the judgment, a proceeding which would have been unnecessary and vexatious, the costs incurred in *that* action could only have been taxed according to the amount sought to be recovered by a fresh judgment. L. B. 6, 7 March 1834. If a plaintiff obtain judgment in a class below that in which he has brought his action, the defendant is only liable for costs in the lower class; and the difference must be taxed as between proctor and client. L. B. 28 May, 13 June 1835.

On one or two occasions, where a party appellant has applied for the rehearing of a case, the S. C., entertaining doubts of the existence of any real grounds for the application, and desirous of repressing useless and vexatious litigation, has granted the rehearing, but on the condition, fully explained and assented to by the appellant, that in case of his being again defeated in the D. C., he should pay double costs to the adverse party; which condition, in case of failure, has been enforced. But where a D. C., on dismissing a suit, awarded double costs against the plaintiff, the S. C. would only affirm the latter part of the decree, on the ground that the D. Judge had recorded that the plaintiff had endeavoured to impose upon the court, by the answers which he gave to the questions proposed to him, and therefore that the award of double costs might properly be considered in the nature of a punishment, for endeavouring to mislead the court by his answers, as directed to be imposed by the 29th rule of the 1st section. The S. C. expressed strong doubts, whether a D. C. would be justified in imposing double costs, merely because an action was brought on insufficient grounds,

or even on no real grounds at all, unless such action were attempted to be supported, as in the present instance, by false statements, made personally by the plaintiff in court: For a party might often deceive himself, or be misled by others, as to his right of action, and it would often be unjust to make him answerable for the statements set forth by another hand in his libel; but when he gave false answers on his examination in court, his offence could scarcely be attributable to others, and was therefore safely and properly visited on himself, as that of swearing falsely was visited, when duly proved, on a witness. No. 823, Walligammo, 1 July 1835. See also title False Claim.

In some few instances, defendants are entitled to call on the plaintiffs to give security for costs. In England, the only three cases, in which such security is required, are 1st, where the plaintiff is an infant; 2dly, where he resides abroad; and 3dly, in an action of ejectment, where there has been a former action of the same description. As to the first case, however, the authorities are conflicting; nor does there seem to be any good ground for an infant, or those who represent him, being called on to give security. A case indeed was decided in the Common Pleas about 1813, to be found in Mr. Taunton's Reports, and in 1st Marshall, anonymously, in which the court took this view of the subject. The reason for the third class of cases is the fictitious nature of the action, which prevents any one decision from being considered as final. This, therefore, is also inapplicable to Ceylon. The remaining cause, that of the plaintiff residing out of Ceylon, seems to furnish a just ground for this precaution. By the civil law, also, a foreigner, having no property within the jurisdiction of the court, may be called on to give security for costs: But if he be unable to find such security, he may be admitted to swear that he will satisfy the costs. In a case in which a foreigner in Ceylon was thus called on to give security, which he was unable to do, the S. C. directed him to enter into a bond, by himself alone, in the penalty of 30*l.*, to be forfeited if he should not pay such costs as might be awarded against him, or if he should leave the island, or attempt to do so, without making such payment. For under the present

system of judicature in Ceylon, parties are not allowed to be sworn in their own behalf (rule 30 of sect. 1), and besides, a bond seemed much more likely to prove effective in answering the end proposed, than any oath would have been. No. 7086, Colombo North, 19 June 1835. Where security for costs has been demanded in Ceylon, on the mere ground of the poverty of the plaintiff, the S. C. has given its opinion that this furnished no reason for the application. L. B. 27, 30 Oct. 1834: And where security had been ordered on this ground by the court below, the S. C., on appeal, referred the case back to be proceeded with in the ordinary course. No. 2523, 5097, Matura, 20 March 1835. Cases may, however, present themselves in which other grounds, as suspected fraud or the like, might justify this precaution; as, to give an extreme case, where a plaintiff in England, after the case was ready for hearing, was convicted of felony, and sentenced to transportation, the court required security for costs, both retrospective and prospective. *Harvey v. Jacob*, 1 B. and A. 159.

The taxation of costs, a most important branch of the duty of every court and its officers, is provided for by the 41st rule of sect. 1, which directs that all bills of costs, whether between party and party, or proctor and client, shall be taxed by the secretary of the court, with appeal to the D. Judge, and afterwards to the S. C., if either party be dissatisfied. By a supplementary rule of 4 June 1834, it was ordered for the reasons there assigned, and in order that the S. C. might exercise an immediate and constant control over all bills of costs, that every proctor in each D. C. shall furnish a duplicate copy of every bill of costs to the secretary, who must transmit all such duplicates on the first of every month to the S. C., where they are carefully examined and criticized. And by a circular letter to the D. Judges of 1 May 1835, the S. C. directed that the above rule should apply to all descriptions of bills of costs; whether presented by proctors or by the parties. The attention of those interested is also directed to another supplementary rule, No. 9, of 9 Oct. 1834, by which several directions and explanations are given to the officers of the courts, and several charges are declared to be inadmissible: But this order was held not to

be applicable to bills of costs for business transacted previously to 1 Oct. 1833.

The following points have been brought to the notice of the S. C. on different occasions, and may be considered as decided, unless on further consideration, the decisions upon them should be held not to rest on sound foundations.

In the first and second classes, proctors are allowed by the table of fees 10 per cent. on the amount in dispute, in lieu of all charges: On this branch of the table, it has been decided that—

The proctor shall be allowed his 10 per cent., whether he be engaged at the commencement, or in the progress, of a suit; but no retaining fee:

No charge for drawing pleadings can be taxed against the losing party, if a proctor be once engaged at any stage of the case; for the proctor has become entitled to his 10 per cent., and the successful party might have avoided the charge for drawing the pleadings, by employing a proctor from the beginning: Such charge must therefore be borne by the party himself.

If no proctor be engaged at all, the charge for drawing pleadings, by persons not proctors, may be taxed against the losing party, at the rate of 9d. for every 120 words; but no percentage is allowed: L. B. 25 Nov. 10 Dec. 1834; id. 22 April, 2 May 1835; and 28 May, 13 June 1835.

In cases above the first and second classes, the proctor is entitled to his retaining fee, at whatever stage of the case he may be retained. Ibid.

Proctors are entitled to the same fee for "attending the court on the trial of a cause," when it is decidedly summarily, as when it is decided after hearing evidence: L. B. 11, 13 June 1835.

If a party choose to take a copy of the decree, it must be on stamp; but as the successful party may always take out execution, immediately after judgment, on common motion, without the aid of any such copy, this charge cannot be taxed against the losing party, but must be borne by the party applying for it: L. B. 10 Dec. 1834, 2 May 1835.

Nor can any charges be allowed for making out a list of pro-

perty taken in execution; for this is a duty thrown on the fiscal or his officer, and the plaintiff has only to point out the property. If therefore a party chooses to have such a list made out, it must be at his own expense. L. B. 2, 8 July 1834.

Nor can any charge be now taxed for drawing or copying bills of costs, whether by proctor or party;—this charge having been voluntarily relinquished by the proctors of Colombo, and disallowed, as a general rule, by the S. C. L. B. 10 and 19 Sept., and 4 and 8 Nov. 1834.

Where a party employs no proctor, he is entitled to make no charges in the shape of costs, except for sums actually expended by him in the progress of the suit;—for stamps for instance, and drawing pleadings; provided, with respect to this latter item, he produces vouchers to show that he has actually disbursed money for that object: If a party draw his pleadings himself, he ought not to be allowed to charge for his own labour in his own cause. L. B. 18 May, 2 June 1835.

With respect to appeal from taxation, the S. C. had occasion to observe, That there would seem to be scarcely any necessity for such appeal, unless indeed to prevent execution, or to avoid immediate payment, since the contested items would be brought to the notice of the S. C., on the duplicate bill being transmitted to the Registry, in pursuance of the supplementary order of 4 June 1834;—but that, if made, such appeal must be on stamp, no exception being made in favour of appeals for costs;—and that the criterion of the class, in which such appeal should be brought, would properly be the amount of costs taxed, as that would indeed be the only subject then in litigation between the parties. L. B. 9, 14 May 1835.

When a bill of costs has been taxed by one of the Registrars of the S. C., an order issues as a matter of course for the proctor to refund such of the charges as, upon that taxation, have appeared not to be warranted by the table of fees, or the general practice of the D. Courts.

As to getting a revision of a case on the *merits*, on an appeal ostensibly for the *costs* only, vide *suprà*, p. 22.

See also titles Pauper, Proctor, Stamp.

## CUSTOMS' DUTIES.

See title Prosecution.

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## DEBTOR AND CREDITOR.

Creditors entitled before heirs, page 81—Third parties 82—Balance, assigned to 3rd person, cannot be opened 82—A. having entrusted B.'s money to C., may sue C. in his own name, 84—A. undertaking to pay B.'s debt, cannot sue B. till paid 85—Difficulty of seizing the point of a case 86—Buyer of goods answerable for price, though acting for another 86—Agreement to pay it to a creditor of seller, not within Reg. of Frauds 87—Payment to creditor's agent (accountant) good 83—So, to a Cutcherry Modlear 89—A. obtaining B.'s goods from C. is liable to B., though C. had no authority to issue them, 89—Debt, recovered by a deft., sequestered by his creditor 90—Goods sold and delivered liable for purchaser's debts, though not paid for 91—Insolvents; suit by, how conducted, 91—Transactions relating to, vigilantly watched; assignees required to produce former deed of composition 92—Can D. C. remand insolvent for above 12 months? 92—Term must be specified, or till compliance with order 93—Dowry (Malabar) not liable for husband's debts 94—Contracts void by fraud 94—But not always by infraction of a positive law 94—Soldier cannot be arrested for debt under 30l. (Mutiny Act), and if attachment for non-appearance issue into another district, D. C. is justified in not executing it, and discharging deft. 95.

THAT creditors of an estate have a right to be paid, before the heirs can claim their respective shares, seems a position too clear and too well-founded in justice, to require any authority to support it. And yet instances have occurred, in which parties have stoutly resisted this legal and equitable preference. Thus: A person having obtained judgment and execution on a bond, entered into by Perera as principal, and Fernando as surety, which judgment had never been appealed from, sought to put the execution in force against the estate of the surety, for the amount which had not been recovered from the principal. The daughter of the surety opposed this proceeding, on the ground that the one-fourth share of the estate, which she claimed as one of the heirs of her father, ought first to be set aside for her. The D. C., however, considered that as the property of the surety was, by the terms of the bond, rendered liable for the debt of the principal, the daughter's claim must

be set aside till that debt was satisfied : And the S. C. confirmed this decision, observing that, as a general rule, creditors are entitled to priority over heirs ; and that as the original decree against the defendant's father had never been appealed from, it must be presumed to have been well-founded, as against that person. No. 14, 136, Calcutta, 11 June 1834.

Questions frequently arise between the debtor, the creditor, and a third party, in which it is not easy, at first sight, to say on which side the justice of the case lies. The chief points to be considered in such cases are,—what was the original intention of the contracting parties,—what the real justice and equity of the case require,—and if, as is generally the case, one of the contracting parties must be the loser, to take care that the loss falls, if possible, rather on him who trusted to the party occasioning the loss, than on him who is brought into the transaction, without having so placed his confidence : And above all, where there is the slightest suspicion of fraud, a court must naturally lean against that side, on which such suspicion arises. An action was brought in 1835, to recover the sum of RD. 3888. 7. 2, which the defendant, in 1830, had acknowledged in writing to be due from him to Mootoo Samy, the bill-broker, on a settlement of accounts, and which debt M. Samy had assigned for a good consideration to the plaintiff. The defence to this action on its merits (1), was that though the defendant did not deny that a balance for the above sum had been struck, yet several transactions had taken place between him and M. Samy in 1828, which ought to be taken into the account ; and which, if so taken, would have reduced the balance to less than one-fourth. One of those transactions was the employment of a vessel, belonging to the defendant, by M. Samy ; by which the latter, it was alleged, had received certain sums in the shape of freight. An objection of a more technical nature

(1) It may be useful to those who are not conversant with legal language to observe that the *merits* of a case mean the real substantial justice, which the law would award, considered apart from technical objections, such as the want of stamps or the like ; on which latter points, however, courts are sometimes obliged to decide, though contrary perhaps to what moral honesty and the conscience of the parties would dictate.

was also made;—that the paper-writing, by which the defendant acknowledged the balance to be due, was inadmissible in evidence for want of a stamp: And a similar objection was taken on the part of the plaintiff to a letter from M. Samy to the defendant, which was offered in evidence by the latter, to show that M. Samy had actually received freight. On these points, the S. C., on appeal from the decision of the D. C. in favour of the plaintiff, delivered the following judgment, affirming the original decree: “The court is of opinion that the paper, by which the defendant solemnly acknowledges, on 18 Feb. 1830, that the balance due by him to M. Samy, on the settlement of the accounts on that day, amounted to RD. 3888. 7. 2, must be conclusive against him. The want of a stamp would have been fatal to this instrument, if it had been attempted to enforce it as a promissory note; but the document is perfectly admissible, for the collateral purpose of showing what the balance was declared and admitted to be, at the time it was written, on the authority of *Gregory v. Fraser*, 3 *Campbell*, 454. (See further, title *Stamp*, as to the admissibility of unstamped instruments for collateral purposes.) And on the same principle, the court is very much inclined to think that the letter from M. Samy to the defendant would be admissible on behalf of the defendant, if it could avail him: For the object of producing it is, not to enforce it as an agreement, but to increase, by its collateral evidence, the probability of the defendant’s vessel having earned freight for M. Samy. But it is admitted, that this charge for freight never found its way into the book of accounts of these parties at all: The defendant’s remedy, therefore, if that claim has not been satisfied, must be sought against M. Samy, and not against the plaintiff, to whom the integral debt, acknowledged by the defendant to be due to M. Samy, has been assigned on a good consideration. So, as to the other deductions, sought to be made on the part of the defendant: The transactions to which they refer, as well as that relating to the freight, took place in the year 1828; whatever claim, therefore, the defendant might be able to make against M. Samy, if the action were between those two persons (as to which it is unnecessary to say more than that the strongest evidence would be required

to rebut the solemn acknowledgment of the defendant), it is impossible that such claim can be substantiated against the present plaintiff. This court does not hint in the remotest degree at any fraud in this case: But it would be dangerous in this, or in similar cases, after a debtor has admitted a specific debt to be due from him, and after that debt has been assigned to a third party, to allow the debtor to rake up old transactions of former years, and to bring forward admissions of the original creditor, by which the person to whom the debt has been assigned might find it reduced to nothing. The defendant should have considered that, by giving the acknowledgment to M. Samy, in Feb. 1830, he was creating for that person a false credit, if he intended afterwards to dispute the charges, of which the sum thereby acknowledged to be due, consisted." No. 4099, Colombo South, 30 Dec. 1835. Two other points arose in the course of the trial of this case; one as to the admissibility of a copy of accounts, the other as to the right of the defendant to examine M. Samy as a party to the suit, which will be mentioned under the respective heads of "Evidence," in speaking of the *subpœna duces tecum*, and "Examination of parties."

In an action to recover certain sums paid by the plaintiff to the defendant, it appeared that both parties had kept taverns in the service of the same arrack renter; and that the plaintiff had paid over the monies received at his tavern to the defendant, for greater security. The renter being dead, these sums became in fact the property of the executors; but they looked to the plaintiff for payment, and he accordingly brought the present action. The defendant denied the plaintiff's right to sue for money belonging to other parties; and averred that he should have a good ground of defence to an action by the executors. The D. C., being satisfied that the sums in question had been received by the defendant, gave judgment for the plaintiff for the benefit of the estate: And the S. C. affirmed that judgment in substance; observing, That there could be no doubt that the plaintiff, though only acting in trust for the executors, was entitled to sue the defendant for the amount which he had paid over to the latter's charge; and that as the plaintiff was avowedly suing for money due from him to the estate, there was no rea-

son why the defendant should not have made any defence to this action, which he might have had against the right of the executors to receive the amount. No. 6863, Colombo North, 16 Dec. 1835.

An action was brought to recover, among other sums, the amount of a debt which the plaintiff had engaged to pay for the defendant to a third person. At the trial it appeared that this debt had not yet been paid by the plaintiff, against whom an action was at that moment pending, at the suit of the defendant's creditor. The D. C., however, gave judgment for the plaintiff, which the S. C. was compelled to reverse, as far as regarded this sum. The S. C. observed, "The plaintiff is premature in his demand; for his right of action against the defendant will not be complete, till he has fulfilled the engagement into which he has entered, and the performance of which must form the consideration of his claim on the defendant. In thus modifying this decision, however, it is right to state that the decree of the D. C. has the authority of an English decision, *Barclay v. Gooch*, 2 *Espinasse's Reports*, 571, in support of it; though that decision was subsequently, and on more mature consideration, overruled. *Maxwell v. James*, 2 *Barnewall and Alderson*, 51. It was observed on the latter occasion, that no money had yet come out of the plaintiff's pocket, and non constat that any ever would; for if he recovered from the defendant, still it was possible that he himself might never pay it: The period of time, at which his remedy against the defendant would commence, had not yet arrived. Reasoning, which applies precisely to the present case; for though an action has been commenced against the plaintiff by the defendant's creditor, still it is quite possible that the defendant may find means to defeat it." But to prevent unnecessary expense, it was further ordered, that when the plaintiff should have satisfied the debt, he should be allowed, on proving that fact to the satisfaction of the D. C., to move to enter up judgment for the sum so proved to have been paid or satisfied, without the necessity of a fresh action. No. 6106, Kandy, 6 May 1835.

Erroneous judgments frequently proceed from want of sufficiently mature consideration of what the true question between

the parties, or the true difficulty to be solved, may be. The outward and more prominent features of a case may seem to refer it to one class or description, when a stricter investigation of the real and substantial points involved in it may probably give it a totally different character. The following case presents a double instance of this mistaken view; one, as regards the rule above alluded to, that the party confiding in one unworthy of trust should be the loser, rather than he who has not so trusted; the other, as regards the regulation for the prevention of frauds. Nor are such instances to be necessarily set down as any reflection on the sagacity of the Judges, in whom they occur; more especially when it is considered that many of the functionaries, for whose use, if the writer may presume to use the expression, these general observations are intended, have not had their minds schooled by early discipline in legal and logical reasoning. Men even who *have* possessed those advantages, and who have moreover passed their lives in the study of legal difficulties, are often obliged to postpone the consideration of such questions, till they are able to abstract their minds from the confusion, which discussion in open court will sometimes produce, and to devote themselves in private to the cool and calm investigation of the real questions which the case presents. And such is the course which all Judges will do well to pursue, whenever they feel the slightest doubt, whether they clearly see and fully comprehend the point at issue. An action was brought against an administratrix, for the value of 34 head of cattle, alleged to have been sold by the plaintiff to the deceased husband of the defendant, which sale the defendant, in her answer, denied. Several witnesses proved the sale and delivery of the cattle to the deceased, who, it appeared, had bought them for one Sinne Palle, the beef-contractor with government, to whom they were afterwards transferred, but whom the plaintiff had refused to trust: It further appeared that the deceased, as a mode of payment, undertook to settle a debt due from the plaintiff to certain Natticotea Chitties, which however he had failed to do. On this evidence, the D. Judge considered, 1st, that the evidence was not sufficient to establish a sale to the deceased, inasmuch as the sale, if any had taken place, was

rather to S. Pulle; and that, even if it were otherwise, the plaintiff was the fittest person to bear the loss, on account of his misplaced confidence in the deceased:—2dly, that the claim of the plaintiff could not be supported, on account of regulation No. 4 of 1817, which enacts that no contract shall be valid for (among other objects) charging any person with the debt of another, unless it be in writing. (And see ordinance No. 7 of 1834, which makes a similar provision.) Judgment was accordingly given for the defendant, which, however, was set aside by the S. C., and judgment directed to be entered for the plaintiff against the estate, for the following reasons: “On the first ground assigned for the decree of the court below, the assessors differ from the D. Judge; for they consider that, ‘according to the evidence, the plaintiff is entitled to judgment:’ And on questions involving merely the credit of witnesses, and the sufficiency of their evidence, considerable weight ought to be attributed to the opinion of the assessors. It is true that the cattle were ultimately received by S. Pulle; but the legal sale, according to the witnesses, was to the deceased. Nor is there anything contradictory in that circumstance, when it is considered that the plaintiff declared his unwillingness to give credit to S. Pulle. The argument, that the plaintiff is the fittest person to bear the loss, for his mistaken confidence in the deceased, is not applicable to the circumstances. It is not the case of a person confiding in another, and when he finds his confidence likely to be attended with loss, endeavouring to throw that loss upon a third person. It was the deceased in whom the plaintiff confided; it is to the deceased, or, which is the same thing, to his estate, and not to any third party, that the plaintiff now looks for payment. As regards the sufficiency of the evidence, therefore, this court agrees with the assessors in the court below, that there is nothing to bar the plaintiff from recovering his debt.

“On the second point, the Regn. against Frauds and Perjuries, the D. Judge and his Assessors are of the same opinion; but this court is compelled to differ from that opinion, inasmuch as the Regn., when the spirit of it comes to be examined, does not bear upon the present case. This suit is not brought against

the estate, on a bare engagement entered into by the deceased, to take upon himself a debt due by the plaintiff to a third person; it is for a debt contracted by the deceased himself to the plaintiff himself. It is true that the mode, in which it appears to have been agreed that the cattle should be paid for, was by paying the amount to certain chitties, to whom the plaintiff was indebted. But this is no more, than if the deceased had undertaken to pay the amount into the hands of the plaintiff's bankers or agents. The regn. is intended to prevent creditors from fixing debts, which perhaps they consider desperate as regards their original debtors, on solvent persons; unless the guarantee of such solvent persons has been reduced to writing. And if the Chitties had brought *their* action against the deceased, or against his estate, upon this undertaking for the debt due to them from the plaintiff, the regn. would have been an insuperable bar to such action, without a note in writing signed by the deceased in support of it. But it is no answer whatever to the present claim." No. 11,850, Colombo, 30 April 1834.

It often becomes a question, whether a debtor who pays his debt to a third person, considering him as the agent of the creditor, be absolved from further liability. The real question in such cases is, whether the creditor have, by his acts or permission, or in any other way, so conducted himself as to lead the world to suppose that such third person was authorized to receive monies for him in general, or the sum in question in particular. Thus: In an action between a renter and his sub-renter, the latter proved that he had paid the *kist* or instalment in question to his principal's accountant, who was indeed called to prove that fact; but it appeared that the accountant had never paid over the amount to the renter. The D. C. decided that this was no payment to the renter, and that the subrenter was still liable to him, and must seek his remedy against the accountant. But the S. C. reversed this decision, and held that the subrenter was absolved from all further liability: For as the accountant was the admitted agent of the renter, payment to the former was, in law, payment to his principal, the renter; and it was for that person to sue his own trusted servant, if he had not paid over the money he had received, rather than for

the subrenter to have that burthen imposed upon him. No. 13,046, Negombo, 2 April 1834. So, where in an action by Government for certain sums for tobacco and tithe rent, the defendant proved different payments to the Modlear of the Cutcherry (who afterwards became a defaulter); which payments were not denied on the part of Govt., but which it was contended the defendant had no right to make to that person: The D. C. decided that these payments were good, having been made to the authorized and recognized servant of Govt.; and that the defendant, therefore, could not be called on to pay them over again. Govt. appealed, on the ground that the Modlear had granted no receipts for the payments, and had never brought the sums to account; But the S. C. affirmed the decision. The judgment of the D. C. was so full and clear in its statement of the facts, and so correct in the conclusion drawn from them, that it left nothing to be added in affirmation of it. And the writer of these notes regrets that he has not that judgment in his possession, so as to be able to insert it here. No. 1397, Trincomalee, 2 May 1835. Both these cases, it will be observed, exemplify in reality, as well as in appearance, the rule of making the loss fall on the party who trusted to the person making default.

These and similar decisions proceed on the principle that the agent, in receiving the money, was acting within the scope of the authority delegated to him by his principal. On the other hand, a person receiving property belonging to the principal through the agent, cannot shelter himself from responsibility to the principal, on the ground that the agent had exceeded his authority in parting with such property. Thus:—An action was brought by Govt. against a Cutcherry Modlear, for the value of certain quantities of paddy, which had been issued at different times from the Govt. store, on the private orders of the defendant on the storekeeper, but without any authority from Govt. The defendant did not deny his orders, on which the paddy had been issued, but contended that these were mere private transactions between himself and the storekeeper, since the latter had no authority to issue Govt. stores, without the signature of the Government Agent; and therefore that the

store-keeper was the person responsible, and that Government had no claim upon the debt. And the D. C. adopted this view of the case, though it animadverted in strong terms on the fraud, which it considered had been practised in private between the Modlear and the storekeeper. The S. C., however, reversed this decree, and gave judgment for the plaintiff; observing, That it might very possibly be true that the store-keeper was not bound to issue the paddy, and that he ought not to have done so without the sanction of the signature of the Govt. Agent; but that the defendant was not the less liable for property which he, or others to his use, had received, because he obtained it by means of misrepresentation, which the store-keeper, by a greater degree of vigilance, might have defeated;—that if a person prevailed on a servant to lend his master's horse, or other property, the servant would be wrong in yielding to the persuasion without authority, but the person obtaining it would still be responsible for its value. No. 2095, Trincomalee, 2 May 1835.

Monies due to a debtor, or which have been recovered and realized, are liable to the creditor of such debtor, like any other property: And where a plaintiff, having obtained execution against his debtor, caused property, which had been decreed to the latter, to be sequestered in satisfaction of that execution, the C. J., on the matter being referred to the S. C., expressed his opinion that no notice was necessary to be given of such sequestration to the debtor, who might safely be left to apply to the court, if he thought he had any ground for obtaining a stay of execution, as regarded the property so seized. L. B. 25 June, 1 July 1834. And where, in an action on a bond for ten ammonams of paddy, the defendant proved a decree against a debtor of his own, in favour of the plaintiff for that exact quantity, the D. C. considered this to be a sufficient answer to the action: And the S. C. affirmed that decision, presuming that this decree against the defendant's debtor, of the precise amount claimed, must have been in satisfaction of the debt due to the plaintiff, unless it could have been proved clearly and positively, that another debt was due from the defendant to the plaintiff, to the same amount. No. 166, Matele, 25 February 1835.

Goods once sold, and the possession of them transferred to the purchaser, become his property and liable for his debts, though the price may not have been paid. And where the seller reserved to himself the right of resuming the property, on non-payment of the balance of the purchase money within a certain period; but, instead of exercising that right, took the undertaking of a third party for the payment; the S. C. held that this was a waiver of the right of resumption, and left the buyer the absolute owner of the goods; that this ownership was not divested out of him and transferred to the third party, by the undertaking of the latter to pay the balance, or even by his part-payment thereof; and therefore that the goods continued to be the property of the buyer, for whose debts consequently they must be held liable. No. 1735, Kandy, 9 December 1835.

Under this head of "Debtor and Creditor" may naturally be classed what few decisions have taken place on the subject of insolvents. It will be recollected that one of the main conditions, on which persons are allowed the benefits of the laws passed in favour of insolvents, is the assignment to trustees, on behalf of the creditors, of all property of which the insolvent is possessed, or to which he may be entitled. In an action for the breach of an agreement, it appeared that the plaintiff had been imprisoned, and afterwards discharged as an insolvent, according to the course prescribed by Regn. No. 8 of 1824: And the D. C., on this being proved, dismissed the action, considering that all debts due to the plaintiff had passed, by operation of the Regn., to his assignees, who alone therefore had the right of suing for the recovery of such debts. On appeal, the S. C. assented to the principle, on which the D. C. had decided; but in order to prevent hardship on the insolvent, and the necessity of an entirely fresh action, modified the decree as follows:—"That the proceedings be referred back to the D. C., in order that the plaintiff may have an opportunity of giving notice to his creditors, or their legal representatives, that the present action has been commenced, and that they, the creditors, may be made parties to the suit if they wish it. If they decline interfering, the plaintiff should then be allowed to con-

tinue the action, but only in the nature of a trustee for his creditors, to whose use any sums, which may be recovered by the plaintiff, would be received and held by the court. The D. C. was correct in considering that the rights of the plaintiff had passed to his creditors, when he received the benefit of the Insolvent Regn. : But it would be hard and unjust towards him, if he were precluded, by the disinclination of his creditors to take up this or similar proceedings, from recovering debts, which may enable him to discharge a part of those, for which his future property is still liable to his creditors." No. 1875, Alipoot, 20 Feb. 1835.

It is scarcely necessary to observe that in all transactions affecting the disposal of the insolvent's property, courts will naturally look with even more than their ordinary vigilance at the conduct of all parties concerned, in order to be certain, as far as that is possible, that the most perfect good faith has governed their respective acts : And the party who seeks to establish an assignment, or any other transaction, by which the right to, or control over, the property is conferred on him, must act openly and without reserve, so as to stand clear of any, the slightest, suspicion. Thus, where persons sued in the character of assignees of an insolvent, for a debt due to him, and endeavoured to rest their claim on a deed of assignment executed after the commencement of the action, and refused to produce a deed of composition of prior date, which the insolvent had entered into with his creditors, the D. C. dismissed the action ; and the S. C. concurred in the view taken by the court below, observing that the non-production of a deed, so essential to the support of the plaintiff's case, must necessarily excite suspicion, even supposing the subsequent deed of assignment to be sufficient to maintain their right. To prevent the necessity of a fresh action, however, the case was referred back to the D. C. to give the plaintiffs an opportunity of still producing the deed in question. No. 3740, Colombo North, 8 April 1835.

While touching on the respective rights and liabilities of insolvents and their creditors, it may be not irrelevant to mention a question which was proposed by a D. Judge, whether the D.C. were still authorized, under the 6th clause of regn. No. 8 of

1824, to remand a prisoner, on proof of his misconduct as pointed out by the 5th clause, for a period of imprisonment not exceeding three years, notwithstanding the proviso contained in the 25th clause of the Charter, by which the criminal jurisdiction of the D. C. is limited, as regards imprisonment, to 12 months? The C. J., to whom this general question was referred, returned for answer, that his own view of the remanding under the 6th clause of the regn. was, that it was rather in the nature of a civil than a criminal proceeding, and in truth was little more than allowing the law, as it stood before the regn., to take its course, where fraud was proved against the debtor; and if so, that the D. C. had authority to remand for three years, notwithstanding the restriction of the Charter: But he added that this was to be considered as merely his own individual opinion; and that if the matter were brought to the notice of the S. C. by regular appeal, the other Judges might take a different view of the subject. L. B. 28 Feb. 1834.

Where the insolvent, however, is remanded in such case, the judgment must specify the term of further imprisonment which he is to undergo. And in a case in which a D. C. remanded the prisoner generally, merely declaring that "the court did not consider him entitled to the benefit of the regulation," the S. C. directed the insolvent to be discharged; observing that as the 6th clause directed that on proof of fraud, the prisoner should be remanded to prison, for such period, not exceeding three years, as the court should direct, to be computed from the day of filing his petition, a specific term of imprisonment ought to be awarded: Otherwise, any prisoner might, for the most trifling concealment, or omission in his statement, be declared not entitled to the benefit of the regn., and might be detained in prison for the full term of three years. No. 5652, Kandy; 30 Sept. 1835.

But there seems to be no objection to the insolvent being remanded, till he perform some act, which justice demands, for the benefit of his creditors. Thus, where an insolvent had been remanded for a further term of imprisonment, on account of his having omitted in his statement a certain bond in his possession, the S. C. set aside the judgment as regarded the term

of imprisonment, on the ground that the bond was under RD. 50, the amount specified in the 5th clause of the regn., and also in consideration of the imprisonment already undergone; but directed that the insolvent be detained in prison, till he consented to deposit the bond in court for the benefit of the creditors. No. 221, Caltura, 29 July 1835.

It may be mentioned here that, according to the customary law of the Malabar districts, dowry property, and the rents and profits arising therefrom, are not answerable for the husband's debts, even to the extent of one-half; and need not therefore be inserted in the schedule of such husband, when seeking relief as an insolvent. No. 2089, Jaffna, 15 Oct. 1834. See this case more fully stated, *infra*, title "Husband and Wife."

It is a general and well-known maxim of law, that fraud vitiates every contract of which it forms a part. But the fraud contemplated by this maxim is an intention to deceive by means of the very contract itself, and not a mere infraction of some positive law, even though passed for the prevention of fraud, unless indeed such law superadds to its penalties the annulment of any contracts made without observance of its provisions; as is done by the ordinance against frauds and perjuries. Thus: In an action to recover a gold necklace, alleged to have been pawned by the plaintiff with the defendant, the D. C. considered that, as the plaintiff had failed to prove that he had conformed to the 15th clause of the regn. No. 6 of 1806, he had forfeited all right to recover the necklace, and dismissed the action. The S. C., however, set aside this decision, and referred the case back to the D. C., to decide on the credit due to the plaintiff's witnesses, as to the fact of pawning: For though the regn. directed that "no person shall either give or receive in pawn any gold or silver thing, without first showing it to one of the police-officers of his village," and though persons infringing that provision rendered themselves liable to punishment,—an infraction of the law of which both these parties were equally guilty; still the regn. did not enact that the owner of the goods should lose all right to recover them back, on payment of the money borrowed. The D. C. accordingly heard further evidence, but disbelieved that any pawning had ever taken place; on the expression of which

disbelief, the S. C. affirmed the original decree of dismissal. It is very probable that the omission to comply with the very wholesome direction of the regn. contributed in a great degree to discredit the plaintiff's witnesses in the opinion of the D. C., and very properly so: For such omission must necessarily raise strong suspicions of fraud, though it did not amount, under the regn. then in force, to such conclusive evidence of it, as wholly to vitiate the contract, if any such had really been entered into. No. 225, Pantura, 21 May 1834. (In the ordinance afterwards passed for improving the police of Colombo, the 21st clause directs that, besides punishment for pawning, without showing the article to the constable, etc., the person so pawning shall not be entitled to recover back the article pawned.)—So, where a verbal contract had been entered into between the master of a ship and his crew, the S. C. held that such contract was not absolutely void, on account of its not being in writing; though, by English Acts of Parliament, the master might be liable to a penalty for not having it reduced to writing. No. 657, Galle, 31 Dec. 1834. See this case more at length, *infra*, title “Shipping.”

The mode of procedure for the recovery of debts, or for any other species of redress which a party seeks in a court of justice, forms what is usually called Practice; the course of which is laid down in a very general outline by the rules and orders. The points which have been decided on this subject will be found under the title “Practice.” (See also titles Execution parate, and Nantissement, as to the distinction between questions of law and of practice.) The following decision, however, respecting the course to be adopted by the creditors of soldiers for the recovery of their debts, seems more properly to find a place under the present head. The annual Mutiny Act directs (clause 3), “That no person, enlisted as a soldier, shall be liable to be taken out of H. M.’s service, by any process or execution whatsoever, other than for some criminal matter,” unless on an affidavit that the debt amounts to 30*l*. An action was brought in the D. C. of Colombo, against a non-commissioned officer in one of the regiments quartered at that place; and on his non-appearance to the summons, a warrant of arrest

issued, and it appearing that the defendant had gone to Kandy, the warrant was transmitted to the D. Judge of that district for endorsement and execution, in pursuance of the 14th rule of section 1. When, however, the defendant was brought up, that court, finding that he was in H. M. service, considered that it had no authority to enforce the warrant, and accordingly ordered him to be discharged. On the warrant being returned thus inoperative to the D. C. of Colombo, the plaintiff moved that the warrant of attachment might re-issue; and the D. J., feeling a difficulty on the subject, referred the matter, as a point of practice, under the 47th rule, to the S. C. for instructions how to proceed. And on the motion of the plaintiff, and in consideration of its being a point of some importance, the question was argued before the C. J. and Second Puisne J.; the Senior Puisne J. being then absent on circuit. The arguments adduced on the part of the plaintiff, and the view taken by the S. C., will be seen by the answer directed to be sent to the D. J., of which the following is the substance:—

“The result of a very full consideration of the question and arguments is, that the mandate of arrest could not legally be carried into effect; and that the D. C. of Kandy was justified in discharging the defendant, when he was brought up before that court, by virtue of the mandate. It has been endeavoured to support the enforcement of this mandate, on the ground that the defendant, not having appeared in obedience to the original summons, was in contempt; and therefore, that the arrest was ‘for a criminal matter,’ and fell within the exception in the third clause of the Act. This is certainly the only ground, on which the right of arrest could be contended for; and on the first glance at the 3d clause, it appears a strong ground. There is no doubt that a party who commits a wilful contempt of the court, or of its process, stands in the light of a criminal, and is to be dealt with as such; and the commitment to prison is to be considered as a punishment for an offence. (Vide *supra*, 61, 2.) But the previous question here is, whether the defendant have been guilty of any contempt, of which the court can take cognizance. And in the consideration of that question, the proviso at the end of the 3d clause becomes very material: “That any

plaintiff, on notice of the cause of action first given in writing to any soldier, etc., may file a common appearance in any action to be brought for any debt, and proceed therein to judgment and outlawry, and have execution, other than against the body." Here, then, is a course of proceeding pointed out by the Act itself, by which all necessity for the personal appearance of the defendant is obviated: And if no necessity exists for his personal appearance, it is difficult to understand how he could be guilty of a contempt in not appearing, or liable to punishment for his non-appearance. Having received notice of the cause of action in writing, he may naturally have considered, or have been informed, that unless he was desirous, on his own account, to appear and answer the demand, the proceedings might be left to go on to a conclusion, without any intervention on his part. The plaintiff could gain nothing in point of time by the defendant's personal appearance; since a power is given to the plaintiff, by entering an appearance and proceeding *ex parte*, to obtain all that can be obtained against the defendant, as long as he remains in the King's service,—viz. execution against his property.

There is indeed one privilege, which the course of proceeding lately introduced affords to parties, and of which the present plaintiff may be deprived; viz., that of examining the defendant personally in court, under the 29th rule, as to the cause of action. If this should be a privilege of which the present plaintiff wished to avail himself, the S. C. can only regret that its rules of procedure are superseded by a higher authority; but it can never maintain that those rules are to be of greater force than an Act of Parliament. With this exception, however, the practice prescribed by the Act is closely similar to that which is often pursued in the D. C., where no absolute necessity exists for arresting the defendant on his non-appearance. Sup. 62.

It still remains for the court to notice one line of argument, which has been used against the discharge of the defendant by the D. C. of Kandy. It has been urged that the Charter confers upon each D. C. a separate and exclusive jurisdiction; that the proceedings of one court, therefore, cannot legally be interfered with by another; that great inconvenience would arise,

if one D. C. could arrest a defendant, and another discharge him, more especially as the record of the proceedings would not be before the latter court, which could therefore be but imperfectly informed on the subject; that there would have been no necessity for sending the defendant to Colombo, but that he ought to have been detained in custody, at least constructively, at Kandy, from whence he might have applied to the S. C. for a writ of Habeas Corpus. The Judges entirely concur in the abstract proposition, that one D. C. is not to interfere with the proceedings of another. But in the present instance, it must be recollected that the interference of the D. C. of Kandy was no spontaneous act on its part; it was called upon by the D. C. of Colombo to exercise certain powers, as an intermediate agent it is true, but into the legality of which powers it was incumbent on that court to inquire, before it ventured to exercise them. This was not the case of an arrest by one court, and a discharge from that arrest by another. Both acts, that of the arrest and that of the discharge, were performed by the same court. Nor was that court without sufficient information before it, to enable it to decide on the legality of the commitment which it was required to order: For the mandate of arrest describes the defendant as "Serjt. J. Hall,"—a description which it has not been contended was insufficient to invest him with the military character;—it specifies the amount of the claim, which is under 30*l.*, and it directs the arrest and detention of the defendant, till he shall appear and answer. This, then, was enough to satisfy the D. C. of Kandy, that the mandate could not legally be carried into effect: And if the Mutiny Act had been brought to the notice of that court in the first instance, it may be doubted whether the mandate would have been even partially executed; as indeed, under the same hypothesis, it is to be presumed that the D. C. of Colombo would never have issued it.

A more technical objection has been made to the return of the D. C. of Kandy, though not indeed insisted upon very strenuously, that the order of discharge takes no notice of any intervention on the part of the assessors. Whether that intervention were recorded in the minutes or not, cannot be decided

without reference to the D. C. ; but the opinion of the Judges is, that there was no necessity for any mention being made of the assessors in the indorsement on the mandate. (Vide supra, p. 43, referring to L. B. 2 Oct. 1833, where it is stated that orders of mere course, or any orders, not included in the description pointed out by the 30th clause of the Charter, may be made without taking the opinion of the assessors, or even by the Judge out of court.)

The S. C. is therefore of opinion that the motion made on behalf of the plaintiff, for the re-issue of the warrant of attachment, should not be granted." L. B. 11, 17 Aug. 1835.

See further, on the subject of debtor and creditor, the following titles : Interest ;—Minority ;—Nantissement ;—Obligation ;—Partnership ;—Pearl Fishery ;—Prescription ;—Principal and Surety ;—Promissory Notes ;—Renter.

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### DECREE.

See title, Judgment.

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### DEPOSITIONS.

Originals, and not copies, to be transmitted on appeal ;—vide supra, p. 27 ; L. B. 2 Nov., 12 Dec. 1833 ; 16, 25 Nov. and 4 Dec. 1835. And see L. B. 28 Feb. and 31 March 1835, for the reasons why the originals are preferable to copies.

Are not to be taken on stamps. L. B. 12 Dec. 1833.

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### DONATIO INTER VIVOS.

Revocable, on non-fulfilment of the conditions imposed ;—see title, Temple.

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### DOWRY.

See title, Husband and Wife.

## EDICTAL CITATION.

Meaning of the term, page 100—Defects of Reg. No. 5 of 1819, 100—Requisites to give validity to certificate of quiet possession 101—All claims received as long as publication open 102—Ordce. No. 7 of 1835 requires strong proof of possession and publication, and then gives a valid title 103—Stamp necessary 103—Affidavit abolished 103—Citation may issue, though possession not disturbed 104—One of several occupiers may have citation 104.

THIS term is used in the law of Scotland, and of some other countries in which the civil law prevails, to signify any citation against a person, whether foreigner or not, who is absent from the country, but who possesses landed property in it: And it is said to be justified by the necessity of the case, and by the presumption that every owner of property in a country will leave some person there in his absence, authorized to represent him and defend his interests. (See Voet Lib. 2, title 4, par. 16, as to the different kinds of edictal citation.) In the following few observations, the term is used in a more limited sense; and is confined to the proceeding, by which a person who is in possession of land, but is without a valid documentary title to it, seeks to confirm himself in his possession, by publicly calling on all persons who may have any claim, to come in and establish it; and in default of any claimants appearing, or, having appeared, being able to establish any legal claim, such possessor seeks to be “quieted in his possession” by the authority of the court, as lawful owner, or at least as having the best apparent right to the land. It is evident that this proceeding, if allowed to give a valid title to the party pursuing it, requires to be strictly regulated as to the conditions, on the fulfilment of which its success is to depend, and to be vigilantly watched in its progress. For otherwise, it might, by means of collusion, be made an instrument of fraud and injustice, easy of execution, and difficult of detection or remedy. The regn. No. 5 of 1819, the three first clauses of which went to define the cases in which edictal citations might be sued for, and to prescribe the mode of proceeding thereon, was found to be by no means efficient, either

as regarded the end proposed, or the means by which that end should be attained. The two following judgments will show the view taken of the system, as it stood under the regulation, and of the necessity which existed for some further provision, for the better attainment of the object in view.

In an action for land, the plaintiff relied chiefly on a certificate of quiet possession; but his witnesses not being present, the D. C. gave judgment for the defendant. On appeal to the S. C., the decree was affirmed, not as absolutely final, but as a nonsuit for want of evidence, leaving it open to the plaintiff to bring a fresh action. (Vide *infra*, title Practice, as to the distinction between a nonsuit, and final and absolute adjudication.) “But it may be useful (the judgment went on to state), in the event of such second action, to make one or two observations on the document, on which the plaintiff seemed principally to rest his case;—the certificate of quiet possession. The process of Edictal Citation is one which might be made eminently useful in this Island, where so much land is held on no valid documentary title. But it is to be feared that, as heretofore obtained, the writ of quiet possession cannot and ought not to have that force and validity given to it, which the plaintiff would claim for it. In the first place, the party suing out the Edictal Citation ought to be in actual and *bonâ fide* possession of the land; and he ought to establish this to the satisfaction of the court, not by his naked affidavit or affirmation, but by that sort of proof which would satisfy the court that he really did possess the land at the time, either by actual occupation or cultivation, or by the exercise of those acts of ownership which, according to the nature of the property, denote possession. In the second place, it should be shown that the citation had been published with a decree of notoriety,—of actual obtrusion on the notice of the neighbourhood,—that should make it almost impossible for any person to plead ignorance of it. But unless these two conditions have been fully complied with, the mere production of the secretary’s certificate of quiet possession ought to go but little way, towards establishing the right of the party producing it. An unprincipled suitor would have little scruple in making a false affirmation of possession; nor would he meet with much

difficulty, it is to be feared, in procuring the citation to be returned as duly published, though perhaps the publication might never have extended beyond the conniving headman, by whom the return would be made to the fiscal." No. 2354, Chilaw and Putlam, 7 Oct. 1835.

In the other case above referred to, persons having obtained the Edictal Citation, and the two months, being the term prescribed by the Regn. of 1819, having expired, they applied for the certificate of quiet possession; which the D. C., however, refused to grant, on the ground that certain other claims to the land, but which had not arisen out of the Citation, were still undecided. The applicants having appealed, the S. C. affirmed the interlocutory order in the following terms: "It would be a sufficient reason for affirming this order, that the certificate of quiet possession had not as yet been granted, and that the application had been suspended, in order to await the decision upon certain other claims: For, as long as the application is kept open, there can be no doubt that all claims ought to be received, whatever may be the day mentioned in the citation. But the appellants have evidently formed a very erroneous opinion of the effect of this proceeding by Edictal Citation, and of the certificate consequent thereon. They seem to imagine that the certificate of quiet possession gives a valid and indefeasible title to the party obtaining it. This, however, in the present state of things, is by no means the case. Much more certainty, as regards the possession of the party suing out the Citation, much greater and more certain publicity to that proceeding, and much longer time for claimants to come in, must be severally provided for, before an effect so decided and conclusive can be given to the certificate: And these objects will possibly soon form the subject of legislative enactment. But the only force which ought to be given to this certificate of quiet possession, as obtained under the present practice, is the arriving at the following conclusion:—That though the neighbourhood has been cited in a certain manner to come forward with claims, if any existed, yet that, for a certain number of months, none had been made. This fact would no doubt go some way in assisting a party to prove title by prescription, or in any

other way founded on possession. But it would not and ought not to be held conclusive against subsequent claimants, if such claimants could account satisfactorily for their silence, during the term the citation was pending. And therefore these applicants, if they had been well advised as to their own interests, and were actuated by an honest desire of ascertaining and contesting all claims to the lands in question (which is the real ground and meaning of Edictal Citation) ought to have been eager that these and any other claims should be received and discussed, whether the time specified in the citation had expired, or not. No. 976, Amblangodde, 25 Nov. 1835.

Soon after these decisions, an ordinance was passed, No. 7 of 1835, repealing Regn. No. 5 of 1819, as far as relates to this subject, and substituting what it was hoped would prove a more effective course of proceeding, in the place of that which had been found defective. The three main objects of that ordinance were,—1st, to require satisfactory proof of possession; 2dly, to enforce the greatest possible degree of publicity; 3dly, those two conditions being literally and substantially complied with, and no adverse claims being set up or established, to give the party in possession a good and valid title. Whether this ordinance has proved successful, or the reverse, the writer of these notes has no means of saying. It is one which would necessarily require the test of experience, as to its manner of working, before its merits or demerits could be pronounced upon with confidence. Whatever faults and deficiencies may as yet have been discovered in it, have no doubt been rectified and supplied, by the same knowledge and experience which pointed them out.

The following points, though decided with reference to the Regn. of 1819, will be found, it is believed, not inapplicable to the proceedings under the Ordee. of 1835.

The item "Edictile Citation," in the table of stamps of 1 Oct. 1833, being general and without exception, must be taken to include those moved for under the Regn. L. B. 18, 22 Sept. 1834.

The affidavit of the applicant, it is scarcely necessary to say, can no longer be received. *Id. Ibid.* And see Rule 30 of Sect. 1.

A person applied for Edictal Citation, without asking for a certificate of quiet possession, stating that he required the citation for the purpose of having title deeds passed in his name; that in truth his possession had not been disturbed, and that he held certain documents, showing his right to a certain extent, but not absolutely conclusive. The D. Judge doubted whether this citation, which he considered to be unnecessary litigation, ought to be granted; and referring to the S. C. for instructions, received for answer that there did not appear any objection to a party moving for Edictal Citation, even though he should not be actually disturbed in his possession;—that he might wish to give an opportunity to other persons to bring forward any claims to the land, which might often be a very proper precaution, previously to venturing on having title deeds passed in his name;—that in such case, the proceedings might turn out to be superfluous, but could scarcely be called “unnecessary litigation,” since, if no one answered the citation, no litigation could be said to arise. L. B. 18, 22 April 1834.

In one case, in which the usual citation had issued, the certificate of quiet possession was refused, on the ground that there was another person equally interested with the applicant, who had not joined in the application, and whose share had not been set apart. But the S. C., on appeal, referred the case back to the D. C., in order that the other person in possession might be called in, and have an opportunity of joining in the application; or, if he refused, that his share might be excepted out of the proceedings. Nos. 436 and 649, Amblangodde, 17 June 1835.

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## ESCAPE.

By supplementary Rule of 16 June 1834, D. Courts are, for the reasons there given, authorized to try persons for this offence: And one of the D. Judges, in answer to a question submitted by him to the S. C., was instructed, That any person found within the jurisdiction of a D. C., having made his escape from lawful custody, might be tried before that court, though the original act of escape took place in a different district;—for

as every moment's continuance at large was a substantive offence, he might be legally tried in either District, though not in both. L. B. 27 Aug., 2 Sept. 1834.

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## EVIDENCE.

English rules introduced by ordee. No. 6 of 1834; reasons for it, page 106—Leading rules: 1st evidence confined to points in issue; test, by which to ascertain them 107—Evidence to character; of parties, of witnesses 108—2dly, Affirmative to be proved; exceptions 109—3dly, Best evidence to be given; Example, in proving deeds 110—Difference of this proof in England, and Ceylon, and reason of it 112—Names of absent persons as witnesses to deeds, of no effect 113—Handwriting, how proved 113—Admissions of parties; caution against collusion 114—Confessions of criminals 115—Former decree, if issue and parties the same 115—4thly, Hearsay not evidence: Except, when part of the transaction; or complaint of rape, etc.; or evidence of a deceased witness; or dying declarations; or declons. of deceased persons as to relationship, or adoption; or on other subjects, if against their own interest; or reports of customs or public rights, or of character, in suits, etc., for defamation; or admissions of parties, etc., 116 et sequ.—Application of these 4 rules 118—Positive and presumptive evidence distinguished 119—Presumptions of law 120—Witnesses: number of; one sufficient; exceptions 121—Lists of, civil; default in filing, how taken advantage of; how filed; amendment of 122—Criminal, when to be filed 124—When witnesses, not in list, admissible 125—Summoning; subpoena (whether indispensable); penalty; subpoena duces tecum; how acct. books produced, examined, etc., 125, 6, 7—Privilege from attendance, claimed and refused; by Moorish women; by Buddhist priests; judgment of S. C. 127—Payment of expenses, civil 131—Criminal 132—Examination on interrogatories 133—In other districts, should be by D. J.; omission in 26th rule 133—Out of Ceylon 134—Discretion with D. C. 134—Incompetency; 1st, for want of understanding; 2dly, conviction of perjury; 3dly, husband or wife; exceptions; no other relations excluded; 4thly, interest; nature of, to disqualify; exception, agents, etc.; how competency restored 135—Credit of witnesses 138—Advocates, proctors, and interpreters; communications to, when privileged; other privileged communications 139—Examination of parties; distinction between party and proctor, and reasons for it 140—Prosecutors, informers, etc., competent 141—Oath, must be in the ordinary form; and administered in court 141—Ceremonials of different casts 143—Examination and cross-examination: Leading questions; objections; questions of law; of opinion; by the court; of competency and credit; criminating questions 144—Proficiency in these rules only acquired by experience and observation; attendance on S. C. recommended 146 (note)—Evidence to be vivâ voce; exceptions 146—Depositions at length

and in first person 147—When evidence may be dispensed with; great caution necessary; cases on this subject 148—Prisoners may cross-examine, and enter on defence, before commitment 149—References to other titles 150.

THE ordinance, No. 6 of 1834, after reciting that “by the abolition of torture for the purpose of obtaining confession, by the introduction of trial by jury in criminal cases, and from other causes, the English rules of evidence had been gradually introduced, and were generally adhered to, within the island of Ceylon, though they had never been expressly established by positive enactment,” declares “that those rules are and shall continue to be the law of Ceylon, as well in civil as in criminal matters, except where altered or modified by express law.” The rules of evidence, as prescribed by the Civil Law, had not only become obsolete in point of practical effect, but had been so deeply broken in upon by existing laws, of which the abolition of oaths by parties, decisory and others, may now be added to those alluded to by the ordinance, that it had become necessary, either to recognize the English rules as the general law, or else to draw the line of demarcation between such of them as had been introduced by express enactment, and the practice of the Civil Law, as far as that still remained untouched: A task which would have been as difficult in execution, as it would have been unsatisfactory in its results; for it could only have produced, at best, a piece of patchwork. Indeed it may well be doubted, whether it would have been possible to have reconciled what yet remained of the Roman Dutch rules of evidence, with the present mode of administering justice in Ceylon. Another reason, which seemed to render this measure highly expedient, was that in the Kandyan provinces, the R. Dutch law had never prevailed at all. Without this order, therefore, either the Dutch rules of evidence must have been introduced for the first time into those districts, and without any other part of the same code; or a different law of evidence must have governed the Kandyan, from that which prevailed in the maritime districts.

Such, then, being now the law of the island, it may be useful to those who have not gone through a regular course of legal reading, to have a brief compendium presented to them of the

leading principles, on which that law is founded. Without going into the nice distinctions and refinements, which have arisen out of the numerous decisions in England on the law of evidence, it is proposed to give such general rules as are to be found in the best writers on this subject, accompanied by any observations which the state of things in Ceylon seems to call for, and noticing under each head, the decisions of the S. C., referable to that head (1).

First: Evidence should be confined to the points really in issue between the parties; the substance of which should be proved, and no more. See "Issue." This rule, which in England involves some nice distinctions, as to what averments or assertions, appearing on the pleadings, are necessary to be established by evidence, and what are not, may be stated in very general terms as applied to Ceylon, where technicalities of pleading are almost unknown. The only way, by which to ascertain what the issue is, and consequently what evidence is necessary, is to begin by clearing the case on the one hand of all the superfluous and irrelevant statements which so often appear in the pleadings, and on the other hand, to supply any omissions which render the case obscure, by calling on either part for explanation. This course, indeed, is in substance prescribed to the D. C. by the 8th rule of section 1. Whatever is admitted by either side, either in the written pleadings, or in the *viâ voce* examinations, may be considered as proved. This process will show

(1) The matter, out of which the following very general analysis has been compressed, with the exception of that which has reference more particularly to the state of things in Ceylon, has been taken principally from Mr. Phillips's work, though the order pursued by that author has not been strictly adhered to: And some of the heads have been blended together, where the division would have been too minute for so mere an outline. For fuller exemplifications and illustrations of the rules, the reader must apply himself to that valuable work itself. At the time the writer of these notes left Ceylon, one of the D. Judges, in his laudable zeal to benefit the practitioners of the courts, was engaged in making an abridgment of this treatise; a publication which would be of the greatest use to those gentlemen who have not had a legal education, *provided* they take care fully to understand the spirit of every position of Phillips, before they attempt to apply it in practice: The writer trusts he shall be forgiven this caution, in consideration of the nicety of distinction, which sometimes separates one class of cases from another.

the real nature of the claim or complaint, and of the answer or denial, in its true light, and freed from all false colouring; and will reduce the facts to be proved by evidence to those which still remain denied on either side, and which are essential to the establishment of the claim or defence. Whatever is unnecessarily stated in the pleadings, it would be equally unnecessary, and would therefore be a waste of the time of the court, to attempt to prove: Such evidence should be rejected as irrelevant. The application of this rule, that is the task of deciding what are the points really in issue between the parties in each class of cases, must be left to the discrimination of the D. Courts. But there is one subject, on which the admission or exclusion of evidence is often a matter of delicacy, and on which therefore some observations may be useful, and may perhaps serve as a guide for the application of the rule in other instances: This is, the *character* of parties or of witnesses. As regards *parties*, it is every day's practice, on the trial of a person on a criminal charge, to call witnesses to prove his general *good* character, on those points which bear some affinity or analogy to the crime imputed, and on which therefore a good character heightens the improbability of his guilt; as, for honesty, on a charge of theft; humanity, on a charge of murder, and the like. But the tenderness of English practice will not permit converse proof of former misconduct of a similar nature, unless where such collateral evidence is necessary to show the intention of the prisoner in committing the act in question; as, on a prosecution for uttering counterfeit money or forged notes, evidence of similar utterings, or of the possession of other counterfeits, is admissible, as proving the guilty knowledge of the prisoner, which is indeed one of the principal points in issue. But as a general rule, evidence of *bad* character should be carefully excluded during the trial; though after conviction, it may often be proper to institute inquiry into the former conduct and character of the prisoner, in order the better to apportion the punishment. No. 424, Negombo (criminal), 15 Oct. 1835. In civil actions, the character of the parties ought never to be inquired into, unless it forms the subject of the action, and so is put in issue; as in an action for slander, or other injuries done

to the plaintiff's character, it is plain that the amount of damage must depend, not only on the nature of the injury, but on the previous value of the character injured. As regards *witnesses*, their character for credit may be said to be always in issue, whether in civil or criminal cases; because it is only in proportion to the credit given to them, that their evidence can avail the party calling them. It is therefore always open to a party to call witnesses to impeach the credit of those of his adversary: But this can only be done by asking as to the general character and credibility of the witness, and not by inquiring into particular acts of his life; for a witness cannot be expected to come prepared to answer particular charges, not in issue, and of which he would have had no notice. And where a D. C. allowed a suspected deed, not in question between the parties, to be given in evidence, for the purpose of discrediting a notary, who was one of the witnesses, the S. C. observed on the irregularity of this piece of evidence, though it concurred with the decision which the D. C. had come to on other grounds. No. 11,371, Colombo, 6 Jan. 1836. As, therefore, on this subject of character, so on all other points, the question to be asked, in deciding on the necessity or admissibility of a piece of evidence, must always be; Is the matter, to which this evidence refers, really in issue, or relevant to the dispute, between the parties?

Secondly: When, as is generally the case, one party affirms a thing, and the opposite party denies it, whether such affirmative and negative be expressed on the face of the pleadings, or be implied from the nature of the transaction, it is for the former to prove his affirmative; and till that is done, the latter is not called on to prove his negative: And this is also in accordance with a maxim of the Civil Law; that the proof is incumbent on him who affirms, not on him who denies. See Voet., lib. 22, tit. 3, par. 10, et sequ. But to this rule there are some few exceptions or limitations. As, if one charges another with the omission of his duty, he is bound to prove his charge, though it involve a negative; for the law always presumes innocence, and that a person has not acted illegally, till the contrary is proved. And wherever the law presumes the affirmative of a fact, as it does that a person is still alive, or that a child is legi-

*—To make (if a marriage be proved) / in such cases, the party wishing*  
 ing to show that such person is not living, or such child not legitimate, must give evidence to that effect (1). It is also laid down, as incidental to this rule, that where a fact lies more peculiarly within the knowledge of one of the parties, the burthen of proof lies on that party. Acting on this principle, the S. C. decided that in an action by a grain-renter for his share of the crop, his claim to which was not denied, but the question was as to the amount of the defendant's crop, it was for the latter to show what that amount was; for this must be a fact within his own knowledge, whereas it would be almost impossible for the renter to prove with precision the crop of every field within his rent. No. 1091, Jaffna, 2 May 1835. It must be recollected that, where the burthen of proof lies on a defendant, and he, being called on by the court to prove his case, succeeds in doing so, the plaintiff must then be allowed to go into counter-evidence, however satisfactorily to the D. C. the defendant's case may have been proved. The parties have, in fact, merely changed places. An instance occurred, in which the S. C. was obliged to refer a case back for the reception of the plaintiff's evidence, the D. C. having decided after hearing the defendant's only. No. 5229, Kandy, 21 Nov. 1833.

Thirdly: Every fact, which it is proposed to establish, must be proved by the best and most complete evidence that the nature of the fact will admit of. By *best* evidence, is meant such as leaves none of greater or superior weight unproduced: By *most complete* evidence, must be understood all which it is in the power of the party to adduce; — with this qualification, however, that after the mind of the court is rationally and

(1) These instances are mentioned here, because they stand rather prominently in English treatises, as exceptions to the general rule. But they scarcely seem inconsistent with the principle, that the affirmative must be proved, rather than the negative. For the death of a man is a positive fact, as well as his existence, and often as easily, or more easily, proved: And so, the facts necessary to establish the illegitimacy of a child, whose reputed parents were married, may be of an affirmative, rather than a negative character. In such cases, each party may be said to assert both an affirmative and a negative: For instance; a plaintiff asserts that A. B. is alive and not dead; the defendant asserts that A. B. is dead, and not alive, etc.

*ERRATUM*, p. 110, 1.

Use the last line of p. 111 to the top of p. 110.

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fully satisfied with the evidence adduced on a particular point, it is a mere waste of time to hear further evidence to the same point (see the 28th rule of the 1st section, and *infra*, p. 148, as to dispensing with further proof), unless counter-evidence, adduced by the opposite party, should make a balance of the weight of testimony necessary. For an example of this rule in its several branches, which may be taken from one of the most ordinary transactions in Ceylon:—Where a deed or other written instrument is to be established, it is plain that the original is the best evidence of its existence, and must therefore be produced; unless the party seeking to establish it can show that it has been lost or destroyed (provided such destruction be not wilful on his part), or that it is in the hands of the opposite party, who does not produce it. In such case, a counterpart, or, if there be no counterpart, a copy, when proved to be a correct one, becomes the best evidence of which the case is capable, and therefore admissible: And if there be no copy, verbal evidence may even be given of its contents, subject of course to the doubts which must necessarily be created by such a mode of proof, and which must vary according to the credibility and apparent memory of the witnesses. In proving the execution of such deed again, the best and most complete evidence is to be found in the testimony of the notary (if the instrument be notarial) the writer, who in most instruments passed among natives signs in that character, and all the subscribing witnesses, whose evidence can be obtained. And if all these persons prove the execution, and their evidence be not shaken, the deed may be said to be *completely* proved. But it sometimes happens in transactions between natives, either through fear of the deed being denied, or from some other cause, that the neighbours are called together to hear the instrument read, and to see the parties and witnesses sign it. In such case, it is usual and proper, as a matter of caution, and to make the evidence *complete*, to summon a few of the most respectable inhabitants to speak to the fact: But it would be useless and absurd to summon the whole village for that purpose; nor indeed would it be necessary to hear those who were intimate (if a marriage be proved); in such cases, the party wish-

attendance, if the court felt satisfied with the unshaken evidence of the subscribing witnesses.

In what has been suggested above, as to the proof of written instruments, it is right to notice a variance from English practice in this respect. Indeed it may be well to remark, generally, that though the English rules of evidence are now the law of Ceylon, the application of them must vary in some instances, according as the state of society and other circumstances vary from those of the mother country. The principles, or leading rules, remain unchanged; but they would *not* remain unchanged, they would be perverted and bent from their true direction, by an attempt rigidly and inflexibly to apply them to a state of things, differing from that for which they were originally conceived, without corresponding modifications. In England, then, an instrument is considered sufficiently proved by the evidence of one of several subscribing witnesses, unless any doubt or suspicion be thrown upon its validity; but in Ceylon, where forgery is so fearfully common, and false testimony so easily obtained, it would be by no means safe to permit deeds to pass, thus imperfectly proved. It is true that if one false witness be produced to support a forgery, it may not be much more difficult to procure several for the same object. But it is in the contradictions, which are almost certain to appear on the judicious cross-examination of several witnesses to a fabrication, that the detection of the fraud, and the protection of the party attempted to be defrauded, mainly consist. It is incumbent therefore on the D. C., to see that all the subscribing witnesses to a deed, and a fortiori the writer, be called to prove the execution, or that a most satisfactory reason be given for the absence of any of them; and this, though the instrument be notarial: For though it is to be hoped that the greater number of persons appointed to that office are honest and honourable men, still too many instances have occurred to the contrary, to make it safe to trust solely to their integrity. If any such writer or subscribing witness be alleged to be dead, or to have become blind, or to be out of the jurisdiction, such fact should be satisfactorily shewn, and his signature, as far as that may be practicable, be proved. And where the evidence has

been defective in these particulars, as where the writer of the deed stated that he did not know whether one of the subscribing witnesses were alive or not, the S. C. referred the case back for further inquiry. No. 4826, Chilaw and Putlam, 15 Nov. 1834. And in another case, where only one out of four subscribing witnesses was called, the S. C. considered the proof insufficient. No. 13,808, Galle, 21 March 1834. This doctrine is by no means to be considered as imputing to the English practice a deviation from the rule, of requiring the best and most complete evidence: It is merely an application of the same rule to different circumstances: That which is held to be full and complete evidence on this subject in England, cannot be safely so considered in Ceylon.

It is no uncommon practice in Ceylon, especially in the Kandyan districts, to insert in deeds the names of persons not present, as witnesses to them; and this may often be done without any fraudulent intention. But it is impossible that the insertion of such names can really give any validity to a deed; it would make the attestation of witnesses absolutely nugatory. No. 186, Maturatte, 24 Oct. 1833.

If there be no subscribing witness, the execution of a deed, supposing witnesses are not absolutely essential to its validity, may be proved by a person present at such execution, though not called on to subscribe, or by proving the handwriting of the party to the instrument, as far as that is practicable. Persons indeed, conversant with native writing, appear sometimes to speak as positively to the genuineness of signatures, as is usually done with respect to European writing. The means of knowledge, which enable a witness to take upon himself to speak to another's handwriting, form a very fit subject of inquiry on cross-examination, or by the court, which must of course decide according to the extent and nature of the opportunities which the witness may have had. This knowledge may have been acquired, either by having seen the person in question write on former occasions (1), or by having received letters from him,

(1) Provided he have observed the character of what has been so written, so as to enable him to recognise that character in the writing now produced. It would seem scarcely necessary to say that this must be implied. But the

or by having had other occasions to become acquainted with his writing. The bare production of documents, unsupported by proof, or by the admission of the opposite party, amounts to nothing. No. 747, Ratnapoora, 20 Jan. 1836 ; L. B. 19 May 1835.

The admission of a party may be considered, generally speaking, as the best evidence against himself, whether made before or after the commencement of the action, whether in writing or verbally, and whether made by the party himself, or his agent or attorney, or by a person who is proved to have a joint-interest with him in the case. But in the application of the latter part of this rule, courts must be on their guard against a species of collusion, which is not unfrequently attempted in Ceylon, of setting up a fictitious party, by whose acts or admissions, it is hoped, the person really interested may be bound. Thus, in an action on an otty bond against three defendants, two of whom admitted the bond, but the third denied it, the D. C. gave judgment for the plaintiff on those admissions. But the S. C. referred the case back for regular proof of the otty bond, observing that, without such proof, the third defendant, or any other bonâ fide purchaser, might be defeated by collusion between the otty holder and the 1st and 2d defendants. No. 86, Walligammo, 8 July 1834. In another case, the plaintiff sued two defendants for usurpation of her land, claimed by her in right of inheritance and long possession, by her ancestors and herself, of which she gave proof. For the defendants, evidence was given of a sale by the 2d defendant to the 1st; supported by certain rent-vouchers, which threw an air of greater probability over the defence, but which still left untouched the real question, whether the second defendant had any right to dispose of the property. The D. Judge saw at once this material defect in the defence, attempted to be established by the collusion of the defendants, and gave judgment for the plaintiff in terms

general terms, in which the rule is usually laid down, might induce a belief that the mere seeing another in the act of writing would give a knowledge of the characters; Whereas, without an inspection of what is so written, a person might be in the daily habit of seeing another write for years, without gaining any acquaintance with his hand.

which left nothing for the S. C. to add in affirmation of it. No. 11,371, Colombo, 6 Jan. 1836. See also No. 2461, Batticaloa, *infra*, title Fraud.

On the same principle that admissions are evidence against the parties making them in a civil suit, confessions of criminals are admissible against them, and may rank among the best and strongest evidence, provided they have been given voluntarily, and not by means of promises, threats, or ill-treatment. (*Vide infra*, title “Examination of Parties.”) And even where the confession itself is inadmissible, from having been obtained by undue means, any *facts*, such as finding stolen property in a concealed place, may still be received in evidence, though discovered by means of the confession which is itself rejected, as improperly obtained.

A former decree of a competent tribunal ranks as the best proof of the matter thereby decided; for if this were otherwise, the decree would not be a *decision*, and litigation would be endless. But it must always be borne in mind that such decree or judgment, in order to be conclusive, must have been pronounced directly on the point now in issue, and between the same parties, or between parties whose interests were identical with those now litigating. These two requisites will be considered more fully under title “Judgment.” But it may be well to mention here a mistake which has more than once occurred, with respect to the weight which ought to be given in a civil suit to a verdict of acquittal on a criminal prosecution, relating to the same object. It often happens that the genuineness of a deed produced in a civil suit is doubted, and the party producing it is committed to take his trial for the forgery of it. It has been supposed that if such party be acquitted, the deed must necessarily be received as genuine. This is not so; the verdict of acquittal is no proof of the validity of the instrument, which must still be proved in the usual manner. No. 691, Madawalatenne, 30 Oct. 1833. The proof may have been insufficient to establish the forgery, or to fix that offence on the party accused; but it by no means follows that the instrument must be valid, any more than an acquittal of murder would be proof that the person alleged to have been murdered was still alive. On

the same principle, an acquittal of perjury is no proof of the truth of the statement. No. 412, *Maturatte*, 22 Nov. 1833.—“A *conviction* is conclusive evidence of the fact charged, if it afterwards become a question in a court of civil jurisdiction; but an *acquittal* is no proof of the reverse, because it does not, like a conviction, ascertain facts.” Buller’s *Nisi Prius*, 245.

Fourthly: Another general rule, which must be familiar to every one at all conversant with the proceedings of British courts of justice, is, that hearsay is not admissible as evidence. This indeed is but a corollary of the proceeding rule, if the original speaker be living; because a repetition of what he said is not the best evidence of the fact, intended to be proved by his statement. Another reason given for the rule is, that the statement, in all probability, was not originally made upon oath. And a third reason is, that the opposite party would have had no opportunity of cross-examining the real deponent.

To this rule, there are some exceptions or limitations:

1st. Where the hearsay forms part of the transaction, which is the subject of inquiry; that is, where it is necessary to inquire into the nature of a particular act, or into the intention of the person who did the act, proof of what that person said at the time of doing it is admissible, for the purpose of showing its true character. Such evidence, however, is not to be received as proof of the act having been done; but only, that fact being proved, as explanatory of the transaction.

2dly. On prosecutions for rape, or attempted rape, it is always matter of inquiry, whether the prosecutrix made a complaint to any one, as speedily as possible after the injury committed. This is in close analogy to the first exception; for the immediate complaint almost forms part of the transaction under examination. Such disclosure, however, is admitted, not to prove the truth of her statement of the principal fact, which it ought not to be allowed to do; but as corroborative evidence of her repugnance and resistance: For in the absence of such immediate complaint, where the means of making it present themselves, a strong inference arises of consent.

3dly. The testimony of a deceased witness, given on oath in a former action, provided the parties and the point in issue be

the same: But if a witness, examined in a former action, be alive, his evidence should again be given *vivâ voce*. (Vide *infra*, under this head, Examination of Witnesses, 146, 7.)

4thly. The deposition of a witness on a criminal prosecution, taken upon oath before the D. C., in the presence of the party accused, may be read in evidence on the trial, if it be proved that the witness is dead, or unable to travel, or kept out of the way by the accused.

5thly. The dying declarations of a person are admissible, on a prosecution against the party charged with occasioning the death, provided it be proved that the deponent was conscious of his approaching death;—a consciousness, which is considered to operate as powerfully in the elicitation of truth, as the obligation of an oath.

6thly. Declarations of persons deceased are admissible to prove relationship, where that fact cannot be satisfactorily established by living witnesses, or other existing proofs. How far such testimony can be relied on in Ceylon, where veracity is not a prevailing virtue, nor accuracy of recollection a very general endowment, must be left to the discretion of the courts, according to the circumstances of each case. When offered in evidence to prove the *time* of a person's birth, such declarations must necessarily be received with the greatest caution, on account of the extremely vague ideas of the natives as to the lapse of time, even when called to speak, of their own personal knowledge, to a transaction of former date; unless the period be fixed in their memory by some public event, with which the fact in question may be associated in their minds. On questions of adoption among natives, however, such evidence is often found to be very material; and these declarations are usually accompanied by acts, which go far towards explaining the meaning of the expressions used. Where the declaration of the deceased appears to have been made obviously against his own interest, such declaration or admission may, generally speaking, be received in evidence on any subject.

7thly. General reports (1), which are a species of hearsay,

(1) This expression is used here, in preference to "common reputation,"

are sometimes received in evidence, to show the impression on the public mind, as to a particular fact: As, to prove the existence of a custom, or the exercise of a right, for a length of time. But this must be understood as confined to public matters, and ought not to be admitted as regards private rights. And even as regards public rights, these reports should be received with the same caution, as was recommended with respect to the declarations of deceased persons, and for the same reasons. General reports are also sometimes admitted, to show the public impression on questions of opinion:—And in one class of cases, namely, where defamation is the injury complained of, the S.C. of Ceylon has always received evidence of common reports, touching the character of the complainant, in extenuation of the slander, etc., whether in civil actions or criminal prosecutions. See title Libel.

8thly. After what has been said (p. 114) on the subject of admissions by a party to a suit, or by persons having a joint interest with such party, it is scarcely necessary, unless to avoid the possibility of misconception, to observe that such admissions do not come under the description of hearsay, and may be received in evidence against the party making them, but not in his favour.

By these four rules, well understood and correctly applied, most questions of evidence, arising in the ordinary course of judicial proceedings, may be governed. To have entered with greater particularity into the respective subjects of them, would have exceeded the limits of this very brief summary, without perhaps producing any corresponding advantage to those for whose use it is designed. For it may be questioned whether in Ceylon, where the object of all the courts is speedy and substantial justice, obtained by the simplest and easiest means, rather than a rigid adherence to form and precedent, it be not preferable that the D. Courts should have recourse, in all cases, to first principles, trusting for the true application of them to plain common sense, and to rectification, when necessary, by the S.C., than that they should, on every occasion, be

which is the term usually applied in the law books, but which might mislead the general reader, by its somewhat equivocal meaning.

searching for "a case in point," on the applicability of which to the case pending it would still, in the generality of instances, require a legal head to decide; since it is rare that any two cases exactly correspond, in all their features and bearings.

There is one view of the subject of evidence which, though it does not present itself in the shape of a general rule, yet ought not to be passed unnoticed; and which indeed should be always kept sight of, in the application of the principles above sketched out. This is, the distinction between *positive* evidence, and *presumptive*, or, as it is sometimes called, *circumstantial* evidence. Positive proof is where a witness speaks to a fact of his own knowledge: As, if he deposes to having seen rent paid for a certain period, or to having seen a person take certain property. Presumptive or circumstantial proof is where the fact is not proved by direct testimony, but is to be inferred from circumstances, which could not, or in all probability would not, have existed, if the fact itself had not taken place: As if, in an action for rent, the tenant produce a receipt for rent, not for the period in dispute, but for one subsequently expired; or if, on a prosecution for theft, or for receiving stolen property, the prosecutor prove that the property was found concealed in the prisoner's house: In the first case, a presumption arises that the rent in question has been paid, because otherwise, it is very improbable that the landlord would have granted a receipt for rent subsequently become due; in the second case, a presumption arises that the prisoner has stolen or received the property, from the apparent improbability that, otherwise, it should have been found concealed in his house. But such presumptive or circumstantial evidence is but a substitute for direct proof, and should never be relied on by itself, if positive evidence of the fact can be obtained: And this, on the principle of the third rule above given; for if direct proof exist, presumptive evidence is not the best, though it may very properly be adduced in support and corroboration of the witnesses to positive facts. And presumptive evidence may always be contradicted or neutralized by contrary proof. Thus, in the cases just put; the landlord may show by evidence some reason why the later rent was accepted, and a receipt given for it, though the former

rent still remained unpaid; and so the prisoner may be able satisfactorily to prove that the property was placed in his house, without any guilty connivance on his part. As regards the relative value of these two different kinds of evidence, there can be no doubt that positive proof of a fact is more satisfactory than circumstantial evidence, *provided* the witnesses to the fact itself can safely be relied on. On the other hand, a train of circumstances will sometimes produce a degree of conviction of a particular fact, almost as strong as if the fact had been sworn to by eye-witnesses; and with this superiority in point of value, that such a chain of circumstances could scarcely be put together, by any exertion of ingenious wickedness; whereas nothing is easier, or it is to be feared more common in Ceylon, than for two or more persons to combine together to swear to a particular fact, though such combination, happily, can rarely stand the test of judicious cross-examination.

On some subjects, the law is said to raise presumptions; that is, to draw certain inferences from particular circumstances. As that a child, born during marriage, is legitimate till the illegitimacy is proved, sup. 109, 10; — so, that the person in possession of property is the owner, till the contrary is proved; So, in the instance just given, that where a receipt for rent is produced, the former rents have been paid, unless the contrary be shewn: So, that a bond has been satisfied, after an unexplained forbearance by the obligee for many years, which by the common law of England was fixed at 20. The whole law of prescription, indeed, is founded on these presumptions in favour of long possession of land, or of satisfaction of debts, or compensation for injuries, after certain periods of silence or acquiescence on the part of creditors or claimants. And the laws on that subject, whether the English statute of limitations, or our own regns. and ordnce. of prescription, only reduce this principle to practical certainty, by defining the periods, at the end of which such presumptions shall respectively arise, in each class of cases. Vide *infra*, tit. Prescription. But there is one presumption which our law always raises, not from circumstances, but from principles of humanity, or rather indeed of

justice ;—that every man shall be presumed innocent, till he is proved to be guilty.

Under this title of “Evidence,” may most conveniently be classed such general observations on the subject of witnesses, as appear necessary to complete this outline. And these will be given, as shortly as may be consistent with intelligibility, under the heads mentioned in the summary placed at the beginning of this title of Evidence.

As regards the number of witnesses necessary :—The second clause of the ordinance, No. 6 of 1834, following the Charter of 1801 as regards criminal matters, declares and enacts that the testimony of one credible witness, in any case civil or criminal, may be deemed sufficient evidence before any court, of any fact deposed to by such witness as of his own knowledge; except where the evidence of two or more witnesses is required by law,—that is, by the law of England generally introduced by the first section. In treason, therefore, the evidence of two witnesses would be necessary, except in treasons relating to the coin, as to which one witness has been made sufficient by statute. As regards perjury, the law of England not being quite decided, and the charter of 1801 having contained a clause on the subject, it was thought proper to provide for it in express terms, which is accordingly done by the third clause, to which the reader is referred. That clause also provides that no local laws, requiring a particular number of attesting witnesses, or a particular mode of executing instruments, nor any rule for regulating the proceedings of the D. C., shall be affected by the order. And we have seen that where there are several subscribing witnesses to an instrument, they ought all to prove their signatures, or their absence should be accounted for, not by virtue of any express law, but for the reasons assigned above p. 111, 2. With these exceptions, then, one witness, if full credit be given to him, is sufficient in any case, civil or criminal. The observations of Mr. Phillips on this point are well worthy of perusal, for the clear common sense, and conclusive reasoning, which they contain. “In deciding upon the effect of evidence, the question is, not by how many witnesses a fact may have been proved; but whether it has been proved satis-

factorily, and so as to convince the understanding. The number of witnesses is not more conclusive on matters of proof, than a number of arguments on a subject of reasoning. If the law were in every case to require peremptorily two witnesses, this would by no means ensure the discovery of truth; but it would infallibly obstruct its discovery, whenever a fact is known only to a single witness; and thus secret crimes might escape with impunity (1). Abstractedly speaking, there cannot be any reason for suspecting the evidence of a witness, because he stands alone. The evidence of a single witness may be so clear, so full, so impartial, so free from all suspicion and bias, as to produce in every mind, even in the most scrupulous, the strongest and deepest conviction. On the other hand, witness may crowd after witness, all asserting the same facts, yet none be worthy of credit. In short, it is the character of witnesses, and the character of their evidence, that ought to prevail, not their number.”—Phillips, part 1, chap. 7, sect. 1. To these excellent remarks, however, it may be permitted to add one observation, which indeed is little more than a repetition of what was said above, p. 112, but which the habits of the natives in Ceylon require should be constantly borne in mind, whether with reference to proof of deeds, or of any other facts;—namely, that where it appears that more than one witness *might* have been called to testify to a fact, the court would naturally inquire why only one was produced, and would not be satisfied in such case with the evidence of the single witness, unless it appeared above all suspicion, uncontradicted, and in no respect requiring confirmation.

Lists of witnesses, in civil cases, are directed by the 21st rule of sect. 1, to be filed by the respective parties within eight days after filing the documentary evidence. If the plaintiff fail so to do, the defendant may move to have the case dismissed, unless cause be shown to the contrary. If the defendant fail, the plaintiff may move to proceed *ex parte*, unless cause be shown. But these steps can only be taken by the respective parties, after due notice to the other side, as directed by the rule. And

(1) And in civil matters, it may be added, just debts would often be evaded, and personal injuries remain unredressed.

where actions have been dismissed by D. C. on this ground, without the previous rule to show cause, the S. C., on appeal, has referred the cases back for further proceeding; observing that, under the 21st rule, the plaintiff must have an opportunity of showing cause against the rule for dismissal on the day appointed, according to the form No. 15, on which day he would either come prepared with his list, or would show cause for his omission to satisfy the D. C.; or, in default of either of those courses, the action would then be dismissed. No. 400, Caltura, 27 May 1835; No. 87, Jaffna, 2 May 1835. In one case, the plaintiff moved that the case might proceed *ex parte*, because the defendant, who was ill, had sent his list of witnesses to the court by his daughter, instead of presenting it himself, or by a proctor. The D. C. rejected this motion, and the S. C. affirmed the decision;—observing that there was nothing in the rule, or in the nature of the document, which required that a party should be either present or represented in court at the time of its delivery;—that the list might be sent by a servant, or even by the post, provided enough appeared on the face of it, to inform the officer of the court, in what case and on whose behalf it was sent;—that if the list did not arrive, or turned out to be fictitious, the consequences could be injurious only to the party running the risk, or practising the deception, since he would only be allowed to summon the witnesses named in the list;—and that even if no list had been produced, the illness of the defendant, if believed, would have been a sufficient ground for granting a moderate extension of time. No. 1195, Caltura, 9 May 1835. A question was referred to the S. C., whether a plaintiff might be allowed to amend his list of witnesses, by erasing two names, and substituting those of two persons, whom, it was evident to the D. C., the plaintiff had intended to summon. The defendant opposed the motion. The answer returned was, that as the D. Judge expressed himself satisfied as to the intention, there could be no objection to the mistake being rectified, provided no injustice would be sustained by the defendant in consequence of the substitution, which must depend on the stage in which the case was;—and that if sufficient notice of the amendment were given to the defendant before the

hearing, it would be difficult to understand on what ground he could resist the application. L. B. 19, 21 Jan. 1836.

As regards cases in the criminal jurisdiction of D. Courts, no time is prescribed by the rules of practice for filing lists of witnesses, on the part of the prosecution: And to a question proposed by a D. Judge, whether the time prescribed in civil suits, or what other period, ought to be adhered to, the S. C. directed an answer to be returned, That it would be scarcely possible to lay down a fixed and invariable rule, as it was a point which must often be left to the discretion of the court;—that the names of the witnesses for the prosecution ought, in most instances, to be given in when the accusation is first made, because, generally speaking, the prosecutor must know, when he goes to make his complaint, who are the persons who saw the injury committed;—that frequent exceptions must, however, present themselves to this general rule, either from the nature of the injury itself, or from collateral facts becoming material, which the prosecutor could not be supposed acquainted with, at the time of making his complaint: That with respect to the witnesses for the defence, if the accused intended entering into it at length before the D. C., the time allowed in civil cases might with propriety be adopted;—but that if he reserved his defence till his trial before the S. C., the time of his commitment was the proper moment for giving in his list of witnesses, according to the supplementary rule of 5 April 1834. L. B. 17, 21 Sept. 1835. This rule directs, for the reasons there given, that no witness shall be summoned on the part of any defendant in a criminal prosecution, whose name is not given in to the D. C., at the time of his commitment or being held to bail, unless by order of the S. C., on motion by the proctor for prisoners: And in order that he may have full opportunity to summon all witnesses really necessary, he is to be allowed till the following day, if he require it, to give in his list. The S. C. has decided that a complainant is not bound, and that it might often be improper for him, to give up the name of his informant, on his making his complaint in the first instance; more especially as this must be disclosed, when the list of witnesses for the prosecution is filed. No. 966 (criminal), Colombo, 12 Aug. 1835.

A question of some importance was submitted to the S. C. by the D. Judge of Colombo, No. 1, viz., whether a witness could ever be examined on the part of the prosecution, whose name was not on the list, and who might have been in court during the examination of the other witnesses: To this question the following answer was returned: That the course adopted by the S. C., in deciding on the admissibility of a witness under the circumstances proposed, was to consider whether the necessity of such additional evidence might have been foreseen by the party wishing to adduce it, and whether that party therefore ought to have summoned the witness in the regular manner;—that if those two questions were answered in the affirmative, the evidence of such witness ought not to be admitted, because otherwise, the rules requiring that lists of witnesses should be furnished, and that no witness should be allowed to hear the evidence of the others, would become nugatory;—that on the other hand, it must sometimes happen in the progress of a case, that the evidence of a person becomes material, from the disclosure of some circumstance which could not have been anticipated, or for the purpose of contradicting evidence adduced by the opposite party, or for other reasons;—that in such case, where the party could not reasonably be expected to come prepared with such evidence, it would be an unjust and too rigorous construction of the rule of restriction to exclude such testimony, and would indeed deprive the prosecutor in many instances of his right to adduce evidence in contradiction of the defence set up, since it was impossible for him to foresee with certainty what line of defence might be adopted;—and that it might often operate with equal hardship on a defendant, where new evidence, in addition to that given on the preliminary investigation, was adduced on the trial. L. B. 18, 22 June 1835. It will be observed that the mode recommended by this letter, of deciding whether evidence, offered without adherence to the general rule, be admissible, is the same as is prescribed by the 27th rule of sect. 1, as regards civil cases.

The mode of summoning witnesses is prescribed by the 23d rule of sect. 1: And by a supplementary rule of 3 Dec. 1834, all subpœnas and process, issuing from the D.C. of Colombo, No. 1,

must be delivered into the fiscal's office six days (if the service be within the gravets), and ten days (if without), before the day of appearance. This rule was made, in consequence of representations of the inconvenience occasioned by citations being delivered at the fiscal's office, without allowing sufficient time for the service and return. If the same necessity had appeared to exist in other districts, a similar rule, it is to be presumed, would have been, or would now be, issued. The penalty of 5*l.* for non-attendance in obedience to the subpoena, may either be levied in whole or in part, as the D. Judge shall think fit; and any witness, committed for non-payment of the fine, may be discharged by the D. Judge's order, as soon as he considers that the contempt has been sufficiently expiated. Circular Letter to D. Judges, 21 Feb. 1834. In the D. C. of Colombo, No. 1, when the hearing of a case is postponed, the witnesses, in order to avoid delay and ensure their attendance on the adjournment day, are served with fresh subpoenas for that day, before leaving the court. Supp. Rule, 15 April 1835. This also is a rule, which would no doubt be extended to other districts, if necessity or convenience required it. The question was submitted to the S. C. by a D. Judge, whether the 23d rule did not make subpoenas absolutely necessary; and whether it would not be irregular to admit the evidence of a witness, who had not been subpoenaed: To which an answer was returned, That there was nothing in the 23d rule, making it obligatory on a party to summon his witnesses by subpoenas, nor was it ever intended to impose that necessity upon him;—that if he did avail himself of the process of the court, he must use it according to the form prescribed, and on payment of the necessary sums for stamps;—but that if he chose to trust to his own powers of persuasion to obtain the attendance of witnesses, he was perfectly at liberty to do so, provided their names had been inserted in the list delivered to the opposite party: But that a witness was not liable to an attachment for non-attendance, unless he had been personally served with a subpoena. L. B. 9, 13 June 1835: Id. 8, 25 Oct. 1834. So, with respect to the production of documents, it is unnecessary, as regards the admissibility of them as evidence, to inquire whether the production is voluntary

on the part of the witness, or in obedience to the order of the court: But the more regular course is to take out a subpoena duces tecum; and if a party omit to do so, he cannot insist on the production, whether the object be records of a court, or any other documents. L. B. 19 Nov. 1833. As to the mode of compelling the production of account-books, in the possession of the opposite party, and of referring to them when produced, the S. C. has observed, That the usual course was, for the party requiring them, to give notice to the other side to produce them;—that if they were not produced, secondary evidence would be admitted of their contents, and the court would be inclined to lean against the party refusing to produce them, or, if they were absolutely necessary, might insist on their production;—that when they *were* produced, the reference to them ought to be under certain restrictions, if required;—that a merchant might have good reasons for not wishing his books to undergo general inspection;—and therefore it was but reasonable that the reference to them should be confined to the particular points in contest, and should take place in court, if so required, and in the presence of the owner. L. B. 25, 26 Sept. 1835. Where a document is not produced by the adverse party, in obedience to the order of court, a copy may be given in evidence; and where the party could have no reason for supposing that the original would be withheld, it is no objection to the production of the copy, that it was not filed with the other documents; for it is not till the original is declared not to be forthcoming, that the copy becomes admissible at all. L. B. 5, 6 Oct. 1835, on case No. 4099, Colombo South, referred to *suprà*, p. 82.

From this duty of giving evidence, one of the most sacred which a member of society can be called upon to perform, no class of persons is exempted. Attempts have however been made in Ceylon, at different times, to set up a claim of exemption on the part of two descriptions of persons,—Moorish females, and Buddhist priests. The ground on which the privilege has been claimed on the part of the former, is the repugnance which females of that class feel to appearing at all in public, and the disgrace supposed at one time to attach to such

public appearance, which, it is even said, is contrary to the Mahomedan religion. The courts, however, have never felt themselves at liberty to yield to these reasons, and the privilege has never been recognized. In civil cases, Moorish women have sometimes, it is believed, been examined at their own homes; but this must or ought to have been by consent of the opposite party: And in criminal cases, such a course, even with consent, could scarcely be had recourse to, consistently with our mode of trial. As regards Buddhist priests, the claim of exemption is founded upon an alleged tenet of their religion, which prohibits a priest from giving evidence, if its effect may be to subject others to punishment. This therefore is confined to criminal cases; and though scarcely a criminal session passes, without one or more priests giving evidence against prisoners without objection, still the claim has been made more than once and overruled. But in 1835, the question was raised in the D. C. of Amblangodde, and brought to a deliberate decision in the S. C., by a priest who refused to give evidence on a prosecution for theft, and who persisted in his refusal, after having been warned by the D. Judge of the necessary consequences of his pertinacity. The D. C. at length imposed a fine upon him of 6*l.*, from which conviction the priest appealed to the S. C., and argued before the three Judges in support of the right of exemption claimed, at considerable length, and under an evidently honest persuasion that he was doing his duty; and supporting his arguments by some curious allegorical extracts from Buddhist lore, to show that, even if his conduct had been contrary to the municipal or temporal law of Ceylon, he, as a priest, was not amenable to punishment. He admitted, however, in the course of his address, that he should not feel the same scruples in giving evidence, if the punishment consequent on a conviction would be moderate,—or, as he himself exemplified it, would not exceed a “a few lashes.” The judgment of the court, as pronounced by the Chief Justice, affirming the conviction of the D. C., but reducing the fine to 1*l.*, was in substance as follows:—“The S. C. has given the fullest and gravest attention to this case, and to the arguments which the defendant has now adduced, in vindication of his refusal to give evidence. We are

by no means disposed, even if we should be justified in so doing, to treat with levity or disrespect the parables or allegories, taken from books which the defendant holds sacred, by which he has endeavoured to justify himself. There is, however, one doctrine, which would seem to be inculcated by some of the passages quoted by the defendant as authorities, which must not be allowed to pass unnoticed;—that is, that priests are entitled, by virtue of their office, to forgiveness for offences which they may commit. There is no such privileged class in this island. All persons, whatever may be their station, rank, or vocation, are responsible for their acts, and are alike subject to punishment, if they violate the laws. With respect to the particular offence, of which the defendant has been convicted, that of a contempt of the D. C. by refusing to give evidence, this court is decidedly and unanimously of opinion, that no religious scruples, however sincerely and conscientiously entertained, can be received as a justification of that refusal. This opinion is founded on principles of paramount necessity; and,—if it were necessary to have recourse to weaker grounds,—it might be justified by the constant practice of Buddhist priests giving evidence in criminal cases, without any scruple or hesitation on their own parts, and unmarked by any act of degradation or reprobation for so acting, on the part of their religious superiors. And the vague manner, in which the defendant has attempted to define the degree of latitude to be allowed in criminal cases, “to the extent of a few lashes,” furnishes one of the strongest arguments, against admitting the right of exemption at all. For every priest would be governed in this respect, by the degree of tenderness he might feel. It would therefore become a mere exercise of arbitrary discretion by the priest, even supposing he could be certain of the extent of punishment, which his evidence might occasion. A speech of His Excellency the Governor, publicly delivered at Kandy on 13 Feb. last, has been referred to, as sanctioning the claim to exemption from giving evidence, which the defendant makes on the part of the priesthood. This court is bound to treat with the utmost deference and respect whatever comes from so high an authority; though, if the doctrine inculcated, even from that quarter, were such as could

not be supported in point of law, a court of justice would be equally bound to declare its dissent from it. On reference, however, to the address of His Excellency which has been cited, it appears that the inference, to be drawn from that document, has a contrary tendency to that which the defendant would attribute to it. The letter of the chief priests, therein recited, shows that they considered the conduct of the priests, who communicated treasonable discussions to government, to have been highly praiseworthy. It is true that, from the subsequent part of the Governor's address, it would seem to have been considered, "That according to the doctrines of the Buddhist religion, the sacerdotal functions of those priests would have been superseded," if the persons accused had been convicted. This would make the deprivation of the priest depend, not on his giving evidence against a fellow-creature, but on that evidence being believed, and tending to conviction. But however that may be, no court can allow a person, whether priest or layman, to excuse himself from one of the most sacred duties of society, that of giving evidence, on the ground that, by so doing, he would subject himself to priestly censure or deprivation; especially when the high priests themselves admit, that even voluntary denunciation is "highly praiseworthy." For it must be presumed that those authorities would not make a distinction between offences of different degrees: If it be praiseworthy spontaneously to denounce persons for offences which, if proved, would render them liable to capital punishment, it cannot be an immoral act to impart, under the sanction and by order of a court, the knowledge which a man happens to possess of an offence, the consequences of which would be less repugnant to the feelings of humanity. The grounds, therefore, on which this court has taken upon itself to reduce the penalty imposed in the present instance are, not that it by any means assents to the claim of exemption, but that it believes the defendant to have been actuated by sincere and conscientious, though mistaken, scruples; and also that the point has not before been solemnly decided. But it is to be understood that, on no future occasion, will the S. C. interfere on the same grounds, even in mitigation of punishment, for this species of

contumacy. No. 41, Amblangodde (criminal), 10 June 1835.

As regards the payment of witnesses;—this is provided for, in civil cases, by the 23d rule, which directs, “That all witnesses, whose homes shall be more than four miles from the D. C., shall be entitled to receive such sums as are now allowed to witnesses in the respective districts, etc., for every day which they shall necessarily be absent from their homes, in obedience to the citations: And every party, on applying for citations, shall either deposit in court, or give security for, such sum as the secretary (who shall refer to the D. Judge, if any dispute arise as to amount) shall consider necessary, with regard to number and distance; which sums shall be included in the taxed costs, except when the court shall consider that witnesses have been summoned unnecessarily, the allowance to whom shall, in all cases, be made by the party summoning them.”

A representation was made to the S. C. by a D. Judge, of the neglect of parties to comply with this rule as regards the deposit in court, by which the hearing of cases on the day fixed was often rendered impossible, and the time of the court was thus wasted. The S. C. informed the D. Judge, that he would be perfectly justified in dismissing a case, if it appeared on the day fixed for trial that the necessary deposit or security had not been made by the plaintiff, or in hearing the case *ex parte*, if this default had been made by the defendant; that the secretary ought to refuse to issue citations, unless the deposit or security were given, entering on the record his reason for such refusal, which would be a ground for dismissing, or hearing *ex parte*, as in the case of neglect altogether to summon the witnesses. L. B. 23, 29 Aug. 1834. A D. Judge inquired whether, when a case was postponed under the 24th rule, in consequence of the absence of a material witness from indisposition, the party requiring such witness ought to pay the expences of the opposite witnesses, as well of those residing within four miles of the court, as of those living beyond that distance: The S. C. returned for answer, That in the case proposed, the 24th rule threw the costs of the opposite witnesses on the party, on whose application the delay took place, and on whom therefore the burden of unnecessary attendance ought in fairness to fall:

But that if a party, in such case, were to waive his absent witness, or to propose that his evidence should be taken on another day, and the witnesses who were present be examined at once, such party might then be considered as relieving himself from this liability; because the case, if postponed at all, would be postponed, not in consequence of the absence of the witness, but of the other party refusing to go to trial, and to allow the absent witness to be examined afterwards: As regarded witnesses, however, whose homes were not more than four miles from the court, they were entitled to no allowance under the 23d rule. L. B. 23 Nov., 2 Dec. 1833. See title Witnesses.

The payment of witnesses in criminal cases, before D. Courts, has not been (at least had not been up to March 1836) very definitively settled. For a considerable time the old practice was adhered to, of not allowing batta to witnesses in criminal cases, unless when summoned to attend the trial before the S. C., at a place out of their own district, or at a distance above four miles from their homes. L. B. 24, 29 Oct. 1833. The subject, however, was subsequently brought to the consideration of the S. C., and batta was ordered to be allowed to a witness, summoned before a D. C. out of another district. This decision, it is believed, took place on 8 Oct. 1835. With respect to the D. C. of Colombo No. 1; on a representation to the S. C. by the D. Judges, of the hardship sustained by persons summoned to give evidence on complaints which were either without foundation, or of which the persons summoned bore no knowledge, and yet were obliged to attend without batta, It was ordered that whenever the D. C. should be satisfied that the prosecution had been instituted on false, frivolous, or vexatious grounds, the complainant should be directed to pay batta to the witnesses on both sides, and should be liable to execution on non-payment, as in civil actions. L. B. 16, 19, and 24 March 1835; and Supp. Order (Colombo) 10 April 1835. If this rule should have proved beneficial in Colombo, similar orders would no doubt be passed for other districts, in which the same necessity for it should be shown to exist.

By the 24th rule, all witnesses are to be examined *vivâ voce* in open court, unless the witness be unable, from age, sickness,

or other insurmountable cause, to attend the court; or unless all parties consent in writing to the witness being examined on interrogatories; or unless the witness be out of the island and its dependencies, or at so great a distance, as to make the expense and inconvenience of compelling his attendance disproportioned to the importance of the suit: In which cases, the witness may be examined on interrogatories, in the mode, and subject to the conditions, prescribed by the rule. It is right to notice here an omission which occurs in this 26th rule, of any express direction, to whom the D. J. shall address his commission, for the examination of witnesses in other districts. In point of practice, it is believed that all such commissions are directed to the Judges of the districts in which the witnesses to be examined are found; but the rule ought certainly to have been explicit on this point. In pointing out and regretting this omission, the writer cannot refrain from presenting his readers with the opinion expressed by Mr. Cameron on this point; and which is the more valuable, as showing the views entertained by that gentleman, to whom the island of Ceylon is so deeply and lastingly indebted for its present juridical system, on the jurisdiction of the D. Courts. "One great advantage of a uniform system of local courts, subject to one appellate and controlling court, is that instead of thwarting each other, and struggling to encroach upon each other's jurisdiction, they can be made to cooperate, whenever the ends of justice would be served by their cooperation. Thus, if a cause is pending in district A, and one or more of the principal witnesses are resident in district B, at the other end of the island, instead of sending a commission to private persons to examine those witnesses, the business may be delegated to the D. C. of B. The examination will then be carried on by a public responsible officer, presumably bringing to the business all the learning, and all the practical skill, which is to be found in the district. Such an examination indeed would not be quite so effective as an examination before the Judge who is to decide the cause; but it would approach so near to that point, that the convenience of witnesses might be consulted with far less risk of injustice to parties, than it could be, if the system of examination by private commissioners were

adopted. It is scarcely necessary to remark, that this course is no violation of the system of exclusive local jurisdiction, established by the Charter. The examination of witnesses, though subservient to jurisdiction, is no *part* of jurisdiction. And if it were, the delegation of it to private individuals would be a still greater violation of the Charter, than the delegation of it to another court." The ordinance No. 6 of 1834 prescribes the course for obtaining the evidence of witnesses, residing out of the island. These provisions, it will be understood, relate only to civil matters. The S. C. would usually leave it to the discretion of the D. C., to decide whether witnesses in remote districts should be examined on interrogatories, or in person. Petition Book of 1835, p. 3. A similar discretion must also be exercised, as to granting further time for filing interrogatories, where the period first allowed has proved insufficient; taking care that such indulgence is not abused to the injury of the opposite party. L. B. 12, 18 May 1835. And so also, as to granting further time for the return of the commission:—Thus, a commission having issued to examine a witness at the Mauritius, which, after an interval of ten months, was not yet returned, the D. Judge applied for instructions to the S. C., whether he ought to proceed with the case, or what course he ought to pursue. On this application, the S. C. observed, That the question proposed was, simply, whether a reasonable time had or had not elapsed, for the return of the commission,—a question which might more satisfactorily be answered by the D. Judge, than by the S. C.; for though, on the naked statement of dates, ten months would be ample time to have allowed of the return, still there were many collateral circumstances, with which the D. Judge would either be acquainted, or on which he had the means of obtaining information, and on which the facility of getting the commission speedily executed would very much depend;—such as the part of the Mauritius, at which the witness resided, whether near to or distant from Port Louis or the courts,—the nature of the evidence required,—whether any documents were referred to,—the length of the interrogatories, etc.:—That on other points, the plaintiff ought to be able to furnish information, and if he could not, or if that informa-

tion failed to satisfy the D. C. that there was good reason why the commission had not been returned, the case ought to proceed, under the proviso at the end of the 26th rule :—That it might possibly be out of the plaintiff's power to give such explanation, and it might be hard upon him to be deprived of this evidence; but if he could not afford the necessary information, it could scarcely be expected that the opposite party could furnish it; and of the two evils, it was more just that the inconvenience should fall on the party, at whose instance the deviation from the usual course of proceeding had been adopted, than on the defendant, who complained of the delay already incurred :—That some limit must be put to such postponements, or a mode would be held out, through which any party might protract a suit indefinitely, by procuring a commission, for the examination out of the island of some imaginary person :—That though the court, or other functionary, to whom the commission was directed, ought to return in such case that the witness was not to be found, still, if that was not done, the inconvenience ought to be borne by the party applying for the commission, who, in making that application, must be considered as impliedly engaging that it should be returned within a reasonable time. L. B. 16, 20 Aug. 1834. Under very cogent circumstances, as where a witness was about to leave the island, the S. C. has sanctioned the examination of such witness before the trial, in a civil case. *Petition Book of 1835*, p. 178. There seems to be less objection to this course in Ceylon, where the D. Courts are constantly sitting, and can consequently take the examination of the witnesses themselves, than in England, where witnesses, in such cases, must usually be examined on interrogatories before commissioners.

Incompetency to give evidence is limited by the ordinance, which, with two trifling exceptions to be noticed in their place, coincides with the 25th rule in this respect, to the following causes :

1st. Inability, from want of age or understanding, to comprehend the obligation of telling the truth;

2dly. Sentence or conviction of perjury. The ordce. varies here in some degree from the rule, the words of which are “sen-

tence or conviction of an offence which legally disqualifies." It was thought better, however, in framing the order, which, it will be recollected, is of date subsequent to the rules, to limit the disqualification to the single offence of perjury. For though by the law of England, there are many other offences, the conviction of which renders a person incompetent to give evidence, difficulties would often arise in Ceylon, in the application of the rule of disability, from the term "felony," as distinguished from other offences, not being known to the law of that island. And as, by the English law, in all offences except perjury, the competency of the convict is restored by his undergoing his punishment,—a mode of reintegration, which the frequency of corporal punishment in Ceylon would render somewhat grotesque,—it was considered better to leave all such offences to affect his credit merely, and to distinguish perjury, as the only crime which should render his evidence wholly inadmissible.

3dly. The standing in the relation of husband or wife to one of the litigant parties; the general rule being, that husband and wife can neither be witnesses for nor against each other. But this must be taken with the exceptions, which exist to the rule in the law of England: As where a wife has acted as agent for her husband, by entering into contracts for him with other persons. And in all prosecutions against the husband for personal injuries to the wife, she is a competent witness. In prosecutions for bigamy, the woman last married is a competent witness against the accused, after the first marriage is proved; but this forms no exception to the general rule, because the witness is not legally his wife. And where a husband is the principal witness in support of a criminal prosecution, his wife is always a competent witness; because the law does not recognize him as a "party," the Crown being the prosecutor. No other relationship, however near in degree, is a ground of exclusion by the English law, as now introduced into Ceylon, which differs materially in this respect from that of Holland. For by the Roman Dutch law, fathers, sons, and brothers, are inadmissible as witnesses for and against each other; and servants for their masters, as long as they are under the authority, and receive

the wages of the latter. Voet. Lib. 22, tit. 5, par. 3, where indeed it is said, that all *domesticum testimonium* is objectionable. A decision has just taken place in England, which shews how impossible it is considered to exclude relations, however near, from giving evidence, even in family matters of the most delicate nature; and in the ecclesiastical courts, too, which govern their practice so much by the rules of the civil law. In a suit by a wife for a divorce, on the ground of cruelty, she moved to examine two minor children of the marriage, as to an alleged act of violence. The husband's advocate contended that the court had a discretionary power of rejection; and that considering the age of the children, the eldest being only ten, the time when the alleged act was committed, four or five years since, and the cruelty of compelling children to give evidence against their parents, who might have to indict them for perjury, the court should assume the power of rejection, even if such power were not expressly recognized. But the learned Judge, Dr. Lushington, held that, whatever might be the evils attending it, he had no discretionary power to refuse the examination, if the children were of an age to understand the nature of the obligation: It was, no doubt, desirable that children should not be called on to give evidence against their parents; and therefore it was matter of serious consideration for the wife and her advisers, whether the necessity of the case obliged her to adopt this course: But if insisted on, the court had no choice, as the objection went only to the credit of the children, and not to their competency. *Lady Julia Lockwood v. Lockwood*, Consistory Court, 8 Nov. 1838.

4thly. The having a direct interest, that the party calling the witness should succeed in the suit. The 25th rule was couched in more general terms, as regards this disqualification,—“directly interested in the event of the suit.” The alteration was made in the order, lest, by a too literal application of the rule, a person interested in the event of a suit should be rejected, though called by the party opposed to such interest, and to speak consequently against his own interest, in which case he is clearly admissible. See *L. B. 5, 6 Oct. 1835*, on No. 4099, *Colombo, inf. exn. of parties*. The interest, to disqualify, must not

rest on the mere wishes or belief of the witness himself, though they might affect his credit very materially; but it must be some direct and certain benefit to himself by the success of the party calling him, or some disadvantage to himself by the success of the opposite party, however small and inconsiderable such benefit or disadvantage may be. Thus, liability to pay the costs, if the party calling him fail in the action, is sufficient to disqualify. So, executors and administrators should not be allowed to give evidence in favour of the estate, even though they have no beneficial interest as heirs or legatees, on account of their ultimate liability for costs, and still more of their claim for commission: No. 6863, Colombo North, 16 Dec. 1835; *supra*, p. 10. If a witness have an interest inclining him to each of the parties, he may give evidence for either. There is one class of persons, which forms a somewhat wide exception to the rule respecting interest: Servants or agents, within which latter term are comprized all who make contracts for others, are admitted to prove sales, contracts, payments, or receipts of money, or the delivery of goods, though such witnesses may have a direct interest, in the shape of fees or commission, to establish such sales, etc., or in exonerating themselves, by proving such delivery or payment. This is allowed for the convenience of trade, and the common usage of business. The competency of an interested witness may be restored at any time before he is sworn, by release, payment, or any other means by which his interest is extinguished.

All other objections, besides these four, shall only, in the words of the order and of the rule, affect the credit, but not the competency of the witness. And we may venture to add, as a general rule, that whenever a D. C. is in doubt, whether a witness be or be not incompetent on any of these grounds, the safer course is to admit the evidence, subject to the consideration of credit, and to correction by the S. C., if the party opposing the reception of such witness should appeal on that ground. On questions of credit, the opinion of the assessors will naturally be of great weight with the court. (*Vide supra*, p. 43, 4.) And in deciding cases in appeal, the S. C. feels inclined, on points which depend on the credit due to witnesses,

to defer to the opinion of the court, before whom the witnesses have been examined *vivâ voce*, rather than come to a contrary conclusion, on the bare perusal of the depositions. No. 374, Kornegalle, 14 Dec. 1833, No. 264, Amblangodde, 13 Jan. 1836; Unless when very glaring contradictions or inconsistencies occur, as in a case which will be mentioned, under title Fraud, No. 1448, Islands.

Before quitting the subject of competency, it is necessary to advert to the position of advocates and proctors, who, though not to be classed among incompetent witnesses, are not allowed to give evidence of any communication which may have been made to them, in their professional capacity, by their clients: And such is also the rule of the R. Dutch law. Voet, Lib. 22, tit. 5, par. 6. This is the privilege, not of the counsel, but of the client; and never ceases, except by the client himself waiving it: It extends to all communications, whether in the progress of a suit or otherwise, made to the advocate or proctor *in his professional character*; but otherwise, that is, if the witness have not been employed, as advocate or proctor, in the particular business forming the subject of inquiry, any communications, even though made confidentially, are not privileged, because they were not made to him as the retained counsel of the party, in which character alone the obligation to secrecy exists. And see No. 1652, Negombo, 6 Jan. 1836. So, he may be examined, like any other witness, as to a fact which he knew before he was retained; or which has come to his knowledge, without his being entrusted with it as legal adviser; or where he has made himself a party to the transaction. A person, acting as interpreter between the proctor and client, is, under similar obligations of secrecy as the proctor himself. The foregoing rules, it will be observed, have reference to the professional adviser being called as a witness *against* his client: As a general rule, the advocate or proctor is admissible *for* his client: No. 14,136, Caltura, 11 June 1834. In such case, he may be cross-examined on those points to which he has given evidence; but on all other points, in which the confidence of his client is involved, his mouth is closed. There are some other kinds of confidential communications, besides those made to legal ad-

visers, which courts will not allow to be revealed. The following are given as instances, and as having been decided to be privileged: Official communications between the governor and law officer of a colony; orders given by the governor to a military officer; correspondence between government and its agent; and the report of a military court of inquiry.

But though the professional adviser of a party cannot be asked to disclose the confidential communications of his client, the party himself may, in Ceylon, be made to serve as a witness against himself, by means of the mutual examination, directed by the 29th and 31st rules. This is a deviation from English practice, which does not allow any party to be compelled to give evidence against himself, any more than it will permit him to testify in his own favour. But the innovation, which was introduced by direction of the Secretary of State, in consonance with the recommendation of Mr. Cameron, is certainly calculated to shorten litigation, and elicit the truth; nor, on the other hand, does it appear to have been attended with any inconvenience, of which parties can justly complain. (*Vide infra*, title "Examination of Parties.") And here it may be asked why, if a party can be examined against himself, the mouth of his legal adviser should not also be unsealed? Instances have indeed occurred, it is believed, in which it has been proposed to substitute the proctor for the client, to be examined. But, in the first place, the object being to obtain the fullest admissions on the subjects of inquiry, the best course must be to apply at once to the fountain-head for information, which would be more satisfactory when drawn from that source, than when obtained at second-hand through the proctor: On the principle, therefore, of obtaining the best evidence, the party is the proper person to be examined. Nor could it be expected that the proctor would be so intimately acquainted with the facts, however unreserved the communication to him may have been, as the party himself; and the partial disclosures or admissions, which the proctor might be compelled to make, unexplained and unqualified by circumstances, which could only be in the knowledge of the party himself, might operate with great injustice against the cause of the client. Another objection

would be the difficulty of enforcing the 29th rule, as regards punishment for false statements. The proctor could not be made responsible for the deceit practised on him by his client; nor could such deceit be brought home to the party, without making the proctor a witness against his own client, who after all might allege that he had been misunderstood by his proctor. (Vide *infra*, title False Claim, p. 185.) But a still worse consequence to be apprehended, would be the probable destruction of that full and unreserved confidence, which ought always to exist between client and proctor. For though the client, if acquainted with the rules of practice, would know that he was himself liable to be examined as to the facts within his own knowledge; yet he might be unwilling to confide the state of his affairs to another, if that other could be compelled to reveal all that had been entrusted to him. The 8th rule, it will be observed, is cautiously worded in this respect, even as regards examination by the court; for the court is only authorized to examine the proctors of the respective parties, touching any material facts, which are not stated with sufficient clearness in the pleadings, *as far as such proctors may consider themselves at liberty to answer the questions.* 184

A party cannot be examined in his own favour, or in favour of his co-plaintiffs or co-defendants, in civil suits. In criminal prosecutions, the party injured is a competent witness; and even in cases of forgery, which formed an exception to this rule in former English practice, the party whose name is forged has always been admitted as a witness in Ceylon. The reason of this distinction between civil and criminal proceedings is that, in the latter, the injured person, as above observed in p. 136, is not considered a *party* to the prosecution, which is always instituted at the suit of the crown. So, an informer on a penal regulation or ordinance, L. B. 21, 26 July 1834;—subject to all the doubt as regards credit, which naturally attaches to a person suing in that character.

The 26th rule directs that all witnesses shall be sworn, according to the form prescribed by the rites of the religion, which they respectively profess; and that no other or extraordinary kind of oath shall be permitted. This latter prohibition, which

indeed only repeats a provision in an old regn., No. 5 of 1819, was introduced from a conviction that the practice of admitting, on particular occasions, oaths, or rather imprecations, differing from the usual appeal to the Deity, such as that sometimes resorted to by the Cingalese, of swearing on the heads of their children, would only bring into disrepute and contempt the obligation of the ordinary oath, without producing any greater degree of veracity in what is deposed under the sanction of extraordinary ones. A Judge of one of the Northern districts suggested to the S. C. the expediency of sending the Malabar witnesses to a temple, to be sworn; in the hope that the more imposing nature of the ceremony, being one to which the Malabars sometimes have recourse among themselves, might be more efficacious in obtaining the truth. After a full consideration of the question, however, by all three Judges, they directed the D. Judge to be informed, That they should not feel justified in sanctioning the course proposed;—that though they were fully aware of the difficulty of arriving at the truth, and though they agreed that this object might sometimes be attained by the method proposed, still it would often fail, as had been shown by former experience;—that a striking instance of such failure occurred about the year 1816, when the witnesses in some criminal case of importance having been sworn in the temple of Canda Swamy near Jaffna, as being reputed a temple of peculiar sanctity, the whole of the witnesses on one side or the other were afterwards found to have perjured themselves; and that the practice was afterwards discontinued by the S. C., from conviction of its inefficacy:—But that a still stronger objection than the mere doubtfulness of the remedy presented itself to the Judges, in the comparative discredit, which a partial adoption of it would throw on all evidence, given under the sanction of the ordinary oath;—that a witness sworn in the usual manner would naturally infer that the obligation upon himself was not so binding, as on those who were sworn in the more solemn form;—that if introduced at all, therefore, it must be made the constant and universal rule, and not in one district only, but in all;—that the consequence of this would be, that each class in each district must have its own peculiar form of words and

place of swearing, the latter part of which system would be scarcely practicable in itself, to say nothing of the danger of witnesses evading the oath altogether, through the connivance of the priests, if it were not administered under the eye of the court;—and that the best remedies against the evils complained of would be found in strict interrogation, acute observation of the tone and demeanour of each witness, a careful comparison of facts and probabilities, and the examination of the parties themselves, both by each other and by the court. L. B. 22 Sept. 2 Oct. 1835.

As regards the ceremony to be used in administering the oath, this must depend, as directed by the rule, on the religion professed by the witness, and also, in some degree, it is to be feared, as long as the distinctions of cast exist, by the rank and station of the witness, if a native and not a Christian. A question arose in 1834, whether a witness of the Rhodian cast, who was examined in the court of one of the southern districts, ought to prostrate himself on the occasion of taking the oath, which was represented to be the ceremony prescribed by custom for persons of that class. The King's Advocate, to whom the matter was referred, and who was naturally startled at a mode of taking an oath, so revolting to English customs and feelings, and so unusual even in Ceylon, consulted the then Chief Justice on the subject, who returned an answer to the following effect, which is given here, not as any judicial authority, but merely as his individual opinion, entitled only to weight, as it may be founded on just reasoning: "Such distinctions unquestionably do exist, and are observed, almost necessarily I believe, in the courts. In the Northern districts, the lower casts of Malabars, instead of swallowing the Ganges water, take off one of their cloths and step over it, as the mode of imprecation. I never heard of this ceremony of prostration, nor indeed do I ever remember a witness of the Rhodian cast being examined before me. The most material question is, what mode of taking the oath does the witness consider most binding upon him? But that is not the *only* question. Care must be taken not to degrade the usual ceremony in the opinion of the mass of the people, by performing it to those whom custom, and perhaps their religion,

may have declared incapable of taking part in it. The obligation might be destroyed, as regards the generality, without raising the persons to whom it is extended a single degree from their state of degradation. Nay, it may be doubted whether the poor witness himself would comprehend the reason of the substitution, or would even consider the more elevated ceremony equally binding upon him, as that to which he and his kindred had been accustomed. The better course, when such questions arise, would be to make inquiry, not from the priest, who probably is more bigoted on the subject than any one else, but from those whose rank and character would entitle them to credit, and who could incur no part of the fancied degradation: I mean native Christians, to whom the mode of administering the oath to the lower orders would be a matter of indifference, but whose experience would still enable them to give a sound opinion as to custom." L. B. 31 March 1834. The expression of the foregoing opinions will not, it is hoped, be ascribed to any partiality, on the part of the writer, to the distinctions of cast. No one would feel greater satisfaction than himself at their total abolition, *provided* such abolition were the result of fair and calm reasoning, on the awakened good sense and feeling of the population;—an operation which has already made some progress, as regards the subject of assessors and jurors of different casts sitting together. Vide supra, p. 40.

The manner in which witnesses shall be examined, cross-examined, and re-examined, is laid down with some minuteness by the 27th rule. The main distinction between examination by the party calling a witness, which is usually called examination *in chief*, and cross-examination by the opposite party, consists in the power of putting what are called leading questions;—a power which is given to the latter, but denied to the former. Leading questions are those which are shaped in such terms as to show the witness the answer desired from him; and are therefore not allowed to be so put by the party calling him, because the witness is supposed to have already a bias in favour of that party. Where, however, it appears to the court that the witness's inclination is the other way, and that he is unfavourable to the party calling him, their relative situation being

changed, a certain latitude is allowed in examining him, as if he were on his cross-examination. (Vide *infra*, p. 150, as to the danger of indiscreet cross-examination.) Where an objection is taken to a question, whether on the examination in chief, or on cross-examination, the D. C. ought not to stop the case, but should proceed as directed by the 27th rule, leaving it to the objecting party to appeal, if he think proper, after the decision of the case. No. 703, *Cultura*, 9 May 1835, *suprà*, p. 18. A witness ought not to be asked questions of law, or questions which can only be answered by solving legal points; it is for witnesses to state facts, and it is the duty of the court to draw its own inference of law from those facts. L. B. 24 April 1834. A witness may, however, be asked his opinion on any matter, with which his habits or pursuits have made him conversant;—as for instance, a workman, as to the goodness of work performed;—a merchant, as to the genuineness and value of articles sold, and the like. The ignorance of native parties, or the inexperience of those who conduct their cases, will sometimes require assistance from the greater degree of knowledge which must be presumed to reside in the D. C., which should put questions in such cases to the witnesses, tending to elucidate the evidence, and to render it more complete. No. 396, *Ruanwelle*, 15 July 1835. When it is proposed to examine a witness, in order to show that he is incompetent, such examination should take place when he is first called, as directed by the 25th rule; but a question merely affecting his credit, as whether he be on good or bad terms with either of the parties, is properly reserved for cross-examination, because such question does not affect his competency, or, consequently, his admissibility. No. 2587, *Ruanwelle*, 20 Jan. 1836. There are certain questions, however, which a witness cannot be compelled to answer; viz., where his answer would expose him to penalty or punishment, or would render him liable to a criminal charge; though the facts may of course be proved by other witnesses. Whether he may refuse to answer a question degrading to his character, is still an unsettled question; the better course seems to be to allow such questions to be put, and let the witness answer if he choose so to do, but not oblige him to answer, if he object to it.

Till about thirty years ago, it was doubted whether a witness could be compelled to answer, when, by so doing, he might subject himself to a *civil* action, or charge himself with a debt. By a statute passed in 1806, however, 46 Geo. III. ch. 37, it was declared that a witness could not legally refuse to answer on those grounds: And it may be observed that this latter ground of objection would be inconsistent with our practice of mutual examination of parties, the very object of which is to make a party bear witness against himself, whenever truth and good faith require that he should do so (1).

As regards the receiving and taking down the evidence, it may be stated as a general rule, that the testimony of every witness must be taken from his own lips, except in the cases about to be mentioned; and that it is not sufficient to read over the evidence he may have given in another suit, even though to the same point, and between the same parties. For otherwise, the opposite party would have no opportunity of cross-examining the witness, which he has a right to do on a second trial, though he may have already done so on the first; nor could the

(1) These very general rules and definitions will go but a short way, towards instructing the young practitioner how to conduct, or a newly appointed D. Judge how to control, the examination of witnesses. Nor would the learned discussions, into which Mr. Phillips and other writers on this important subject have entered, nor even the lucid exemplifications, with which they illustrate their positions, enable their readers to attain any very great degree of proficiency, unless the study were accompanied by practical observation: In like manner as grammatical learning, and the perusal of authors in a foreign language, are found insufficient to enable the student to speak the language, till after he has been for some time in the habit of hearing it spoken. For this reason, it is earnestly recommended to all those who are concerned in the administration of justice in Ceylon, and who do not feel themselves beyond the necessity of any further improvement, to attend regularly and sedulously every session of the Supreme Court, which may be within their reach, and compatible with their other avocations. More knowledge of practical utility would be gathered, by thus periodically watching the regular and disciplined proceeding of the high tribunal, which is to set the example to all the other courts of the Island, than would be gained by years of mere disputation on points, the generality of which (judging from those which have been brought to the notice of the S. C., by reference or appeal) have long been considered settled, and would never be even questioned by persons of legal habits and experience.

court form so correct an opinion of the degree of credit due to such testimony: L. B. 14, 21 Nov. 1834. In case of the death of the witness in such case, however, his deposition may be received, as we have seen supra, p. 116. Former depositions may also be received by consent of all parties, in civil cases; or may be read, in any case, for the purpose of contradicting the testimony given by the same witness on the subsequent occasion. L. B. 19 May, 1835, No. 2775, Hambantotte. So, where the claim or defence of a party to a suit is inconsistent with the deposition made by that party on a former occasion, when called as a witness, such deposition may be read in evidence against him. No. 341, Kornegalle; 20 Dec. 1834. See further on this subject the exceptions mentioned to the fourth general rule, supra, p. 116, 7. The mode, in which the evidence should be taken down, is given at some length by a circular letter to the D. Judges of 29 Nov. 1834. And as this is a subject of importance, it may be useful to insert here the two paragraphs which relate to it:

“The S. C. is desirous of drawing the attention of the D. Judges to the necessity of taking down the evidence of every witness at length, in the very terms used by the witness, instead of giving the general result of his testimony, “as corroborating the evidence of preceding witnesses,” which is frequently the practice. This course would be less open to objection, if the notes of the D. Judge were solely for his own use, and to assist his own memory. But when a case is brought up in appeal, the S. C. can only arrive at a safe conclusion upon the evidence, by judging of the very words used by each witness. Whether the statement of one witness be corroborative of that of another, and in what degree, must be matter of opinion, unless indeed the evidence of both were to be word for word the same, which rarely happens; and the S. C. might entertain a different opinion upon this point, from the court below.”

“Another recommendation, connected with the mode of recording the evidence of witnesses, which the Judges would press strongly upon the notice of the D. C., is that every deposition be taken down in the first person; as, for instance, “I was at Colombo on the 1st instant,” instead of “witness was at

Colombo," or, "he was at Colombo." By using the third person, a confusion often arises, from the impossibility of ascertaining whether the words uttered, or the act done, were spoken or committed by the witness himself, or by some third person, of whom the witness is speaking. All distinction between the person deposing, and the person concerning whom the deposition is made, is thus lost, and this to no purpose whatever. The interpreter should never be allowed to give the translation of the evidence in this way; not only because the D. Judge might inadvertently adopt the same words, in reducing it to writing, but also because, by so doing, the interpreter does not give a perfectly faithful version of what is said. He ought, in performing his office, to put himself in the place of the witness; that is, to give the very exact words used by the witness, which he does not do, if he transposes what is said in the first person, into the third." See also No. 424, Negombo (criminal), 15 Oct. 1834. and No. 163, Wademorachy (criminal), 9 Dec. 1835.

The 28th rule provides that if the D. C. shall consider any fact sufficiently proved by the evidence already adduced, it may dispense with further evidence to the same point. This rule is not to be carried beyond the express terms of it; and, above all, it must not be allowed to have a converse operation, that is, to induce the D. C. to refuse to hear all the witnesses of a party, because those first examined fail in establishing the points for which they were called. Where cases, whether civil or criminal, have been decided, without hearing all the witnesses of a party against whom the decision is given, the S. C. has usually referred such cases back for the rest of the witnesses to be heard; and this, however improbable it may appear that such other witnesses should be able to carry the case any further: For otherwise, the losing party might always say that he had not had a complete hearing, and that the unexamined witnesses would have set his case in a totally different light. No. 3897, Jaffna, 17 Oct. 1833: No. 430, Matura, 18 Sept. 1835: No. Kornegalle (criminal), 11 Nov. 1835: No. Trincomalee (criminal), 30 Dec. 1835. Nor will the personal appearance of the witnesses, however disadvantageous, justify the court in refusing to hear their testimony. L. B. 31 Oct. 1833. D. Judges

have sometimes been recommended not to be too hasty in dismissing actions, on the supposed authority of former decisions, without being quite certain that such decisions are strictly applicable to the cases before them; the safer course is to hear all the evidence the plaintiff may have to adduce, and then consider whether it be necessary to call on the defendant to enter upon his defence. L. B. 30 April, 8 May 1834. This recommendation is not to be considered at variance with that, conveyed by the 4th paragraph of the circular letter to D. Judges of 15 April 1835, which relates to the decision of cases on the pleadings, and by the examination of the parties; which course, when it can be adopted safely, obviates the necessity of summoning any witnesses at all. Where the plaintiff fails in establishing his case, it is unnecessary to hear the defendant's witnesses, unless sometimes, for the greater satisfaction of the court. But when the plaintiff's case is proved, however clearly and even unanswerably as it may appear to the court, the defendant is always entitled in his turn to have his witnesses examined; except indeed where his answer is such as, if proved, would afford no defence to the action. No. 1160, Caltura, 29 July 1835. Vide infra, p. 152, 3. And where a D. Judge decided a suit, on his own personal inspection of the tree which formed the subject of dispute, and which was alleged to stand on government ground, the S. C. intimated that such inspection was not sufficient to warrant the decree, without hearing the witnesses. Petition Book of 1833, p. 56. So, a fortiori, in actions for penalties or forfeitures, which partake so much of the nature of criminal prosecutions, the defendant's witnesses should invariably be heard, even though the evidence proposed may not furnish an entire answer to the action; for it may very often show strong grounds for recommending a remission of the fine, or at least for not giving costs against him. No. 2547, Chilaw and Pullam, 3 Feb. 1836.

The question was proposed to the S. C. by a D. Judge, whether it was incumbent upon him to take the evidence for the defence, in cases likely to be submitted for trial before the S. C.; and it was suggested, as an evil requiring remedy, that much delay was occasioned by protracted cross-examination of the witnesses for

the prosecution. The S. C. directed an answer to be returned, That when a person was accused of any offence, though of a nature which might require a trial before the S. C., he had always a right to go into his defence, if he thought it advisable so to do, because he might possibly succeed in showing that there was no ground for sending him to trial at all, and thus avoid being committed to prison, or the inconvenience of finding bail, and ultimately the disgrace of being put upon his trial:—That the delay occasioned to other business by protracted cross-examination was, no doubt; to be lamented, but it was an inconvenience not very capable of direct and definite remedy;—that if there were ground for supposing the charge to be false, the right of cross-examination, furnishing as it did, when discreetly applied, so excellent a test of truth, was too valuable a privilege to be denied to the accused;—and that with respect to well-founded accusations, the evil, it must be supposed, would cure itself, since the party or proctor pursuing the cross-examination of a witness who really spoke the truth, would usually find every answer tending to conviction. L. B. 17, 21 Sept. 1835. Indeed it often happens that circumstances, which the prosecutor would not have been permitted to inquire into on the examination in chief, are brought forth by injudicious cross-examination; and, in that case, tell with double force against the accused, because given in answer to questions put by himself, or on his behalf. The S. C. has decided that defendants, under the Colombo police order. No. 3 of 1834, must have an opportunity of showing that the buildings, etc., complained of, are not encroachments. No. 592, Colombo (criminal), 3 Nov. 1834, *infra*, title Police.

As to what evidence shall be considered necessary or sufficient to establish a sale of land,—or a marriage under regn. No. 9 of 1822,—or to support a prosecution for perjury or forgery, or theft, see the respective titles, Land, Husband and Wife, Prosecution, etc. And as to what proof is necessary of the authority of a person to certify a fact, such as the enrolment of an annuity, see the judgment in the case of Gibson v. Rodney, 12 Nov. 1830, *infra* title Nantissement. How far reports and surveys of land may be received in evidence, *vide supra*, title Arbi-

(ration, p. 35.) And how far the report of the superintendent of police may be so received, *infra* title Police, L. B., 17 Aug. 1835. As to the admissibility of instruments, with reference to the stamp regns., *infra* title Stamp, and *supra* p. 83. On a prosecution for assault, insults offered to the defendant's wife admitted in extenuation; *infra* title Prosecution.

See also title Witnesses.

## EXAMINATION OF PARTIES.

In civil cases, advantages of, page 151.—Cases in which recommended; as, to fix amount of claim; or facts intended to be relied on; or delivery of goods; declaration of party, in some cases, equivalent to former oath, 152, et sequ.—Wife, suing her husband, not exempted 151.—Nor Moorish women 151.—But only actual parties examined 155.—Soldiers, sued for debts under 30*l.*, cannot be compelled 155.—Examinations to be taken down by D. J. only, and why 156.—Not on oath; punishment for false answers, 157.—In criminal cases; Confessions; S. C. refused to direct D. Judges to question prisoners, 157, 8.

THE system of subjecting parties in civil suits to examination, whether by the court, as directed by the 8th rule of sect. 1, or by each other, according to rules 29, 30, and 31, has already been incidentally touched upon under the head of Evidence, and some others of the preceding titles. P. 140, 146. This mode of inquiry may be considered as an improvement on the practice of the civil law in this respect, as being on a plan at once more simple and more enlarged; and with this important advantage, that by the abolition of the oath, the fearful temptation to perjury which the civil law held out to parties, by calling upon them to swear in support of their own interests, is withdrawn:—A temptation, much greater than any human being ought to be subjected to, even in countries where religious obligations are better understood and observed than in Ceylon. The only difficulty which the Judges felt, in bringing this change into operation, arose with respect to the decisory oath, which, according to the civil law, any party to a suit might require to be put to the adverse party. They entertained some doubts, whether an

order of court, though made under the authority and sanction of H. M. Charter, would be of sufficient force to contravene the law of the land. And it was on this account, as well as on that of one or two other innovations, which seemed to be matter of law rather than of mere practice, that they recommended, as a measure of precaution, the passing the ordinance No. 1 of 1833. As the good effects of this mode of examination were soon apparent, by its shortening litigation in the only way by which that object can safely be attained, viz., by presenting a more direct and speedy, and, at the same time, a more certain road for arriving at the truth, the S. C. has lost no opportunity of recommending the practice to the adoption of the D. Courts.

An action was brought for board and lodging, but the plaintiff was unable to prove for how long, or on what terms. The defendant did not deny having boarded with the plaintiff, but disputed the amount of the demand. The D. Judge, differing from his assessors as to the decision which ought to be given, referred the case, in his anxiety to do justice, to the S. C., and was informed in answer, that this was peculiarly a case for the examination of the parties;—that if the defendant, who did not deny having boarded with the plaintiff, should refuse to make any admission as to time and conditions, there would necessarily arise a strong inference that the demand was just;—that this was a case in which it was scarcely possible for the plaintiff to establish his claim with all the precision of legal evidence, which might be expected in mercantile dealings of a higher nature;—and that one of the objects of introducing the rule for the examination of parties, was to supply these unavoidable defects in more formal evidence. L. B. 6, 11 Dec. 1833.

So, in an action for land, where one party produced a grant from government, which the other party admitted to be genuine, but denied that it was conclusive against him, the D. Judge inquired of the S. C., whether the claim under the grant must necessarily supersede all others, and whether therefore he was to consider the case as decided, without the necessity of hearing evidence, as suggested by the 4th par. of the circular letter to D. Judges of 15 April 1835. The S. C., after informing the D. Judge that the grant was not necessarily conclusive (*vide infra*,

title Land), observed, that the proper course would be to examine the party who admitted the grant to be genuine, as to the grounds on which he intended to contest its efficacy, after which it would be easy to decide whether the facts alleged, supposing them to be proved, would be sufficient to set aside the government grant, as affecting the land in dispute;—that this was the test, by which very many actions might be disposed of, without incurring the expense of going into evidence; because, if the facts stated, whether by the plaintiff or defendant, were such, as, if proved, would not support the action or defence, it was plain that to allow such party to go into proof of those facts would be a mere waste of time. L. B. 20, 23 Nov. 1835.

In an action for goods sold and delivered, in which the plaintiff applied to the D. C. for Nantissement, or provisional payment, one of the grounds on which the application was resisted was, that as the R. Dutch law required that the sales-book of the plaintiff, on which document the application was founded, should be supported by the oath of the merchant, the plaintiff; and as, by the new system of procedure, no oath could be administered to a party in a suit, therefore the ground of the application remained incomplete, and the right to Nantissement could not be enforced. But the S. C. overruled this objection, observing, That though the oath was abolished, the rules of practice had substituted the examination of the party, under penalty if he should practise deception, and that, in the opinion of the court, the declaration thus substituted would be fully equivalent to the oath for the present purpose;—that though, as a mode of final decision by reference to the oath of the opposite party, the mere declaration could not be received as the decisory oath was before its abolition (unless indeed the adverse party consented to leave the point at issue to the declaration in open court of his opponent), still, on a question like the present, where the object was merely to satisfy the mind of the court, whether the goods were delivered or not, it was difficult to imagine a case in which the examination, not merely of the plaintiff, but of the defendant, and not merely by the court, but by each other, would be more likely to promote the discovery of the truth;—and that the right of Nantissement

seemed to go hand in hand with the main objects which the new system of judicature proposed to itself; namely, speedy decision, and the extracting as much as possible of the facts from the lips of the parties themselves. *Clark v. Mahamado Lebbe*, Colombo, Nov. 1835. *Infra*, title *Nantissement*.

In a suit by a wife against her husband for a separate maintenance, on the ground of ill-treatment and abandonment, the defendant denied ill usage on his part, alleging that his wife had deserted him under the influence of her relations, and offering to receive her home again: And he applied for an order on her to appear personally in court at the trial for the purpose of being questioned by him under the 29th rule. This application being opposed on the part of the wife, the D. C. rejected it, on the ground that there appeared no necessity for putting her to this inconvenience. The S. C., however, set aside this decision, and ordered that the plaintiff be directed to appear in the D. C. on the day of hearing; observing, That this was a case very fit for the examination of the plaintiff, as to the ground of her complaint against her husband, more especially as the defendant alleged that she had been taken away from his house by her relations;—that as he professed himself willing to receive her back again, it might very possibly be in the power of the D. C. to reconcile the parties, and induce the plaintiff, when free from the influence of perhaps bad advisers, to return to her husband; and that she would be under the protection of the D. Judge, who would no doubt take care that no offensive or improper questions were put to her. No. 955, *Caltura*, 2 May 1835.

We had occasion, *supra*, 127, 8, to observe on the reluctance evinced by Moorish women to be seen publicly in a court of justice, and the impossibility of yielding to their scruples, as regards their appearance as witnesses. The S. C. has, in like manner, refused to interfere, to prevent Moor women, when engaged as parties to a suit, from being summoned to the court, for the purpose of *vivà voce* examination, *Petn. Bk. of 1835*, page 1; leaving it to the discretion of the D. C., whether such attendance were necessary for the purposes of justice. *L. B. 28*, 30 April 1834; *Petn. Bk. of 1834*, p. 151.

But however liberally the courts may be inclined to decide in favour of this right of examination, no persons can be made subject to the rule, who are not actual parties to the suit. Thus, in an action to recover a debt due by the defendant to a third person, and assigned by that person to the plaintiff, application was made by the defendant to be allowed to examine as a party the assignor of the debt, as to alleged payments made to him by his debtor, the defendant, before the assignment of the debt to the plaintiff. The D. Judge, being doubtful as to the propriety of granting this application, submitted the point to the S. C. The Judges directed an answer to be returned, That it might be sufficient to say that, as the 29th rule only related to actual parties to the suit, and directed moreover that such parties should be liable to *mutual* examination, the person in question, being no party to the suit, could not be examined under that rule;—but further, that there was nothing to prevent the assignor being called and sworn as a witness, not indeed by the plaintiff, if by the terms of the assignment the assignor had an interest in supporting the debt due to him by the defendant, and assigned by him to the plaintiff, but by the defendant, if he thought proper to do so, to prove the alleged payments, for which purpose the assignor would be a competent witness, inasmuch as such payments would be facts adverse to his interest (supra, page 137);—that to allow a person so situated to be considered as a party to a suit, in order to be examined in that capacity, would be to put an overstrained construction on the rule, and would render all persons, who had transferred their rights to others, sellers of land for instance, liable to be thus rendered constructively parties, in order to admit of this partial examination, by which the party examining would take his chance of any disclosure favourable to himself, while the opposite party would be precluded from explaining such disclosure by cross-examination. L. B. 5, 6 Oct. 1835. No. 4099, Colombo, 30 Dec. 1835.

As regards soldiers, we have seen, supra, p. 97, that as by the terms of the Mutiny Act, they cannot be arrested, or compelled to appear, for a debt under 30*l.*; a plaintiff in such case loses the privilege of examining the defendant, if the latter do

not appear voluntarily. This, as was remarked, is an exception to the rule, arising unavoidably out of the statute, which, pro tanto, supersedes the rules of practice.

The examination of parties should be taken down by the D. Judge himself, and by no other hand, unless in case of absolute necessity, such as the Judge being disabled from writing. A D. Judge having submitted his view of this subject, as one among several plans for lightening the business of his court, the Judges directed the following answer to be returned:—"With respect to your suggestion, that the *viva voce* statements of parties may be taken down by the secretary, without the intervention or superintendence of the D. Judge, the Judges of the S. C. feel compelled to express their dissent. They consider that it would, in reality, make the secretary the judge of the court, in a most material part of the proceeding. One of the prominent objects of the new system of judicature is, to constitute the D. Judge a summary and equitable arbitrator between the parties, in all cases, at as early a stage of them as possible; in order that, when practicable, a decision, satisfactory to both parties, may be pronounced at once, upon their mutual statements and admissions: Or, when that is impracticable, that the D. Judge may at least sift out as much of the truth as possible, and at the same time confine the parties to such statements as are really material. These are functions, requiring more experience and discrimination than can be expected, in the opinion of the Judges, to be found in the secretaries of many of the D. Courts. But even supposing the secretaries to be fully competent to the performance of them, they are duties, which it never was intended should be imposed upon them. The most scrupulous jealousy is observable, throughout the Charter, of any exercise of judicial authority, except by the D. C. itself, including assessors as well as judges. As regards the advantage also to the D. Judge, there can be no doubt that he will have much greater facility in directing the ulterior proceedings, and in coming to a correct decision of the case, by having himself heard, in the first instance, the allegations of the parties, explained and elucidated by his own questions. Much, therefore, as the Judges lament their inability to relieve you from the pressure of busi-

ness of which you complain, they feel compelled to urge to you the necessity of still taking this branch of duty upon yourself, as directed by the circular letter of 16 ulto." L. B. 1, 18 July 1834. See also the 10th rule of sect. 1.

It is expressly directed by the 8th, 29th and 30th rules, that the examination of parties shall, in no case, nor in any stage of a suit, be upon oath: Where, therefore, an appellant prayed that the respondent might be sworn at a temple, touching the matters in dispute, it is scarcely necessary to say that the S. C. declared the impossibility of such a course being now permitted. No. 25/5671, Matura, 15 March 1834. We have already seen, however (suprà, p. 153), that, for certain purposes, the declaration of a party in the course of examination is equivalent to his oath under the former practice; as in support of his claim for nantissement. The 29th rule provides for the moderate punishment of any party, who shall attempt to deceive or mislead the court by his answers. And where a D. C. awarded double costs against a plaintiff, who had endeavoured to impose on the court by his answers, the S. C. confirmed this decision, considering the double costs in the nature of a punishment for that attempt; though it expressed doubts whether the D. C. would have been justified in imposing double costs, merely because the action was unfounded, unless attempted to be supported by the false statements, made by the plaintiff in person in court. No. 823, Waligammo, 1st July 1835; suprà, p. 76, 7. See also title False Claim.

As regards the examination of parties accused of criminal offences, the 4th rule of Sect. 2 directs how the defence of persons so situated shall be taken down by the D. C.; and expressly prohibits the taking of any confession, unless freely and voluntarily given. See also suprà, p. 115. In the latter end of 1835, the K. A., in the zealous but temperate discharge of his duty, brought to the consideration of the S. C., the question whether D. Judges ought not to examine persons charged before them with criminal offences, by putting such questions as, without leading a prisoner to criminate himself, might tend to throw light upon the subject of inquiry, and to shorten and simplify the matters, to be ultimately proved by evidence. This appli-

cation was made, in consequence of one of the D. Judges having declined to interrogate parties so situated; on the ground that he did not consider himself at liberty, to do more than receive the statement, spontaneously made by the prisoner. This suggestion received from the three Judges the grave and matured consideration, to which it was entitled; the result of which was the following decision, unanimously and fully concurred in:—  
 “The court considers that this is a matter, which would better be left to the discretion of the D. Judges, than be made the subject of an express order. There can be no doubt that, according to the later decisions in England, the D. Judge, acting in his capacity of committing magistrate, has the power to put questions to the party accused, taking care that such questions be so put as not to ensnare the prisoner, or to draw from him any admission which he might not intend to make. But if an order were to be made by the S. G., directing positively that such interrogation should take place, it is to be feared that many of the D. Judges might misconstrue the direction, and imagine that it became their duty to question the prisoner, rather as public prosecutors, than as neutral and impartial Judges.” Criminal Minutes, 16 Dec. 1835.

## EXECUTION—CIVIL.

Against property, or person, or both; when to issue; practice now uniform through Ceylon, page 159—Writs of possession 159—Exn. for balance; forms adapted to circumstances, 160—By wife against husband's property, but not person, 160—In form *pauperis*, without stamp, 161—Of 2 decrees, first has preference, 161—Into other districts; 36th rule; writ transmitted from 1st court, indorsed by 2d; distinction between process and exn., 162—In general, all property may be seized; goods sold and delivered, though not paid for; land, notwithstanding clause against alienation, 163—Lists of property; no charge for 164—Claims to be proved; Reg. 13 of 1827, 164—Holder of land or of bill of sale, *prima facie* owner; but non-production of titles, no ground to stop sale, 165—Fiscal may stay sale, to inquire into security 166—But exn. may be staid by D. C. independently of regn. 166—Prosecution for perjury, not necessarily to stay exn. 166—Intervention; at any time before proceeds paid over, but not after; inaccuracy in rule 32 167—Payments, how made; receipts, when taken 168—How money; levied

in another D. transmitted to original court. 170—Setting aside sales in exn.; fiscal should have notice 171.

This is the legal term, to denote the writ which a court grants to a party, to satisfy any judgment which he may have recovered against the adverse party, whether by putting him in possession of land, or by realizing the sum of money awarded to him, or by any other mode which the terms of the judgment may render necessary. The following are the points relating to execution, which have been decided by the S. C.

By the 35th rule of sect. 1, if judgment be pronounced for a sum certain, execution may issue, either forthwith, or at any time afterwards, against the property, moveable or immoveable, or against the person, or against both, as the D. Judge shall consider the case may require. But if no exn. be taken out within twelve months after judgment, it must not issue without a previous rule on the opposite party, to show any cause he may have against its issuing. As the rules of practice are to govern all the courts in the island, whether in the Kandyan or Maritime districts, any rule or custom, which prevailed on this or any other point of mere practice, must be considered as superseded. And where a plaintiff, in one of the Kandyan D. C., who had already obtained exn. against the property, insisted, against the opinion of the D. Judge, on his right to exn. against the person also of the defendant, by virtue of the alleged practice of former Kandyan courts, the S. C., in answer to a petition (not a regular appeal) presented by the plaintiff, observed that by the 35th rule, the granting or withholding the twofold exn. was made discretionary, in the first instance, with the D. J., subject of course to appeal to the S. C., as to the exercise of that discretion. *Petition Book of 1835, p. 174, L. B. 21, 25 Nov. 1835.*

One of the D. Judges inquired whether the writs formerly in use, to put parties in possession of land or trees, for which they had obtained judgment, could still be issued under the new system; whether the fiscal should still be directed to report any opposition to such writs to the court; and also whether these writs should be on stamp. The S. C. returned for answer, That there was nothing in the new system of procedure to pre-

vent writs of possession being issued as heretofore;—that no special directions to the fiscal as to opposition were necessary, because it was the duty of that officer to report such opposition to the court, without any instructions;—and that as these writs were in truth “writs of exn. against property,” though usually called “writs of possession,” to distinguish them from the more ordinary writs of exn., they must be on stamps, like any other writs of exn. L. B. 9, 16 July 1834.

On another occasion, a D. Judge inquired whether exn. might issue for the balance of the sum decreed, part of that amount having been paid, and whether the forms Nos. 19, 20, and 21 might be altered accordingly. The S. C. observed, That it did not distinctly appear whether exn. had already issued and been partly enforced; or whether, the payment having been made voluntarily, in part satisfaction of the judgment, exn. was now for the first time asked for, to recover the balance; but that in either case, there would seem to be no objection to exn. issuing for the balance, without the necessity of a fresh suit; and that the forms in question, as well as all the other forms, were intended for ordinary cases, but must no doubt be altered when occasion required, to meet the circumstances of any particular case. L. B. 22, 25 Jan. 1836.

A question of some nicety arose in a northern court;—whether exn. could be granted against a husband, at the suit of his own wife. The parties were Malabar, and the action was brought by the wife, to recover the sum of 30*l.*, being the profits of certain property which had been settled on the wife by her parents, at her marriage. Having obtained judgment, she took out exn. against her husband’s property, and afterwards moved for exn. against his person, on which motion the doubt expressed by the D. Judge arose. The S. C. directed an answer to be returned, That as the law admits of absolute and distinct separation of interest and property between husband and wife, the law must also provide an adequate remedy for either party, whose rights may be infringed by the other;—that the present action would have been more regularly brought by the wife’s parents, or by her other relations, if the parents were dead, on behalf of the wife; or at least, that it would

have had a less anomalous appearance, if they had been joint plaintiffs, because, as the property in dispute had been bestowed upon the wife for her exclusive use and benefit, there seemed little doubt that her family had an interest in seeing that it was preserved entire;—that even as the case stood, however, *exn.* against the *property* of the husband, as defendant, might legally issue, when that proceeding was necessary to secure the wife's separate property;—but that as regarded *exn.* against the *person*, it seemed so inconsistent with the very essence of the marriage state, so directly opposed to the relative rights and duties of the parties, that the S. C. could not give its sanction to such a proceeding;—that as the law on the subject of marriage among the natives, especially in the northern provinces, depended so much upon custom, it would be desirable for D. Courts, on all questions depending on such law or custom, to take the opinion of those natives, whose knowledge, experience, and respectability, entitled them to the greatest weight, before referring the matter to the S. C. L. B. 21, 28 Oct. 1834. It should be mentioned that this was the view taken more particularly by the C. J. and second P. J. The senior P. J. expressed himself inclined to agree that “*exn.* against the person of the husband could hardly be allowed;” but did not feel certain on the subject, “inasmuch as husband and wife were permitted, on valuable consideration, to contract with each other.”

Where a party obtains judgment in formâ pauperis, *exn.* should be granted without stamp; because, till the *exn.* is productive, the pauper must be supposed to have no more means to pay the costs, than before judgment recovered. L. B. 19, 21 Nov. 1833.

When there have been two suits between the same parties, respecting the same object, and the decrees are conflicting with each other,—not an uncommon occurrence in Ceylon formerly, especially as regards suits for land,—that which is prior in point of date ought to have the preference as to being put in *exn.*: And if the parties cannot agree on the *exn.* of the two decrees at the same time, the first should be carried into effect in the first place, without reference to the second; and then the

second should be enforced, as far as the exn. of the first has left that practicable. L. B. 12, 17 Aug. 1835. This is given here as the general and most natural course of proceeding; but circumstances may, no doubt, present themselves, such as fraud in obtaining the first judgment, which would justify a departure from it.

By the 36th rule of sect. 1, if it appear by the return to the writ of exn., that the defendant is resident out of the district in which judgment was obtained, or that he has not sufficient property there to answer the judgment, the plaintiff may move that exn. issue into any other district, and the writ shall thereupon be transmitted to the Judge of such other district, who shall endorse and direct it to the fiscal of his district for exn.; and, when executed and returned, shall transmit it, with the sum levied, or the body of the defendant, to the court out of which it issued. The course prescribed by this rule must be adhered to, both as regards the transmission of the writ by the original D. C., and the endorsement of it by the second D. J., each of these precautions being considered necessary to guard against fraud. As regards the first branch of the rule, where a plaintiff, having obtained judgment in one D. C., took it to another D. C., and obtained exn. from thence, the S. C., on the point being submitted, declared that such proceeding was wholly irregular; and that it could not be supposed that the court which issued the exn. would have taken upon itself so to do, if its attention had been drawn to the fact, that the judgment had been pronounced in another court. L. B. 7, 16 April 1834. So, with respect to the second branch of the rule, the indorsement of the writ of exn. by the second D. J.: It will be seen by the circular letter addressed to the D. Judges and fiscals, 27 Feb. 1834, that a distinction was drawn by the S. C. between *process* into other districts, as provided for by rule 14, and *execution* into other districts, as contemplated by rule 36. As regards *process*, it was considered that, when the original and second district were both within the same fiscal's *province*, there was no necessity for returning the writ, when the defendant was not to be found in the first district, to the court out of which it issued, for transmission to, and indorsement by, the Judge of the district in

which the defendant may be found, because such second district was still within the scope of the fiscal's authority, that is, within his province: (See also L. B. 11 Feb. 1834, to the same effect.) But that, when *execution* was carried into a district, different from that in which it was obtained, it was better that it should go through the court of the district, in which it was to be put in force; because, as there might be other writs of *exn.* against the same person or property, such court ought not to be left in ignorance of a seizure about to be made, at the suit of a party residing in a foreign district. And see L. B. 19, 27 Feb. 1834, where the point arose, which gave occasion to this circular letter.

With respect to what property is liable to be taken in *exn.*, it is to be observed, that the distinctions of the English law, between personal and landed property, and between those things which are tangible, and those which exist only as a right in law (*choses in action*, as they are called in the semi-barbarous French of our law terms), are not recognized by the laws in force in any part of Ceylon. All property, moveable or immoveable, debts due to a defendant, even though not yet recovered from his debtors, or property which has been decreed to such defendant, are subject to be seized in *exn.* Vide *supra*, p. 90. The fiscal must be careful only to take property, which he has good reason to believe belongs to the person against whom *exn.* has issued. And it is proper and usual to take the personal property first, and not to seize the immoveable property, unless the personal be insufficient.

We have seen that when goods are sold, and the possession of them has been transferred to the purchaser, they become his property, and liable to be taken in *exn.* for his debts, even though the price may not have been paid. No. 1735, Kandy, 9 Dec. 1835. *Supra*, p. 91, where this case is mentioned more fully.

Land, the ownership of which was disputed, having been taken in *exn.*, the D. C., after hearing evidence, decided that it was the property of the defendant, but that it could not be sold without a special permission from government; on the ground that the original grant from govt. contained a clause,

restraining the alienation or assignment of the land, without such permission, until the whole should have been brought into cultivation, which, by a former clause, it was stipulated should be performed within three years from the date of the grant, in 1820. The land was taken in exn. in 1833. The S. C. set aside so much of the decree as required the permission of the govt. to dispose of the property in exn., on the ground, 1st, that as the condition of cultivation was to be performed within three years, it might be presumed to have been fulfilled ten years ago, and, in that case, there would be nothing to prevent the alienation by the defendant himself, without consent; but, 2dly, that, in truth, the seizure and sale in exn. constituted no alienation by the defendant, but were an assignment by operation of law; and that the purchaser of the land in exn. must take it, subject to the same conditions, and liable to the same forfeitures, as it was subject and liable to in the hands of the original grantee. No. 7999, Negombo, 16 Dec. 1833.

We have seen, *supra*, page 79, 80, that as the 25th clause of regulation No. 13 of 1827, requires the fiscal to make out lists of property seized, the party cannot make any charge against his opponent for such list. L. B. 2, 18 July 1834.

The mode, in which claims to property seized are to be brought forward and decided, is provided for by the 26th and two following clauses of this regn., No. 13 of 1827, by which fiscals are, by the 35th rule, directed to govern themselves, in enforcing writs of exn. The course pointed out by those clauses is, that "the court shall call on the several parties to establish their respective claims to such property;" which may generally be done, without putting the parties to the expense and delay of fresh actions, by making the claimants intervene in the suit. At all events, the claimants should be called upon to establish their right in the first instance: And where a D. C. "ordered the plaintiff to sue the claimants," the S. C. observed, that such course would defeat the object of the regn., and would furnish a mode by which writs of exn., already so much protracted and evaded, might be made absolutely nugatory; for if the plaintiff were to bring his separate action against each claimant, which he would be obliged to do, according to the view taken of the

subject by the D. C., and were to obtain judgment and exn. against each, a fresh set of claimants might be ready to intercept those exns, and to drive the plaintiff to a new set of actions;—a course which might amount to a total defeat of justice. L. B. 16, 26 Sept. 1835. No. 1404, Islands, 25 Nov. 1835.

In conformity with the 26th clause of the regn., which provides that, in cases of disputed property, the person in possession shall be considered by the court to be, *primâ facie*, the proprietor, till the contrary be shewn, it has been decided that the holder of the bill of sale shall be considered such *primâ facie* owner; and that where land is seized by virtue of an exn. against such holder, a claimant is bound to shew *his* title. No. 3470, Pantura, 6 Feb. 1834. On the other hand, the non-production of the title-deeds of the land seized is not, of itself, a ground for postponing the sale of it in exn. This was the opinion of the Judges, on a case in which the fiscal objected to sell the land, unless the title-deeds were produced, or unless the plaintiff gave security to indemnify the fiscal against any damage. The S.C. observed, That, in many instances, no written titles to land were in existence;—that, in some cases, where they did exist, the defendants themselves would probably secrete them, if by that method they could defeat the sale in exn., and in others, the deeds might be deposited with third parties, whom it might be difficult to compel to produce them, though, in all probability, they would come forward of their own accord, to put forth the claims, to secure which the deposit had been made;—that the 23d and five following clauses of the regn. appeared to give the fiscal all the security he could require, while the rules there laid down, as to who should be considered *primâ facie* owners, and regulating the mode in which notice of the intended sale should be published, and claims reported and inquired into, would make it difficult for the fiscal to go wrong, or for any persons, having real claims on the property seized, to remain ignorant of the intended sale;—but that, if any difficulties should arise, as from the boundaries of land being too undefined to permit of the proper notice being given, or in similar cases, the fiscal would then report the difficulty to the D. C., which would issue such orders as might become necessary. L. B. 9, 15 Oct. 1835.

With respect to the stay of sale under exn., which the fiscal is directed by the 27th clause of the regn. to make, if the property be claimed after seizure, unless such security of indemnity be given him as he shall deem sufficient, the question was proposed to the S. C., whether a fiscal would be justified in postponing the sale, for the purpose of giving him time to inquire into the validity of the security offered. The answer returned was, That the words of the regn. “such security as the fiscal shall deem sufficient,” necessarily implied that he should have reasonable time to satisfy himself on this point, and that there was the less ground of objection to such construction, at least on the part of the *claimant*, because such delay would operate in favour of his demand that the sale should be stayed;—and that, on the other hand, the *plaintiff* could not complain of the delay, since, if time were not taken to make the necessary inquiry, the fiscal would be obliged to refuse the security tendered. L. B. 21, 28 Feb. 1834.

But it is to be observed, that stay of exn. is not confined to the particular class of cases, contemplated by the 27th clause of the regn. Reference was made to the S. C. by a D. Judge, whether an application for a stay of exn. could be entertained at all by the court; whether it must not be made to the fiscal, at the time of the sale, according to the 27th clause, and in no other manner. The S. C. returned for answer, That it did not follow, because the fiscal was directed by the Regn. to observe a certain course of proceeding on all claims made to the property seized by him, that the court should in no case attend to an application for a stay of exn.; that, in truth, the proceedings were quite distinct, the 27th clause contemplating a *claim of right*, made by a third person to the property seized, whereas a stay of exn. might be moved for, without any reference at all to the property seized, or to be seized;—that it might be on the ground of the judgment having been obtained by fraud, or for many other reasons, each of which must be decided, as regarded the success of the application, on its own merits. L. B. 29, 30 Oct. 1833. It has been holden by the S. C., that the prosecution by the losing party of a witness for perjury, was <sup>1</sup> necessarily a ground for staying exn. Peti-

tion Book of 1835, p. 98. See *Warwick v. Bruce*, 4 M. and S., 140, which furnishes a direct authority for this decision.

According to the practice of the civil law, as it has always been administered in the Maritime Provinces, any party has a right to intervene in a suit, and to put in his claim to a share of the property taken in exn., at any time before the proceeds thereof are actually paid over to the person, at whose suit the exn. is issued. And see further, p. 169. And there seems to be no reason, as the S. C. expressed itself on one occasion, for not observing the same practice in the Kandyan Districts. L. B. 11, 16 Dec. 1833. The question in that case arose on a claim made by govt. to property seized in exn., on which occasion the S. C. observed that though government, generally speaking, was considered to have a right of priority over all other creditors, whereas private persons could only come in concurrence with the party who had obtained exn., and with any other creditors, for a proportionate share of the property seized, still the claim made by government must be established in due course of law, before it could be allowed; and that the plaintiff, in the original action, ought to have notice of the day fixed for hearing the government claim, to give him an opportunity of resisting any fraudulent admissions, which the defendant might be tempted to make in favour of government, for the purpose of exempting his property, situated elsewhere, from such claim. The writer of these notes must not quit this subject, without pointing out an inaccuracy which is to be found in the 32nd rule of sect. 1, and of which he is anxious that the blame should rest, as it ought, entirely with himself. That rule declares that a third party may intervene, in any stage of a suit, *before execution*. But this, as we have just seen, is too limited a scope for the right of intervention, according to the law as it has hitherto been administered. Whether it might not be beneficial so to limit this right, instead of permitting the exercise of it at any time before the proceeds of exn. are actually paid over, is a question which may perhaps admit of discussion. But in framing the rule in question, there was no intention of deviating from the existing practice in this respect; and the framer of them can only therefore

frankly admit that the deviation proceeded from inadvertence, and leave it to be remedied by his learned successors, as they shall think proper. Indeed, he must consider himself fortunate, if no mistakes of a more important nature have been discovered in his Rules of Practice, constructed, as they were, in the very short space of time which circumstances allowed him.

But where the property has been sold, and the proceeds actually paid over to the party suing out execution, it may be considered as a general rule, that a claimant cannot call on such party to refund. And the S. C. so decided in one case, even though the claim had been made before the money was actually paid over: The fiscal sold the land 1 Nov. 1831;—on 8 Feb. 1832, a person claimed the proceeds of the sale by right of mortgage;—on 9 April following, however, the creditor was paid his debt out of the proceeds; and the mortgagee brought the present action against the creditor for the amount of the mortgage, which he contended was a preferable claim. The D. C. dismissed the action, and the C. J., on circuit, affirmed the decree of dismissal, considering that it was now too late to call on the creditor to refund; that the fault, if any, rested with the fiscal, for not having reported the claim of the mortgagee to the court; and that the mortgagee must therefore pursue his remedy (if entitled to any) against that officer. No. 6063, Matura, 19 March 1835.

The mode in which payments are to be made to the fiscal, or rather into the Cutchery, whether by the debtor or by purchasers of property sold in exn., is pointed out by the 32nd and following clauses of the Regn. A question of some importance was submitted to the S. C. by a D. Judge. The fiscal had returned a writ of exn. in one case, together with receipts from all the parties interested, in token of their claims having been satisfied; and in another case, in which the plaintiff had become the purchaser of the land, with the purchaser's receipt for the amount of the sale, as so much received on account of his claim. The question was, whether these receipts could be received by the D. C. in lieu of actual payment. The fiscal considered that the practice, if permitted, would facilitate the execution of writs, and might enable plaintiffs to defeat the

machinations of their debtors, to prevent the lands being sold. The S. C., after making inquiry respecting the practice in Colombo, directed the following answer to be returned: "It has not been the practice in the court of Colombo, either before or since the establishment of the new judicial system, to admit receipts of plaintiffs, in satisfaction of the writ, except in particular cases. The matter, however, does not rest on the mere practice of this district. The point has before been under consideration; and though there would certainly be advantages attending the admission of receipts, as pointed out by the fiscal, there is one serious obstacle to that course, as a general rule, and without the special permission of the D. C. By the civil law, the right to property seized in exn. is not completely vested in the creditor, till the proceeds of it are actually paid over to him, by order of the court. *Vide supra*, p. 167. Until that moment, even while the proceeds are actually in court, or under its control, any third party has a right to bring forward his claim upon the debtor; and if he succeed in establishing it, to take in concurrence his share of the property seized. By allowing a plaintiff to become the purchaser of such property, in satisfaction of his claim, except in special cases, and under the condition about to be mentioned; the opportunity to third parties, to bring forward their claims, would be taken away; and the right of concurrence, which the law gives them (whether wisely or otherwise is another question) would be defeated. Where, however, the plaintiff is the mortgagee of the land, or of other property sold in execution, and he becomes the purchaser, he has been allowed, on motion to the court, and by a special order to that effect, to take possession of the property so purchased, without actually paying the amount. And the same indulgence has sometimes been allowed in other special cases, where this course has appeared, under the circumstances, to be most beneficial to all parties. As, for instance, where a plaintiff, being desirous of becoming the purchaser, is willing to deduct a larger amount from his claim, than could be expected to be realized in money by ordinary sale. These, and the like cases, must be left to the discretion of the D. C. to decide upon. But in all such instances, the court has re-

quired a notice to be affixed in or about the court-house, for a certain period, usually a fortnight, of the intention to allow of this transaction, if no good cause, in the shape of adverse claims or otherwise, be shewn to the contrary. And till the expiration of such period, without cause shewn, the purchase by the plaintiff is not considered complete. The judges, therefore, cannot recommend to the D. Courts, to allow of a greater latitude in the admission of receipts, in lieu of money, than the practice thus detailed would warrant." L.B. 15, 31 July 1835.

The question having been submitted to the S.C. how money, levied in another district, ought to be transmitted to the court out of which the exn. originally issued, the following answer was directed to be returned, after full consideration of the subject, and after inquiring from the judges of the D. Courts of Colombo, from the fiscal of the Western Province, and from other officers, as to the course pursued, and the reasons for it: "By the 36th rule, the judge of the second or substituted D. C. is to transmit the writ, when duly executed and returned by the fiscal, to the court out of which the exn. issued, together with the sum levied, etc. The first question, therefore, is, how the fiscal is to return the writ and sum levied, to such second or substituted court: This, as it appears to the S. C., should be performed as in ordinary cases, where the exn. is enforced in the same district in which it has issued; that is, the fiscal should pay the money into court, not literally, for the court itself, as will be seen by reference to the regn., never touches any money; but into the Cutcherry, which is in truth the treasury of the court: The writ is returned, strictly and literally speaking, to the second court itself. The second question is, how the substituted D. J. ought to transmit the executed writ and the sum levied to the original court. No unnecessary delay ought to take place in the transmission; nor ought the second court to wait for any specific motion or application for that purpose. On communication with the D. Judges of Colombo, it has been suggested that the practice now in use should be continued; that is, that on the proceeds of the execution being deposited in the Cutcherry, from whence all monies are transferred daily to the treasury, a draft for the

amount so deposited be at once furnished to the D. J., who would exchange it for a treasury draft, in favour of the judge of the district, out of which the writ originally issued; and the latter judge, on receiving it, would endorse it over to the party entitled to it. To this arrangement there appears no objection, provided none be found to exist in other quarters. But in whatever mode the remittance may be effected, the S. C. is decidedly of opinion that, as a general rule, applicable to all the D. C. in the island, it is far preferable that the monies levied should be paid into the Cutchery, as the treasury of the court, and, when necessary, be transferred from one Cutchery to another by draft, than that they should pass through any other channel. L. B. 2, 15 Oct. 1835.

The question was brought to the notice of the S. C. by a fiscal, whether sales in exn., once completed, ought ever to be set aside, at least without notice to the fiscal, so as to give that officer an opportunity of becoming a party to the suit, or of defending his acts, or those of his officers. The fiscal "claimed to be entitled to this consideration, and to that degree of indulgence and protection for himself and his officers, until their acts were shewn to be wrong, which the consideration of the difficulties he had to contend with, and of his having generally no personal interest to bias his conduct, shewed to be reasonable, and which was necessary to enable him effectually to execute his duties." The judges of the S. C., in reply, after assuring the fiscal of their earnest desire to afford him, and every other officer of the court, that protection which he had an undoubted right to claim from their tribunal, observed, That from inquiry into the practice of the Western Province, it appeared to have rarely, if ever, happened, that a fiscal's sale had been set aside in the Court of Colombo; but that cases might undoubtedly arise in which justice would demand that a sale, though apparently effected with all the formalities and preliminary precautions required by the regulation, should be rescinded; as, for instance, if it could be proved that the fiscal's officer, the plaintiff, and the defendant, were all in collusion together, to prevent due publicity being given of the intended auction, or to refuse to receive the claims which might be preferred

at the moment of sale;—that it was but reasonable, however, that the fiscal should have judicial notice of any action, instituted for the purpose of setting aside a sale in exn.;—that among other reasons, the two following appeared obviously to justify the propriety of such notice; first, that the ground for seeking to annul the sale might often be some alleged irregularity in the fiscal's department in conducting it, in which case he surely ought to have an opportunity of defending his own conduct and that of his officers; secondly, that if the fiscal had no notice of such proceeding, he would proceed to put the property up to sale again, on failure of the first purchaser to complete his contract; and though the loss occasioned by such resale ought to fall on the person ultimately proved to be wrong, still he might turn out to be insolvent, and at all events, much inconvenience might be sustained by parties innocent and ignorant of what was going on;—that under these circumstances, the S. C. would feel called upon to direct notice to be given in future to all the fiscals of any proceedings of this nature; but as the course to be adopted on fiscal's sales was prescribed with some minuteness by Regn. No. 13 of 1827, and as it was probable that that regulation might shortly undergo revision, it might be more convenient to bring this matter to the notice of the Legislative Council, with the view of introducing a provision into the new ordinance, to the effect proposed. L. B. 14 Nov., 11 Dec. 1835. The writer of these notes is unable to say whether the measure, here anticipated, has been carried into effect. But it is scarcely necessary to repeat his opinion, that either by legislative or judicial authority, the notice, contemplated by the letter, ought to be required. With respect to the foregoing decisions on the Reg. of 1827, they can of course be only applicable to any new ordinance, so far as the former provisions are repeated, or as far as they may bear analogy to those which may have been substituted for them.

As to setting aside an execution, improperly issued, vide *Execution-parate*. See also title *Sequestration*.

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## EXECUTION—CRIMINAL.

Vide supra, title Appeal—in criminal cases.

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## EXECUTION—PARATE.

In what cases grantable, page 173—Can it be recalled by D. C., if improperly obtained? 174—Power of D. C. to rescind or alter its judgments, in general 175—Authorities in favour of it, in particular cases 175—Restitutio in integrum, explanation and application of 175—Equitable jurisdiction of D. C. 177—Reference by D. J. to S. C. for advice under R. 47, in accordance with civil law 177—Supplicatio 178—As to par. exn. in particular; arguments and authorities in favour of power of D. C. to rescind, 179—Par. exn. not to be favored 179—Hardship of obliging party to wait for appeal 179—Question of practice, rather than law 181—Arguments and authorities contra 182—Majority of S. C. in favor of this power 183.

THE principle of the process of parate execution is, that certain facts, which the law has declared shall render a party liable to this summary course of proceeding, being established to the satisfaction of the court, the previous stages of an ordinary suit at law are dispensed with, and the creditor is at once entitled to seize in execution the person or property of his debtor, in satisfaction of his debt. L. B. 23 June 1834. It is called by Voet, Lib. 42, tit. 1, par. 48, "execution, without the form of a judgment;" that is, without *previous* judgment, for the decision of the court, that par. exn. shall issue, is in fact a decree or judgment. This process, however, so different from the cautious mode in which courts of justice proceed in ordinary cases, can only be granted in those instances, in which the law has given express authority to demand it: As, to the registrar of the S. C. for monies borrowed from the loan board, by regn. No. 9 of 1824;—to fiscals, for the purchase money of sales in execution, by regn. No. 13 of 1827;—and to auctioneers, by regn. No. 12 of 1825, supra, p. 45. It is to be observed that, of these regulations, that of 1824, No. 9, is the only one which expressly gives the process of par. exn. against the *body* and effects of the debtor. The other two regs. give par. exn. in general terms. The

writer is unable to say whether this distinction has ever been contended for in practice. By the Roman Dutch law, par. exn. was allowed for the recovery of public taxes, expences of repairing roads, fines for neglecting such repairs, and the like. Voet, ubi supra.

The only question of any importance, it is believed, which has arisen on this subject, since the establishment of the new courts, is, whether a D. C. can set aside its par. exn., once issued, on the ground of misstatement by the party applying for it, supposing that such ground, if disclosed to the court in time, would have been sufficient to prevent the execution issuing. The facts were these: On 18 Feb. 1834, an auctioneer made an affirmation in court, touching an auction debt, on which a writ of par. exn. issued against the alleged debtor, conformably to the 14th clause of reg. No. 12 of 1825. About two months afterwards, the debt. applied to have the par. exn. set aside, on the ground that it had proceeded on a false affirmation; and affidavits were produced, stating that the debt arose out of a private transaction, and not out of a purchase at auction, and was for a less amount than that stated in the affirmation. Supposing these affidavits to be true, observed the D. Judge, it was clear the par. exn. ought not to have issued; but as the 31st clause of the Charter gave the S. C. appellate jurisdiction, for the correction of all errors in fact and in law, committed by the D. C., he doubted whether the D. C. itself possessed the remedial power of setting aside its own sentence, on which the exn. issued; and he, therefore, most properly referred for instructions, under the 47th rule, to the S. C. The point underwent great consideration by the Judges, the majority of whom were of opinion that the D. C. did possess this power of correction. But as the court was not unanimous, and as the question involves the more extended one, as to the power of D. Courts, generally, to amend their judgments under certain circumstances, it may be useful to give a summary of the authorities, which were consulted upon the question, and for which the writer, who was at that period fully and rather laboriously occupied by the more general business connected with the new system, was chiefly indebted to his learned col-

leagues. The authorities are here given translated, for more general convenience.

First, then, as regards the more extensive question, the power of D. Courts to rescind, alter, or amend their judgments, without reference to this process of par. exn. in particular. There can be no doubt that, as a general rule, and except under special circumstances, the civil law denies such power to them. This will be found laid down by all the writers and commentators: But it is equally clear, from the same authorities, that several exceptions exist to this general rule, and that, in these instances of exception, the courts do possess this power, either by means of the *restitutio in integrum*, the putting things back into their former state, or by the *supplicatio*; each of which remedies is founded on principles of equity, though the *restitutio* is by far the more extensive one. Thus Pothier in Pandectas, lib. 42, tit. 1, s. 2, par. 27: "The nature of an adjudged case is, that it is unalterable, even though it should have been badly decided: Hence the rule of law, that a matter decided shall be taken for true." But afterwards, at par. 31, he adds, "The execution of a decree is usually suspended, and whatever has been paid may be recovered back, if it be shewn by plain proof, that the judge has been deceived by false documents. . . . And this is equally applicable to *false evidence*, since the reason is the same." And again, in lib. 4, tit. 1, s. 10; "Both the prefect, and other magistrates, may restore things to their former state, of their own authority, *whether against their own decree, or in other cases.*" So Cujaccius on the Code, 7, tit. 49, 50; "Lastly, one decree cannot be overruled by a contrary decree, *unless by means of appeal, or the restitutio ad integrum.*" So Heineccius in his Elements, part 1, s. 462, 3; "It is plain that a magistrate has the power of relieving, by the *restitutio in integrum*, *against his own decree*, or that of his predecessors, or of subordinate magistrates; but not against that of higher courts: And the just and equitable causes for this remedy are, 1st, fear, 2dly, *fraud*, 3dly, want of age," etc. So Wood, in his Institutes, p. 321, 2; "*Restitutio in integrum* is near of kin to an appeal, and is the reducing a thing to its first state, where an appeal has been neglected. It may be granted

to minors, where they have been injured by the decree of the Judge, or any judicial act, and to all others upon any just reason, absence, error, fear, *fraud*, etc., concerning contracts, erroneous confession, proof, or in any other cases where they complain of wrong or mistake." It is plain that Wood contemplates, in this passage, the granting the remedy by the court which has done the wrong. So Voet, Lib. 42, tit. 1; par. 27; "The effect of a decree rightly passed is, that it cannot be revoked or altered by the Judge who pronounced it,—even on the same day; for he is no longer a Judge in the matter." But in the next par., 28, he adds, "But if the decree should have been obtained by false documents, or *false evidence*, it may be rescinded on proof of the fraud, which, during the progress of the suit, was not brought to the notice either of the opposite party or of the Judge, whose good faith has thus been imposed upon; the course being to apply for *restitutio in integrum*, by way of complaint or accusation (not by ordinary action), so that the decree, being rendered powerless by the *restitutio*, may thenceforth lose all the weight of a decision, and the case be inquired into afresh, as if no judgment had been pronounced." And at the end of that par. Voet refers the reader, as to what Judge is competent for this purpose, to his admirable treatise on the *Restitutio in integrum*, Lib. 4, tit. 1. But in giving the substance of that title of Voet, as bearing on the present question, it would be difficult to improve upon the observations made by Mr. J. Norris, the substance of which is accordingly here presented, and which will be found well worthy of perusal and reference, not only on the particular point which drew them forth, but on the more general and highly interesting subject, the equitable jurisdiction of the D. Courts.

"The applicant in the D. C. asks for the revocation of the decree on one of the enumerated grounds, that of false evidence; and I will endeavour to shew that he has not mistaken his course, in applying by way of complaint or accusation to the D. C., instead of appealing to the S. C.; and that the latter will not misdirect the D. Judge, in advising him that he may proceed to examine the applicant's witnesses, and on being satisfied that the auctioneer's affirmation was false, may order the goods.

seized to be restored. The total abolition of the original jurisdiction, civil or equitable, of the S. C. (except in the instances mentioned in the 49th clause of the Charter) would have given just cause of complaint, if parties had been left wholly without equitable relief. But the framers of the Charter, no doubt, well understood the spirit of the civil law, and were perfectly aware that “among the Romans, as remarked by Blackstone, one and the same magistrate was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity.” The title of Voet *de in integrum restitutionibus*,—a remedy which, as Voet observes, requires no praise, since from its equitable nature it is its own panegyrist,—is entirely founded on these principles; and a thorough incorporation of them with our English common law, with which, in fact, says the translator of Vanderlinden, more of the Roman law has been incorporated than the English reader may be willing to suspect or believe (for whole passages are to be found in Bracton and Fleta), might have rendered the separate establishment of a Court of Chancery of very doubtful advantage. Cases will no doubt arise in which, as in the present instance, the D. Judges will find themselves at a loss, how to reconcile the strict rules of positive law with the principles of natural equity; and it is precisely on such occasions, that the advice of the more experienced Judges of the S. C., under the 47th rule, will be found of essential benefit in guiding the decisions of the inferior courts, so as to preserve the uniformity of the law on the one hand, and prevent its too rigid application on the other. And this rule is in strict accordance with the ancient civil law, by which an inferior Judge was accustomed to consult his superior in cases of difficulty; “as the rescripts of the emperors in the code, directed to inferior Judges, sufficiently prove; a practice which was afterwards disused, though now revived by the canon law, and is at this day practised in Flanders and Germany.” Wood, 321. See also to the same effect, Voet, Lib. 49, tit. 1, par. 21. In his first par. of this title, *De restitutionibus*, Lib. 4, tit. 1, Voet describes the *restitutio* to be “an extraordinary remedy, by which the prator, on the strength of his office and jurisdiction, and following the dictates of natural equity, places persons who have been injured

or defrauded, in their former situation, as if no injurious transaction had taken place, or at least decrees them to be saved harmless." In his 2d par. he considers it to be "plain that a magistrate (and he is speaking of inferior functionaries,) had the power of *restoring* against his own decrees." In the 3d and 4th par. he shews how the inferior courts had been gradually stripped of this equitable jurisdiction, but in the 5th par. he explains that, though the jurisdiction of restitution had been arrogated to the higher courts, this usurpation remained an absurd and useless form, since every such application was referred, as a matter of course, to the ordinary tribunals, and was granted or refused according to their recommendation; and he adds, that this practice was so well established, that the S. C. could not legally take the inquiry into its own hands, unless the cause was of a nature exclusively falling within its own jurisdiction. In the 8th par. he examines the question, whether in the event of restitution being sought against a decree or sentence, the inquiry could be committed to the same Judge; and, on the principle of the Roman law, and the authority of Oddus, decides that it could, though Rebuffus and others seem to have been of a different opinion. And he appears to think, with Christinæus and Faber, that it would be absurd to commit the examination to any other than the original Judge. (Vide *infra*, title Fraud, as to the application of the *Restitutio in integrum*, as a relief against injuries by fraud.) Another method recognized by the civil law, for procuring the rescission of a decree under special circumstances, and within a limited time (two years) is the *Supplicatio*, which complaint, according to Wood, page 321, may be made to the *same Judge*, or to the superior, to revoke the sentence, where the party has not appealed in time, or where appeal is prohibited. This remedy is, in effect, embodied in the 5th rule of sect. 8; with this modification, that the admission of an appeal out of time is to be referred to the S. C. From these authorities, then, it is abundantly evident, that the civil law did permit courts to rescind their own decrees, under certain circumstances. Considering the present application as a bill of complaint to the D. C. in its equitable jurisdiction,—a jurisdiction inherent by the Roman law in every magistrate,

and now, in accordance with Mr. Cameron's 2d recommendation, restored to the D. Courts, by the operation of the new Charter,—it seems clear that the D. C. may deal with it in the first instance as it thinks proper, and, if necessary, rescind its own decree, either party being of course at liberty to bring the case ultimately before the S. C. by way of appeal."

But secondly, with reference to this proceeding of par. exn. in particular: The C. J. and 2d P. J. considered, that though the creditor, who took upon himself to aver the necessary facts, was permitted to arrive, *per saltum*, at that stage which in ordinary cases is only to be attained by regular steps, there was no reason why, from this point, the proceedings should differ from other cases; or why an execution, which had been obtained without undergoing the usual ordeal of strict examination, should be held more sacred, or entitled to higher privileges, than one which had been regularly contested;—that as an execution, obtained by regular and gradual proceeding, might still be challenged, not only by third parties, but by the defendant, and might be "taken off" by the court out of which it issued, if it appeared to have been improperly or irregularly obtained (Vanderlinden's Institutes, Lib. 3, part 1, sect. 10, p. 487); so, *à fortiori*, such power of revision ought to exist in cases of par. exn., which gave persons entitled to it so great an advantage over other creditors, and in which the seizure of the person or property is the initiation of the proceeding, previously to which the defendant has no opportunity of contesting the claim;—that otherwise, a party in a remote district might actually be dragged to prison on the mere affirmation of a plaintiff, and might remain there for weeks or months, since no bail could be taken in execution, till a decision could be obtained from the S. C., which, for that purpose, must go through a regular trial of the facts;—that the object of par. exn. was to give the creditor, as speedily as possible, the security of his debtor's person and property, and, more especially, to prevent the property from being otherwise disposed of, objects which were answered by the act of seizure;—that the property must remain in the hands of the fiscal, till any objections raised against the proceedings had been disposed of, or, if of a perishable nature, they might

be sold for the benefit of the party ultimately entitled;—that no injury, therefore, and very little inconvenience, could arise to the creditor from the delay, which indeed would be much greater if the defendant were compelled to carry the case by appeal to the S. C. ;—that such appeal would undoubtedly have been open to the defendant, if the D. C. had refused to rectify the “error of fact” into which it had been drawn by the misstatement of the auctioneer, but that the existence of that remedy, the necessity for which supposed the D. C. to *persist* in its error, by no means prevented the D. C. from correcting such error, in those instances in which it might lawfully do so, by its own hand;—and that the same observation applied to the appeal, which lay to the counsellors of Holland, against decrees of *par. exn.*;—that if this restrictive construction were put upon the Charter, it might equally apply to any interlocutory order, and it might be urged that the D. C. had no power to discharge a defendant who had been arrested on a false imputation of intended flight, or even to postpone the day of hearing, after it had been once fixed, since the same rules must govern the mode of obtaining redress from interlocutory orders, and from final decrees;—that even if this applicant had been forced into appeal, by the declaration of the D. J., that the step once taken was irrevocable and irreparable by the D. C. itself, the S. C. must, in all probability, have referred the case back to the court below, for the purpose of ascertaining what the facts really were;—that the useless vexation, which such a cumbrous mode of proceeding would occasion, was a sufficient proof that it never could have been intended by the Charter;—that the process of *par. exn.* appeared very analogous to execution sued out in England under a *cognovit*, or a warrant of attorney to confess judgment, in which cases the courts would always set aside executions unduly obtained, without driving the defendant to a writ of error or appeal;—or, if the proceeding were to be referred to any class of cases pointed out by the R. Dutch law, it would seem to be to those provisional decrees, by which the defendant is condemned at once, with the proviso, that the fact of his being indebted shall still be inquired into, as where the creditor holds a bond, or other instrument, which, *primâ facie*,

gives a right of action against the obligor (*vide infra*, title *Nantissement*); or it might be compared to the privileged processes of execution, mentioned in the *Censura Forensis* (part 2, lib. 1; tit. 33, s. 32 to 36), the object of which was to obtain security for certain public dues, and which are mentioned in close connexion with the provisional decrees just referred to, and with *par. exn.*, a mode of opposition being pointed out by which any one unjustly or irregularly proceeded against might defeat the execution;—that such right of opposition was the more necessary in a case like the present, where the defendant had no opportunity of opposing the application at the time of making it; since the regulation was imperative on the court to issue the writ on the plaint (true or false) of the auctioneer, without further pleading or process;—and that, independently of these arguments, an express authority in favour of the power of the D. C. in the case of *par. exn.* was to be found in the *Papegaey*, title *Par. Exn.* p. 508, “Any person having *par. exn.* executed against him, and wishing to urge payment, *or anything else*, may come against it in opposition, and apply for a penal mandate from the said court, etc., to appear before a commissioned member of the same court,” etc.;—that, moreover, the present was a question of practice rather than of law, since the doubt was, not as to the right of the party to redress, but as to the course of proceeding, by which that redress was attainable (*vide infra*; title *Nantissement*, where this distinction between law and practice is discussed more fully);—that it was very questionable, whether, in matters of mere practice, Dutch rules ought any longer to be held conclusive in Ceylon, for as all the courts in the island were henceforth to be governed by one uniform course of procedure, the inhabitants of the Kandyan districts might not unnaturally ask why the *practice* of Holland, to which country they never were subjected, and the *law* of which country never was in force in those districts, should be forced upon them, rather than that of Great Britain, of whose dominions they now formed a part:—that the S. C., therefore, called upon as it was by the Charter and the King’s instructions, to guide the D. Courts in their proceedings, not only by the more solemn mode of general rules of practice, but by giving its opi-

nion and advice on any point incidentally arising, and above all, enjoined as it was to see that the practice of all the courts was uniform, would often be obliged, *ex necessitate rei*, to declare *de novo*, and from its own decision independent of precedent, that which it considered would be best to be observed as matter, not of law, but of practice;—and, therefore, that in the present instance, where, in the language of the 47th rule, “the form of procedure was wholly unprovided for” by the regn., even supposing that the R. Dutch authorities did not sanction this power of revocation in the D. C., it was perfectly within the scope of authority reposed in the S. C. to direct the exercise of that power, which, moreover, was supported by reason and justice, as well as by analogy to similar proceedings.

The Senior P. J., on the other hand, was of opinion that the D. C. had no authority, even with the sanction of the S. C., to set aside the *par. exn.* once issued;—that the application for this process might have been met by any disproof which could have been offered at the time, but that the process once decreed, the power of the D. J. was extinct, and the party aggrieved must, as in the case of any other sentence or decree, have recourse by appeal to the S. C.;—and that, as a general rule, the D. C. could never enter upon counter-evidence, from which to annul its own decree, nor could it indeed, in any way, amend or alter a judgment once pronounced. And Mr. Serjt. Rough relied on the civil law authorities above cited, and which, taken without the exceptions by which they are all qualified, would certainly support this general proposition. And to shew that *par. exn.* fell within this general rule, he quoted Van Lee-win, B. 5, ch. 30, s. 5, p. 637, and Merula, ch. 100, p. 672, 3, from which authorities it would appear, that by the R. Dutch law, a party who found himself aggrieved by a decree of *par. exn.* for taxes and penalties, might oppose it, not before the court which issued it, but before certain commissioned counsellors, who constituted a court of appeal for that purpose, and who were to enter into the legality of the whole case. By analogy, therefore, the party aggrieved here should appeal to the S. C. No comparison could be drawn between this pro-

ceeding and English cognovits, or warrants of attorney to confess judgment, inasmuch as the R. Dutch law did not permit a debtor to invest his creditor with the privilege of parate execution. Voet, lib. 4, tit. 1, s. 48.

The opinion of the majority of the S. C. was communicated to the D. J., who accordingly received the affidavits, offered in contradiction of the auctioneer's affirmation. L. B. 2, 23 June 1834. It has been considered right to insert the discussion of this subject thus at length, both because future litigants, who may wish to dispute this power of the D. C., would have a right to know that they had the opinion of one of the judges of the S. C. strongly in their favour, and also because it may be useful in leading and directing parties in their inquiries, upon subjects of a similar nature. But after all, it seems to be of little importance, especially considering the easy and unrestrained intercourse which daily takes place between the S. C. and the D. Courts, whether the latter should be allowed to correct their own judgments, which they themselves discover to be erroneous, under the advice and direction of the S. C., and subject to ultimate appeal to that tribunal, or whether an appeal to the S. C. be declared indispensable in all cases, before any such amendment can be made;—except indeed as regards time and expense, both of which considerations plead strongly in favour of the former of the two courses.

Vide *infra*, title Judgment, where another case is mentioned, in which the majority of the S. C. delivered their opinion, generally, that a court of justice has the power of rectifying a mistake in its own decree.

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## EXECUTION—OF DEEDS.

A grant, or other instrument, relating to land, is not necessarily vitiated, from the circumstance of the execution of it, by all the parties and witnesses, not having taken place at one and the same time. The Reg. No. 20 of 1824, (and the Ordce. No. 7 of 1834) required that a deed affecting land should be passed and executed, or acknowledged, etc., before a notary

and two witnesses; and no doubt each grantor must execute or acknowledge it before the notary and witnesses. But there seems nothing to prevent the execution or acknowledgment, by different grantors, being taken at different times and places, provided always it be before a notary and two witnesses. And the reluctance, which the females of some classes have, to any thing approaching publicity, may very frequently induce the notary to take the execution of female parties at their own homes: But in such cases, the witnesses should see the execution passed. L. B. 24 Sept., 3 Oct. 1834. This, it is to be observed, was only the individual opinion of the chief justice, to whom the question was submitted by a D. Judge.

Vide supra, title Evidence, p. 111 et sequ.

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## FALSE CLAIM.

Should D. C. fine for false actions, etc.?—Recommended by Mr. Cameron: S. C. hitherto dissenting, page 184—Reasons for dissent; difficulty of distinguishing between dishonesty and error 185—Conviction without a jury 186—How decide whether client or proctor in fault? 186—Are not costs the best check? 186—Fine *pro falso clamore* antiquated 187—Objections do not apply to fining for false criminal complaint 187.

The question, whether the courts of Ceylon should be invested with a power of inflicting summary punishment by fine, on persons instituting actions, or setting up defences, without foundation, has undergone much consideration, and may even yet be considered as not absolutely and finally decided. Vide supra, p. 15. Mr. Cameron, in framing his plan of the present charter, recommended very strongly that such a power should be conferred and exercised. The writer of these notes was compelled to dissent from this recommendation, by the fear lest the exercise of such a power, though it might occasionally operate beneficially in repressing vexatious litigation, should, on the other hand, have a tendency to deter honest suitors from asserting their just rights. The secretary of state left the matter open for the consideration of the judges in Ceylon. And hitherto, or at least up to March 1836, the opinion of the S. C.

was unfavourable to the authority proposed to be given. But nothing that had taken place on the subject, up to that period, ought to be considered as going beyond the bare expression of individual opinion; and the reasoning, on which that opinion was founded, may appear inconclusive to the present or future judges of the S. C. It is right to mention, too, that several of the D. Judges have shewn their opinions to be in favour of the practice in question; for they have, in more than one instance, applied to the S. C. to know whether they were invested with the power of fining for a false action, and on one occasion the fine was actually imposed, though it was remitted when brought to the notice of the S. C. See No. 273, Ruanwelle, 25 Nov. 1833.

It is matter of regret to the writer, that he has not at this moment before him the recommendation of Mr. Cameron on this point, with his arguments in support of it, to lay before his readers; but they are no doubt within reach of, and in all probability familiar to, the learned Judges, who may be called upon to reconsider the question. The following is the substance of the answers which were directed by the C. J., after consultation with his colleagues, to be returned to the several inquiries made by the D. Judges on the subject. “There is no authority at present vested in D. Judges, which would justify any punishment for the mere act of bringing a false claim, or of making a false defence, unless accompanied by perjury, subornation, conspiracy, false answers to questions on examination, prevarication, or by some other known and defined offence. In any of these cases, the offender would of course be proceeded against in the usual way, according to the degree of the offence. It is extremely difficult to draw the line, beyond which a man shall not be allowed to avail himself of the right, which all persons are supposed to enjoy, of asserting his own claims, or resisting those of others: Different men may take different estimates of this boundary. There are many modes of legal attack and defence, which the law does not and ought not to prohibit, which yet no honourable man would have recourse to. It would be throwing a duty on the D. Judges, which they could scarcely exercise with safety to the public, or satisfactorily to themselves; to call upon them to punish a party as acting from

dishonesty, when he may possibly have only been guilty of misconceiving the latitude which the law allows him. Nor should it be forgotten that a person so situated, though treated and punished as a criminal, would lose his benefit, his right, of trial by jury; his offence being one, not like prevarication or other contempts of court, palpable and undeniable, but requiring fair investigation, and often a great deal of evidence, irrelevant to the original issue between the parties: For we must remember that it is not the hollowness of the action or defence itself, but the guilty knowledge of its falsehood by the party setting it up, that would justify his punishment. The relation of proctor and client, again, would interpose a serious obstacle to this mode of restraining fictitious actions or defences: The client might say, "I was merely passive in the business; I told my legal adviser what I believed to be the state of the case, and left him to shape my action or defence as he might think most advantageous:" The proctor would say, "I have only done my duty in making the best case for my client which his statement admitted; I believed that statement, though the witnesses have certainly told a different story in court from what we expected." (Vide supra p. 141. The position of the proctor, as here imagined, goes on the supposition that he has exhibited nothing in the shape of unfair *practice*, though he may have been engaged in what turns out to be a dishonest action.) Either the plan would be inoperative for the object proposed; or if the D. C. were to fine and imprison (for imprisonment must be made the alternative of not paying the fine) to an extent sufficient to remedy the evil,—in other words, whenever the court entertained an unfavourable impression of the honesty of the case,—the cure, it may be feared, would go too far, and would often deter well intentioned parties from asserting their just rights, or those which they might consider just, from the fear of disgrace and punishment, if they should be unsuccessful. The payment of costs, composed of court and proctor's fees on both sides, is after all perhaps the best and fairest mode of obliging the losing party (who, it is to be hoped, is generally the party in the wrong) to make amends to the opposite party for his unjust attack or defence; to pay a penalty for his own injustice or pertinacity; and

at the same time, by means of court fees, to contribute something towards defraying the expenses of those institutions, of which he has endeavoured, though unsuccessfully, to avail himself. (Vide supra, p. 15 et seq., and 76.) The ancient practice in English courts, of fining *pro falso clamore*, has been alluded to, as showing that this mode of curbing unjust litigation is not a novelty; but the disuse, into which this practice has long since fallen, is not unreasonably attributed to its tendency to obstruct judicial redress, in cases in which plaintiffs would be justified in taking the opinion of the court, though the result might be doubtful.

But where a person brings a *criminal* charge without foundation, the same objections to summary but moderate punishment do not seem to exist. For as he must have given his evidence in person, there is a direct attempt to impose on the court by a false statement of facts, which, generally speaking, cannot be excused or extenuated, either by the self delusion or by the bad advice from others, which may often lead a man in civil matters to institute a claim, or set up a defence, which may turn out to be without any just foundation. There appears, therefore, to be no objection to imposing a moderate fine, in such cases as are not of sufficient importance to require a prosecution for perjury or conspiracy. See No. 106, Waddemoratchy, 20 May 1835, criminal, mentioned more fully under "Prosecution." Vide supra, p. 123, as to making prosecutors on false or frivolous grounds pay *batta* to the witnesses on both sides.

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## FALSE IMPRISONMENT.

See title Imprisonment.

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## FELONY.

This word is only mentioned, for the purpose of reminding those who may consult English authors on the subject of criminal law, that the distinction which they will there see made between felonies and inferior offences, or misdemeanours, does

not exist in Ceylon, whether as regards the nature of the crimes themselves, or the legal consequences of them, *supra*, 136. The chief distinction which exists in Ceylon on this subject, is that pointed out by the 25th clause of the charter, which limits the jurisdiction of the D. Courts to crimes not punishable with death, transportation, or banishment, imprisonment for more than 12 months, whipping exceeding 100 lashes, or fine exceeding 10*l*." Another distinction, which will be found frequently occurring, and which is mentioned in the 10th rule of sect. 2, is that between the higher offences, and breaches of the peace, petty assaults, and other minor offences of the like nature, being, in fact, a subdivision of those offences, which fall within the jurisdiction of the D. Courts; as to which see *Escape, Jurisdiction, Perjury, Prosecution.*

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## FIDEI COMMISSUM.

Meaning and operation of, page 188—How constituted, and of what? 189  
 When and how to take effect 189—Property cannot be alienated 190—Unless by permission of owner (prohibition of alienation to be construed strictly) 190—Or by authority of law, if necessity or interests of parties require (power of D. C. to order) 190—Or by consent of all interested 191—Property, wrongfully alienated, may be recovered back 191, 2—How *fid. com.* put an end to 192.

As the mode of disposing of property, by means of the *fidei commissum*, must frequently come under the consideration of the courts and practitioners, in those districts of Ceylon in which the Roman Dutch law prevails, it may be not altogether useless to give here a very brief explanation of this species of transfer, and of the leading rules, by which it should be governed. By the term *fidei commissum*, then, is intended property given or bequeathed by the owner to another, with a request, which the law of modern times considers obligatory and enforces as such, to deliver it over to a certain other person or persons. This species of confidential transfer to one person for the benefit of another is very similar to what, in English law, are emphatically called *trusts*. By the R. Dutch law, the person

to whom the property is so transferred in trust (the *trustee* of English law) is called the *fiduciarius*; and the person for whose use and benefit it is to be held in trust (the *cestuy que trust* in the barbarous French of old English law) is designated the *fidei commissarius*. The term *fidei commissum* is as often used to designate the trust on which the property is transferred, as the property itself so transferred. The following brief and familiar outline has been compressed chiefly from Voet *ad Pandectas*, lib. 36, tit. 1, *Ad senatus-consultum Trebellianum*. The number of the paragraph is given for each proposition which Voet lays down, in order to assist the reader in his more extensive researches into that writer and his authorities;—a labour which Voet never fails amply to repay.

Every description of property, whether moveable or immoveable, may be the subject of the *fidei commissum*, which again may be constituted either by gift *inter vivos*, or by will, like any ordinary gift or bequest, by any person capable by law of giving or bequeathing. Par. 6 to 9 of Voet. The trust may be created by express words, or may be gathered from any expressions in the instrument, shewing, as a necessary inference, that it was the intention of the donor or testator to create it. Par. 10. And when a testator, having instituted several heirs, directs that the share of one shall devolve on the rest, they are all to be considered as charged with a *fid. com.* in favour of each other. *Id.* It is sufficient that the *fid. com.* state generally the class or set of persons, in whose favour it is to operate, as the next of kin of the donor or testator, or his relations generally, or a particular family, without designating or naming the individuals; but the family or class, or the persons individually, must be pointed out, for without such designation, the bare prohibition to alienate has not the effect of a *fid. com.*; and is indeed wholly inoperative. Par. 21, 27. The *fid. com.* may be made to take effect at once, or at the expiration of a given term, or on the happening of a stated contingency. Par. 13. If no time or contingency be prescribed in the *fid. com.* for delivering over the property, the trustee is bound to deliver it immediately. Par. 34. By the ancient law of Holland, the *fidei commissarius* used to compel an unwilling *fiduciarius* to

enter upon the inheritance, in order to transfer it, according to the terms of the *fid. com.* But in more modern times, this mode of compulsion has been considered unnecessary; and on the latter person refusing or neglecting to take the trust upon himself, the former is admitted as of right. Par. 46. On delivering over the property, the *fiduciarius*, besides the Trebellian or Falcidian portions (concerning which the distinctions and details would run into greater length than would be consistent with this outline, and for which, therefore, the reader is referred to Voet, and other writers on the subject of *fid. com.*) is entitled to deduct any debt due to him from the donor or testator, and also any expenses incurred by him on account of the property. Par. 36 and 61.

As a general rule, property given or left as *fid. com.* cannot be alienated, par. 62, unless in cases in which such alienation is permitted by the donor or testator, or by the law, or by consent of those interested.

1st. Whether the alienation be permitted by the donor or testator, must depend on the terms of the gift or devise, by which the *fid. com.* is constituted. In many cases, the *fidei commissum* is accompanied by an express prohibition to alienate the property out of the family, or out of the direct line of descent from the person in whose favour it is constituted. In such case, the *fid. com.* is similar, in many respects, to entailed estates in the English law. This prohibition may be so worded as to affect the first taker only, or to be binding on each successive taker, as long as any of the family remain. Par. 28. But if the terms of the prohibition be doubtful, they should be construed strictly, that is, in favour of the power of alienation, rather than against it, and so as to be as little burthensome as possible on the heir. Nor can the prohibition expressed be extended to any other mode; therefore, a prohibition to *sell* does not prevent the heir from disposing of the property by *will*. Par. 27, 8, and 72.

2dly. But in some cases, the law will authorize the *fid. com.* to be alienated, whether the prohibition against alienation have been expressly declared, or be only inferred from the *fid. com.* itself. Thus, where, for want of other property, it becomes

necessary to dispose of the fid. com. in order to pay debts or legacies of the testator, etc., or the public taxes, par. 62, 3:—  
Or, where the property would be deteriorated by being kept, id:—Or, where it might be exchanged for other property, with advantage to the estate, id. Other circumstances may arise, which may make it necessary or beneficial to the estate, to dispose of the property so tied up. But in all instances, application should, in Ceylon, be made to the D. Courts, for authority so to dispose of it. More than one application for this authority were made, within the writer's recollection, to the former S. C. of Ceylon, which always required strict proof of the necessity of such alienation, before it would give its sanction to it. But when it appeared that such necessity really existed, as where the house which had been left in fid. com. was falling to decay, and there were no funds to repair it,—or, where it was shewn that a sale would be more beneficial than repairs,—the requisite authority was given, and the proceeds of the sale were directed to be laid out in other property, for the benefit of the fidei commissarii, and subject to the directions of the fid. com. And on a late occasion, when a D. Judge referred to the S. C. for instructions, whether a similar application made to the D. C. could be complied with; the answer returned, as the result of mature consideration by the Judges, was, That as applications of a similar nature had, upon several occasions, been received and decided upon by the late S. C., it was equally competent to the present D. C. to entertain them;—that the question, as to the propriety of exercising this branch of jurisdiction, by dissolving the restraint of alienation imposed by the original donor or testator, must depend on the degree of necessity which the applicant might be able to establish for the alienation, and upon the other circumstances which each case might present. L. B. 1, 30 May 1835.

3dly. The property forming the subject of the fid. com. may also be alienated by the consent of all those who are interested in it. Par. 62. The chief object of the D. C., in such case, must be to ascertain that all interested are fully aware of the nature of the application, and willing that it should be granted.

If the fiduciarius, or trustee, alienate the property without

due authority, the party or parties interested may recover it back, even from the purchaser, as soon as their right to it accrues, whatever length of time may have elapsed since such wrongful alienation; for, as he could not assert his claim till the arrival of the time, or the happening of the contingency, on which the right was to accrue, no prescription would begin to run against him till then. Par. 64. But, for the same reason, the purchaser would not be liable for the profits received up to the time of such right accruing; for till then, they belonged, not to the *fidei commissarius*, but to the *fiduciarius* or trustee; *id.*

A *fid. com.* is put an end to by the non-performance of the condition on which it was to take effect, par. 66;—by the death of the *fid. commissarius* before his interest has accrued, unless the intention of the testator be otherwise expressed, or unless the *fid. com.* be by act *inter vivos*, in which case his contingent interest goes to his heirs, par. 67;—by the death of the *fiduciarius* before the testator, unless provision be made for transferring the trust in such case to another, par. 69;—by a different disposition of the property subsequent to the *fid. com.*, par. 66;—by the ultimate failure of all those in whose favour it was constituted, or by their renunciation of the *fid. com.*, whether express or implied, par. 65;—lastly, the *fid. com.* may be dissolved by legislative authority, on very strong grounds, such as extreme indigence, etc., par. 70.

The reader will find a short but distinct history of the system of *fidei commissum*, and of the different kinds of them, according to the law of Holland, in a very learned and valuable work, lately published, “*Commentaries on Colonial and Foreign Laws*, by Wm. Burge, Esq., Q. C. London, 1838, vol. II, ch. 2, s. 2;—a work from which the writer of these notes has derived much assistance, and which could not fail to be a most useful book of reference, in all colonial courts of justice.

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## FINES.

See titles, Assessors, Contempt, False Claim, Prosecution, Renter, Stamp.

As to the distinction between Fine and Confiscation, as regards the jurisdiction of the D. Courts, see title Jurisdiction, and Circular Letter to the D. Judges, 12 May 1834.

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## FISCAL.

Reg. 13 of 1827; reference to other titles, page 193—What duties may be done by deputy 193—Copy of process furnished by D. C. 194—Poundage, how levied, etc. 194—Calendar of prisoners, not to be altered after signed, without order of S. C. 195—Bonds to fiscal require no stamp 195.

THE duties, powers, and responsibilities of this officer are pointed out with some minuteness, as we have seen under title Execution, by regn. No. 13 of 1827; and any ordinance, which may have been substituted for that regn., has no doubt provided for the same objects with all the improvements, which the experience of existing inconveniences must have suggested. There seem to have arisen but few questions for decision, as regards these various duties; and of those, most will be found mentioned under the several titles Contempt, p. 62, Execution, p. 158, et sequ., Process, and Sequestration.

Doubts have sometimes been entertained, how far the powers of the fiscal might be devolved on his deputy. The following questions were put to the S. C., soon after the new charter came into operation: Whether the process, required by 1st and 2d rules of sect. 1 to be directed to the fiscal, might be directed to his deputy, appointed by himself? Whether the returns, required to be made by the fiscal, might, in like manner, be made by a deputy? And whether, generally, a fiscal might delegate to his deputy those acts which were required to be performed by himself? To these inquiries, the C. J., after consulting the P. Judges, directed an answer to be returned, That as to the first and second questions, though there might be no positive objection to directing process to the fiscal's deputy, it appeared better to adhere to the practice, which it was believed had always prevailed, of *directing* it to the fiscal himself, he being the officer whom the courts considered immediately responsible to them; but that there was no objection to the deputy fiscal, who

in most cases was the officer, by whom the orders of the courts were really carried into execution, making his *return* to them;—that in truth, the fiscal himself would, in most cases, be obliged to trust to the information received from his deputy for the correctness of his return, and it would often be extremely inconvenient if the deputy were obliged to transmit the process or other order, when served, to the fiscal, for the nominal sanction of being returned by him;—and that for the same reason, there appeared no objection to process, etc., though directed to the fiscal, being issued at once by the court to the deputy, for execution:—That as regarded the third question, there was some difficulty in giving a precise and universal answer;—that as a general rule, applicable to most points of duty, the deputy fiscal must be considered competent to execute the functions of his principal;—that to this rule, however, there were some exceptions, as, for instance, the superintending the execution of criminals in capital cases, though even this might not always necessarily be considered an exception, as in the case of an execution taking place at a great distance from the residence of the fiscal, provided there were a deputy on the spot, to whom the principal could safely trust so serious and important a duty:—that these exceptions must therefore rest very much with the discretion of the fiscal himself, reference being had to the nature of the duty to be performed, the person on whom it would devolve, if the fiscal found the performance of it impracticable, except at too great a sacrifice, and to the degree of inconvenience which might be occasioned to the public, or to himself, by a personal discharge of the duty in question. L. B. 22 Oct., 1 Nov. 1833.

We have seen *supra*, p. 69, that the D. C. is to furnish the fiscal with the copy of process, together with the original.

A fiscal having referred to the S. C. for instructions, whether *poundage* was still to be levied, and in what manner, on sums recovered in civil suits, he was referred in answer to the memorandum at the foot of the table of fees to be levied in the D. Courts, by which it is provided that the poundage is to be levied “at the rates specified in the rules and orders of 10 Aug. and 19 Oct. 1820.” The fiscal was further informed that the prac-

tice observed in the D. C. of Colombo No. 1 was as follows :—  
The fiscal recovers the poundage, over and above the amount directed to be levied by the writ, which amount of poundage, when returned to the court, the secretary invests in the purchase of a stamp, which he renders unavailable for any other purpose, by writing on it in large characters the word *Poundage*, and attaching it to the proceedings. L. B. 27 May, 9 June 1835.

The duties of fiscals, as regards the calendar of prisoners to be tried before the S. C., are pointed out by the 45th clause of the charter. Application having, on one occasion, been made to a fiscal after a criminal session had closed, and after the calendar had been signed by the Judge of the S. C. and by the fiscal, to alter that instrument, by correcting a mistake which had been made by the registrar of the S. C. in drawing up a sentence, the fiscal declined making the proposed alteration; and on referring the matter to the Chief Justice, before whom the session had been held, received his entire concurrence in the propriety of that refusal. The application had been made by the registrar, in his natural anxiety that the mistake might be set right: But a moment's consideration was sufficient to shew that any alteration of so solemn and important an instrument as the calendar becomes, when it contains the sentences of convicted prisoners, should never be made without the express sanction and order of the Judge, by whom the respective sentences were awarded, and by whom alone therefore, on reference to his notes, any mistake can safely be corrected. L. B. 4 Aug. 1834.

Bonds given to fiscals, under 26 and 27 clauses of reg. No. 13 of 1827, require no stamp. L. B. 11, 18 Dec. 1834; *infra*, title Stamp.

## FORMS.

THE various forms, appended to the rules of practice, may be altered by the D. Courts, to meet the circumstances of any particular case, varying from those of ordinary occurrence. L. B. 22, 25 Jan. 1836, *supra*, p. 160.

## FRAUD.

In what it consists ; is not to be presumed : What practices permitted to buyers and sellers ; page 196—Effect of fraud, in annulling contracts ; mode of redress 197—Against whom 198—No relief, if fraud on both sides 198—Contracts can neither be enforced, nor receded from, for purposes of fraud 198—No law can be made subservient to fraud 199—Deed obtained by fraud ; state of mind of the grantor ; case of circumstances 200.

By this term, in its legal acception, is understood any deceit practised to the injury of another, in any dealing, whether in the sale or purchase of property, or in any other transaction ; either positively, by uttering or intimating a falsehood, or negatively, by concealing or withholding the truth. It is a maxim of the law of England as well as of the civil law (Voet, lib. 4, tit. 3, par. 2) as indeed it is founded in natural justice, that fraud is never to be presumed : It must be either apparent on the face of the transaction itself, or must be proved to the satisfaction of the court. Mere inadequacy of value as regards price, or of price as regards value, (the contract of sale is here selected for an example, as that which produces perhaps more litigation and imputations of fraud than any other) is not of itself conclusive evidence of fraud, though it would naturally strengthen other circumstances tending to that conclusion. Voet indeed (*ubi supra*, par. 1) quoting Ulpian as his authority, seems to consider that in matters of buying and selling, the natural inclination of the contracting parties to overreach each other, as regards price, may be classed among the *doli boni*, which, though not absolutely approved of by the law, are at least suffered to pass with impunity. This doctrine, it must be confessed, goes to the very verge of what is legal, and must at all events be taken with this qualification ; that the means of the "circumvention" must neither include the uttering a falsehood, nor the suppression of any truth, with which the other contracting party would be entitled, according to the nature of the transaction and the custom bearing upon it, to be made acquainted. The owner has an undoubted right to extol his property to the purchaser, who in his turn must be at liberty to depreciate it ; the efforts

of each party amounting in truth but to an expression of opinion and comparison: And to this sort of contest, the doctrine of Voet, it is apprehended, must be limited.

The effect of fraud, when substantiated, is to render null and void, or at least voidable, all transactions of which it forms a part. The civil law, indeed, distinguishes between fraud, forming the very groundwork of the transaction, by which a person is allured or drawn in to contract, and without which he never would have had any intention of contracting at all; and fraud introduced in the course of the bargain, by which the innocent party, though he enters of his own accord into the contract, is deceived in the terms of it, whether as regards price or value, or otherwise: Voet, Lib. 4, tit. 3, par. 3. But this distinction has chiefly reference to the mode of redress by the injured party;—the first, or more premeditated kind of fraud, making the contract null and void from the beginning, as if it had never been entered into, and giving also a ground of prosecution; the second, or incidental kind, not making the contract void from the beginning, but giving only a right of action, founded on the contract itself, to be relieved against the fraud: Id. par. 3 and 4. Considering, however, the absence of all technicality of pleading in Ceylon, and the extensive powers of the D. Courts to give substantial and equitable relief against all fraud, in whatever shape, or by whatever form of words the relief may be prayed, it seems scarcely necessary or useful to take this distinction into consideration, as regards civil redress. The rule may, therefore, be safely laid down, that all contracts, into which fraud is clearly shewn to have been introduced, are, as against the party exercising the fraud, either void or voidable;—in the words of Voet, “are either absolutely null by operation of law, or may be invalidated by judicial restitution,” par 7: Which restitution, as applied to a contract of sale, in which fraud has occurred, he describes in another place, par. 4 ad finem, “to be nothing else than the correction of an unfair price, fraudulently fixed, or the rescinding of the purchase on account of fraud.” (Vide sup. p.175, et seq., where the remedy of the *restitutio in integrum* is more fully discussed.) “If, however, notwithstanding the fraud, the party on whom

it has been practised be desirous to adhere to the contract, considering it still advantageous to him, the covenants ought undoubtedly to remain in force; for every one may relinquish a right, which has been given to him for his own benefit, and which it would be unjust, therefore, to pervert, against his will, to his detriment." *Id.* par 7. This latter principle, it may be observed, has been adopted, and become a maxim, in the law of England.

Taking Voet still as our guide, relief may be sought against the person who committed the fraud, or against his heirs, as far as they have profited by it. And even a minor is answerable for fraud, if he be sufficiently advanced in age to understand the nature of it. Attorneys, guardians, etc., are answerable for frauds committed by themselves; though their clients, wards, etc., are also responsible, as far as they may have profited by them. And if several jointly commit a fraud, each is severally responsible, though satisfaction by one will be a release to all. *Id.* par. 9. The relief which we have here been contemplating is purely of a civil nature, and exclusive of the prosecutions which are often instituted on the part of the crown, for the offence against the public.

This civil relief, however, supposes the fraud to be on one side only, and the other contracting party to have acted in good faith, in which case the law interposes to protect the innocent and defrauded party. But where fraud appears on both sides, the law will not allow either party to plead it, as a mode of annulling a contract; for this would be to permit him to benefit by his own fraudulent conduct, which the law, according to another well-known maxim, never allows. Or, to adopt the view again which Voet takes of the subject, "fraud is, in such case, counterbalanced by fraud, and the reciprocal wrong is neutralized by mutual compensation." *Id.* par. 8. Nor, according to the same author, "can a party complain of fraud, of which he was cognizant; for he cannot be said to be deceived, or to suffer wrong, who acts knowingly, and with his eyes open." *Id.* *ibid.*

The maxim of law just alluded to, that no one can be permitted to avail himself of his own fraud or wrong, is of very

general application, and is not confined to the case of a party wishing to enforce a fraudulent contract. The rule is equally operative in enforcing a contract, where a party attempts to recede from it by means of a fraudulent stipulation, whether introduced into the agreement itself, or entered into collaterally with it. Thus: A woman, having executed a deed, conveying certain lands in the Kandyan provinces to her husband, whose rank exempted land registered in his name from taxes and services, afterwards endeavoured to set the deed aside, as not being intended to operate as a real transfer. But it appearing that she had declared to the revenue commissioner, at the time of the transfer to her husband, "that it was final, and beyond the power of her reclamation," the S. C. considered it clear that if she did intend to make the reservation for which she now contended, her object must have been to defraud the government of the grain tax and road service, and therefore, as the law would permit no one to avail himself of his own fraud, the deed of transfer must be held binding upon her. No. 4707, Kandy, 8 Oct. 5 Dec. 1833. This case was decided on the same principle, as those which sometimes appear in courts of justice at home; where a person, for political purposes, transfers an estate to another, in order to give him a colourable qualification to sit in parliament, with a secret reservation that the land is to be conveyed back to the owner, after serving the temporary object: The law would, however, enforce the conveyance, and consider it as an absolute transfer; for if it did not, or if it allowed the owner to claim the stipulated reconveyance, it would be sanctioning a contract entered into for an illegal and fraudulent purpose.

We have seen, *supra*, p. 94, that dowry property, according to the law of the Malabar districts, is not liable for the husband's debts. But where the husband had sold the dowry property, under circumstances which shewed that the wife must have been cognizant of the transaction, and the wife afterwards endeavoured to rescind the sale, on the ground that she had given her husband no express authority, without which he had no right, by the Mahomedan law, to sell: The S. C. held that if this were admitted as a sufficient ground for annulling the sale,

it would be a gross fraud on the bonâ fide purchaser, a fraud in which the wife would be a participator, and of which she would be allowed to avail herself;—a purpose to which no code of laws could ever be allowed to be applied. No. 2461, Batticaloa, 20 Feb. 1835. See also No. Matele, *infra*, title Husband and Wife, p. 223, 4.

When any deed or other instrument is produced, which is not reconcilable with the usual motives and course of human action, one very material question always suggests itself,—what the state of mind of the person executing it was, at the time of its execution. Mere easiness of nature is not, of itself, a ground of relief against contracts; but where anything like fraud appears in the conduct of the other contracting party, such pliancy of disposition, as would easily be persuaded to its own prejudice, must no doubt strengthen the right of its possessor to equitable protection, and increase the vigilance of courts, in detecting imposition. The following case may perhaps be worth perusal, as shewing how necessary it is for those who claim the benefit of deeds or wills, executed in their favour, to come into court free from all suspicion, as to the mode in which such instruments have been obtained. The question arose on a bill of sale, executed by a Malabar woman in favour of the sons of her late husband's second wife (she herself having been divorced from the husband), in prejudice of her sister and other relations. The deed was executed on 8 Oct. 1832, and she died on the 14th of the same month. The sister brought this action against the two persons, in whose favour the deed was passed, to get it cancelled, on the ground that it had been obtained by fraud, and that no consideration had been given for it. The allegation of fraud rested, in great measure, on the fact that the deceased had been reported insane, for five or six months before her death. The following is the judgment of the S. C. as regards this point, from which the facts will appear, sufficiently to make the grounds of the judgment intelligible: “With respect to the state of mind of the deceased, the evidence of the witnesses is conflicting, and not very satisfactory on either side. For as the question of insanity, except in very decided cases, is a matter of mere opinion, the naked expression of such opinion is not

entitled to any great weight, unless it be followed by an explanation of those facts or circumstances, on which it is founded. But the piece of evidence on this part of the case, which has most weight with this court, is the report made to the late provincial court of Jaffna, in answer to a summons at the suit of Mr. Toussaint, a creditor of the deceased, 'that she was insane.' There may be but too much truth in the observation of the D. Judge, as to the facility with which such reports may be obtained; and if the question now before the court was, whether this woman should or should not be compelled to answer the claim of her creditor, the court would look at such an excuse with the greatest distrust, and would require it to be substantiated by the most conclusive evidence, before it should be received as such. But it must be recollected that, at the time when this return was made by the fiscal, the deceased was residing at the house of the first defendant himself, and under his care. It is impossible, therefore, to suppose that it was made without his knowledge; and if he knew of it, he must have assented to and approved of it. For otherwise, it was his duty to oppose an act, by which a fraud was about to be committed on the creditor, and, at the same time, the privileges of a reasonable being were to be withdrawn from his stepmother (if such she may be called). How then can this knowledge and consent (thus necessarily presumed) be reconciled with the assertion which the first defendant now finds it necessary to make, that she had never been out of her mind? The report of her insanity was returned by the fiscal on 16 Aug. 1832, and she died on 14 Oct. following; and yet, the first defendant asserted and undertook to prove that she never was insane in her life. It is to be regretted that inquiry was not made, as to the source from which the fiscal's officer drew his information of her insanity: But if he did not obtain it through the medium of the first defendant, nothing would have been easier than for that person, who heard the stress laid upon this point when the case was first before the S. C. at Jaffna, to have called upon the officer to give up his authority. No such attempt having been made, common sense points to the first defendant as having sanctioned, if not created, this excuse for his relative's non-appearance, to admit

or deny her bond to Mr. Toussaint. Either, therefore, the first defendant knew that she was insane on 16 Aug., less than eight weeks before she executed the deed in his favour; or else, he has lent himself to a fraud, too base and wicked to entitle him to credit in any other transaction in life." On the other objection, that of no consideration having ever been paid, the judgment of the S. C. enters with some particularity; but as that part of the case turned on the contradictions and improbabilities of the evidence, without involving any question of general law, it is not considered necessary to insert it here. But, on both these grounds, the S. C. felt compelled to differ from the D. C., and to set aside the deed, as not having been fairly and honestly obtained, and therefore void. No. 1448, Islands, 6 Sept. 1834. This decision is not to be considered at variance with the observation made under title Evidence, sup. 138, 9, that the S. C. feels inclined, on points which depend on the credit due to witnesses, to defer to the opinion of the D. C. For in the present instance, the decision of the S. C., as regarded the insanity, proceeded, not so much on disbelief of the witnesses, as on the natural inference to be drawn from the facts as proved;—and on the second point, the contradictions appeared in the evidence adduced on a second hearing, after the original decree of the D. C. had been pronounced. It should be observed that the ultimate decision of the S. C. was concurred in by all the Judges.

We had occasion, under title Debtor and Creditor, p. 94, to notice the distinction between fraud, properly so called, and the breach of a positive law, as regards the annulment of the contract, by which such positive law may have been infringed.

We have also seen, under Administration, p. 8, that an agreement to divide the estate of an intestate in any particular way is void, as being either superfluous, or fraudulent.

See also titles Debtor and Creditor, False Claim, Gaming, Prosecution.

## FRAUDS AND PERJURIES;

ORDINANCE FOR PREVENTION OF, No. 7 of 1834.

Consolidates former regns., page 203—How to decide whether a case be within the ordce. 203—By whom objection may be taken, as to land 204—As to charging one with the debt of another 204—To whom was credit given? 204—Ordce. etc. to be construed liberally, and with reference to intention 205—What writing and signature sufficient on sale of land; case stated 205—Principles may be applied to other subjects of ordce. 207—Distinction between land itself, and mere appendages to land 207.

THE chief object of this ordinance was to consolidate the regns. already in force against Frauds and Perjuries in the Maritime Provinces, No. 4 of 1817, and No. 20 of 1824; and the Proclamation of 28 Oct. 1820, for the same object in the Kandyan Provinces. What few decisions have taken place on this subject, and which are about to be mentioned, arose out of the regns. now repealed; But as the provisions to which they relate have been, with some exceptions, re-enacted by the ordce., and as indeed cases must still be decided by the regns., where the transactions to which they relate took place before the passing of the ordce., those decisions could not with propriety be omitted in this publication. It is not always a plain and easy matter to decide, in the first place, whether a case fall within the laws against frauds and perjuries (vide supra, p. 86, 87, 8); or, if it do, whether, in the second place, the requisites of those laws have been complied with: And the numerous decisions, which appear in the English Reports on the statute against Frauds, shew that this difficulty is not confined to colonial judicature. The first of these questions will best be solved by considering what the evil is, which the regns. and ordce. were intended to remedy; and whether the person, endeavouring to avail himself of these provisions, stands in the situation which it was the object of the legislature to protect. For an objection founded on these laws will sometimes be of no avail in the mouth of the person making it, though it might have been valid, if started by one in a different position. Thus, the

Kandyan Procl. above mentioned required the attestation of two witnesses to any deed for the sale or transfer of land. A deed, therefore, wanting such attestation, could not be enforced by the purchaser against the seller;—the latter person being the party intended to be protected. But where a person, having taken unlawful possession of land, rested his defence to an action brought for the recovery of it, on the ground that the deed of sale to the plaintiff from the original owner, though admitted by the latter to be genuine, was defective as regarded the attestation, the S. C. held that the objection must not prevail;—that if it were admitted in favour of the defendant, any person might seize land to which he had no claim, and if there happened to be a technical omission in any one of the deeds, by which such property might formerly have been transferred, the bonâ fide purchaser or holder of it would be unable to assert his right. No. 416, Kornegalle, 23 Nov. 1833.

On the same principle, we have seen that where the purchaser of goods agreed with the seller to pay the amount to a creditor of the seller's, such agreement could not be considered within the regn. or ordce.; as “a contract charging the purchaser with the debt of another,” so as to make a writing necessary, as between buyer and seller; though the want of such writing would have been a bar to an action by the creditor of the seller, against the purchaser, for the amount of the debt. No. 11850, Colombo, 30 April 1834; supra, p. 86, 7, 8.

This provision, which in our ordce. forms the first branch of the 10th clause, seems to have occasioned at least as many doubts, and therefore as much litigation, on the English statute of frauds, as any other clause of that act. The question which generally arises, in order to decide whether a case falls within this provision, is this: Was the credit originally given to the third person, the defendant only giving his guarantee to the plaintiff for the debt? in which case a written undertaking would be necessary, to make the defendant responsible. Or was the original credit given to the defendant, though the goods were furnished, or the money advanced, etc., to the third person? in which case the defendant is liable, though no writing may have passed. Supra, p. 87, 8, and L. B. 6, 11 Dec. 1833.

This is a question which can only be satisfactorily solved, in general, after hearing the evidence, and after calmly and maturely considering what must have been the intention of the contracting parties. And it should never be forgotten that as these regus., etc., have the prevention of fraud for their object, so they should receive the most liberal and equitable construction; and that an overstrained and technical adherence to the letter of the enactments, instead of a fulfilment of the true spirit and intention of them, would tend to aggravate the very evils intended to be remedied.

As to the second question, what shall be a sufficient compliance with the reg. or ordce., supposing the case to fall within it, the same liberality of construction ought to prevail; and in deciding whether the writing and signature be sufficient, reference should be had rather to what must be supposed to have been the real intention of the party signing, than the strict and technical regularity of the writing, as a promise or agreement. Thus: An action was brought in 1834, to recover possession of two gardens, which the defendant alleged he had purchased of the plaintiff, but which the plaintiff claimed the right of resuming, as the contract had never been completed. It appeared that on 21 March 1832, the plaintiff addressed a letter to the defendant, offering him his gardens for sale for 500 RD, which sum he wished to have before the Cingalese new year (April), and he further requested the defendant to get surveys prepared, desiring also to know when he should attend, for the purpose of signing the title deed and receiving payment;—that on 27 March, the surveyor made his surveys, in which the defendant was declared the purchaser, the plaintiff being present, stating that he had sold the gardens to the defendant, and even desiring the surveyor to insert the defendant's name in the survey;—that shortly afterwards, the notary, by desire of the defendant, saw the plaintiff, who told him that he was ready to sign the deed, on the purchase money being paid; and that the defendant obtained possession, and laid out considerable sums in the improvement of the gardens, to which improvements, however, the plaintiff had made some verbal opposition. Upon these facts, the plaintiff contended that, the contract never having

been finally completed, by the payment on the one hand, and the execution of the deed of transfer on the other, he had a right to recede from his engagement, and to be reinstated in the possession of his gardens. The D. C., adopting that view, gave judgment in his favour. The defendant having appealed, the plaintiff further insisted on Reg. No. 4 of 1817, which enacts that "no promise, contract, etc., shall be valid for the sale or purchase of landed property, unless the same be in writing, and signed by the party making the same, or by some person lawfully authorised by him." The following is, in substance, the judgment of the S. C. as far as it related to this point.

With respect to the first objection, it is to be observed that the non-completion of the contract is attributable at least as much to the plaintiff as to the defendant. The payment of the purchase money, and the execution of the deed of transfer, ought to be contemporaneous acts. (Vide supra, p. 48, 9.) Or the plaintiff might have sued the defendant for the purchase money at any time, on executing the title deed. The only point, on which this court has felt any doubt, has been with respect to the reg. But on consideration, the letter of the plaintiff of March 1832, would seem to be a sufficient contract in writing, followed as that was by the survey, which was an entire acceptance of the offer on the part of the defendant. The stipulation, that the money should be paid before the new year, implied a counter-stipulation, that the transfer should be executed by that time; for no one can be called on to pay the purchase money, until the vendor is ready to make out and give a good title. But if any doubt still existed on this point, it would be removed by the acts of survey. Those instruments, prepared by direction of the plaintiff, by whose desire also the plaintiff's name was inserted as the purchaser, amount, in the opinion of this court, to a "contract in writing signed by a person lawfully authorised by the party." In point of strict law, therefore, this court is of opinion that the defendant is entitled to have the contract fulfilled. As a matter of fairness and equity, there could not be a moment's doubt. It would be the height of injustice to allow a person to go to great expense for two years in the improvement of land, with only the feeble opposi-

tion which the plaintiff appears to have made; and then to turn him out, on the ground of non-completion of the contract, which is attributable full as much to the seller, as the purchaser. It was accordingly decreed that the defendant should remain in possession of the gardens, and that on receiving a good title from the plaintiff, he should at the same time pay the plaintiff the sum of 37*l.* 10*s.* (the purchase money) with interest from March, 1832. No. 109, Caltura, 27 Aug. 1834.

There are a multitude of English decisions on this point, not all of them quite consistent with each other. But they seem fully to recognize the principles on which the above decision proceeded:—First, That where the contract rests on correspondence between the parties, it is sufficient if such correspondence, upon a fair interpretation of it, imports that the agreement is actually concluded, and no longer rests on bare treaty and negociation. (See 2 Vesey and Beames, 341.) Secondly, That a writing in the hand of the party himself, amounting to an agreement to sell or purchase, is sufficient, though not literally signed by him. (See 1 Esp., 189; 1 Russell and Mylne, 625; 18 Ves. Jun. 175.) It is to be observed, that the foregoing case arose out of the reg. of 1817; and that the ordce. which has repealed both that reg. and No. 20 of 1824, adopts the provisions of the latter reg. as to requiring *all* instruments, effecting the sale, purchase, etc. of land, to be executed before a notary, and signed by two witnesses; or if there be no notary in the district, to be signed by two witnesses. The principles may, however, still be of use, as applicable to the several branches of the 10th clause of the ordce.

In considering the applicability of the *land* clauses of these laws, it sometimes becomes necessary to distinguish between the land itself, and those privileges or advantages which, though derived from the land, are yet not identical with or inseparable from it. Thus, where a plaintiff complained of being disturbed in his possession of a boutique in a public bazar, which he had bought by verbal sale from the defendant, and where he had sold goods for three years, the D. C. dismissed the action, on the ground that the sale was a fraud on the stamp reg. No. 4 of 1827, s. 5, which requires that every deed, etc., purporting

to convey a title to lands, etc., shall be on stamp. On appeal, however, the case was referred back to be proceeded with in the D. C. The S. C. observed, that the 5th clause of that reg. only required that conveyances of *land* should be on stamp, and the 9th clause provided that no contracts need be reduced to writing, except such as were then by law required to be in writing. The question therefore was, whether this were such a contract. The reg. against frauds, indeed, required that all conveyances of land should be in writing. But it appeared that the present transfer was not of land, but of the mere construction in the shape of a boutique, erected on the spot by the permission of government, to whom the soil, it must be presumed, still belonged. If the plaintiff had endeavoured, by virtue of this sale, to establish a right to the ground on which the boutique stood, the objection might be fatal; but the seller had stated that he gave up the boutique to the plaintiff, on merely receiving the expenses he had incurred in erecting it. If then the plaintiff's claim did not extend to the ground, but was limited to the building, and to the right to carry on trade there, like the holder of a stall in a fair or market, nothing in the stamp reg. would interfere with the enforcement of such claim. No. 964, Jaffna, 25 July 1835.

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## GAMING.

Prevalence of, in Ceylon, page 208—Modes of repression; security for the peace, prosecution of gaming houses, etc. 209—General police ordce. 210—By the civil law, money won at play can neither be sued for, nor, if paid, be recovered back, unless fraud 211—And security, etc., for payment void 212—So, as to wagers, and stake-holders 212—English law 212—Distinction between private and public gaming 212.

THE prevalence of this vice among the native inhabitants of Ceylon, and the crime and misery which are its constant attendants, have occasioned the subject to be several times brought to the notice of the S. Court; both by D. Judges, in their anxiety to know how these disorders were to be repressed, and by the peaceable inhabitants of country places, infested with

gaming houses. And though the answers, which the Judges directed to be returned, were far from what they would have wished them to be,—being, indeed, suggestions of what the law ought to be, rather than of any existing and efficacious remedy for the evil complained of,—it may still be not wholly useless to the D. Courts, to know the view taken of this serious subject by the S. C., in the absence of any positive law to regulate it.

In Sept. 1834, a petition was presented to the Chief Justice by the inhabitants of Pilliagodde and the neighbouring villages, complaining of certain persons, for allowing and enticing the inhabitants to assemble in their houses and gardens, for the purpose of gaming. The C. J. referred the petition for inquiry to the D. J. of Colombo, who inquired into the matter, and finding that the complaint was well-founded, requested instructions how he ought to proceed. He was informed in answer, “That sufficient evidence of disorderly practices by the defendants appeared on the face of the depositions, to require that they should be called upon to enter into their personal recognizance, in the usual amount, with reference to their condition and circumstances, for their peaceable and orderly conduct in future; and that the police officers should be directed to keep a vigilant eye upon the premises in question, and in case of any the slightest breach of the peace or disturbance taking place there, to apprehend the parties concerned, and bring them forthwith before the D. C.;—that places of this description would most naturally fall under suspicion, in case of robbery, as the receptacles of stolen property, since it was well known that, while the propensity for gaming was one of the most frequent incentives to theft and robbery, the gaming house often furnished the means of disposing of the plunder;—that the difficulty, if not impossibility, of repressing the vice of gambling in private was undeniable, but that a house or other premises, publicly kept for the express purpose of enticing gamblers to congregate, and of furnishing them with the means of ruining themselves and their families, and afterwards driving them to the commission of crime, constituted a nuisance, a pest, which the laws of no well-regulated state would tolerate;—that, at present, there seemed

to be no express law against these noxious establishments, at least out of the larger towns,—a defect which would probably be remedied by the first ordinance, which might be passed for regulating the general police of the island ;—that the sanction which, to a certain degree, unfortunately, might be considered as having been given to these institutions by the gaming rents, while they were in existence, would naturally make the courts unwilling to be extreme in their rigour towards offenders, who might possibly consider the abolition of the monopoly which the rents practically kept up, as a virtual permission to any person to keep a gambling house who pleased ;—but that the defendants ought to be given to understand, and *that* in the most public manner, that standing as they did, to say the least of it, on the very utmost boundary line between what was lawful and what was illegal, their conduct would be most narrowly watched, and that any infraction of the public peace, which might be proved against them, or be traced to them as the originators of it, would be visited with much greater severity, than if committed by persons, whose ordinary habits were those of honest industry.” Answers to the same purport were sent to similar inquiries from other D. Judges. L. B. 20, 29 Sept. 1834. Id. 16, 28 Feb. 1835, and 26 Aug. 1 Sept. 1835.

The measure contemplated in the foregoing letter, of an ordinance for regulating the police of the whole island, has, in all probability, been before now effected. The executive government, it is well known, was long anxious that such provision should be made; though the difficulty of legislating on such various subjects for a whole population, divided into distinct nations, and varying so much in laws, customs, and habits, had prevented the execution of it up to the early part of 1836.

The only case on the subject of gaming, which has occurred in the courts of Ceylon, within the recollection of the writer of these notes, was an action brought in the D. C. of Pantura on a wager of 40 RD., won by the plaintiff on a cock-fight, from four defendants, one of whom was described as the *renter* ;—which it is presumed meant the tavern-renter, since the gaming rents are now happily abolished. The defendants pleaded payment, which was proved to the satisfaction of the D. C., and the action

was accordingly dismissed. The plaintiff appealed, on the ground that the payment had not been sufficiently proved; but the S. C., as may be supposed, was not inclined to disturb the decision, so that it was unnecessary to consider the question, whether this action could have been maintained, supposing the fact of payment had not been established. If such necessity had arisen, the C. J., before whom the case was heard in appeal, would have felt bound to express a very strong opinion against it. Upon this subject, the reader can consult Van Leewin, p. 371, 2, and Vander Linden, 311. But the authority of Voet seems to be conclusive on the point, as regards those districts, at least, in which the R. Dutch law prevails. In his title "Concerning Gamblers," Lib. xi., tit. 5, after shewing the distinction between games of skill and strength, which were allowed by the Roman law, and games of chance, which were held unlawful (par. 1 and 2),—a distinction which also existed in the ancient common law of England,—he enumerates the various penalties, to which gamblers, and those who encouraged gambling, were formerly subject. Among others, the house kept for public play was confiscated, and the keeper of it could have no redress, civil or criminal, for any robbery, assault, or other loss or injury, which he might have sustained while it was so employed; par. 3. This rigour, he tells us, had been softened down in more modern times, though the dishonest character (for such the law designates it) attached to gamblers and gaming-houses still remains: So that neither money lost at play can be sued for at law, nor, on the other hand; can such money, if once paid, be recovered back; because, as both parties, winner and loser, are equally criminal, and as no right of action can be founded on an illegal consideration, the party in possession is considered to be in the preferable situation: But if it could be proved that the winner was indebted for his success to foul play, whether in gambling for money or anything else, the loser could scarcely be denied his right to recover back his losses; for, in that case, the players would not be equal in delinquency, nor ought the winner, loaded with the infamy of fraud, in addition to the disgrace of gaming, to be left in a better situation than the loser, who is only open to the latter imputation; par. 6. As the law

will sanction no obligation founded on gaming, so neither will the promise to pay money lost at play derive any additional force from sureties, pledges, or any other securities; which, on the contrary, may be recovered back or annulled, without payment of the money lost. Par. 7. The same stamp of illegality, which is thus affixed to the players themselves, and the same inability to sue for what is won or lost, attach also to those who *bet* upon games of chance; for such wagers are but another kind of gaming, and rest on an equally corrupt foundation. Par. 8. If the betters deposit the object of their illegal wager with a stakeholder, and he pays over the stake to the winner, the latter is entitled to retain it, as he would have been, if he had been paid by the loser; but either party, at any time before payment, even the loser after the bet is decided, would have a right to retract, and to call on the stakeholder to pay back to him whatever he might have deposited, instead of paying it over to the winner. Par. 9. Such is the R. Dutch law on the subject of gaming, as laid down by Voet. It would be well if the natives of Ceylon were aware that, in the pursuit of their favourite vice, they must expect no favour or support from the law in gaming disputes, even when they have right (as between gamblers) on their side. The English Acts of Parliament, passed for the suppression of gaming, go further than the civil law; for not only can no money lost at play be recovered by action, but the loser of any sum amounting to 10*l.* may recover it back from the winner with costs, 12 Geo. II. c. 28; or any person losing or winning 10*l.* at one time, or 20*l.* in 24 hours, may be fined five times the amount. It may, however, be doubted whether any laws that could be devised would be sufficient to repress gaming in *private*; at least without a degree of inquisitorial and vexatious interference with domestic habits, which would be wholly inconsistent with English feelings of independence and mode of government. But as regards houses or other places devoted to *public* gaming, there can be no reason why laws should not be framed and enforced, amply sufficient for the suppression of these nuisances. The experiment is now in a course of trial in the French capital, where the licenses to gaming houses, which till lately disgraced the government, are

entirely abolished, and all such establishments are declared to be illegal. If the reformation prove incomplete, it will be owing, as in London, to the defective execution of the laws, rather than to the laws themselves.

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## GANGSABÉ.

See Arbitration.

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## GOVERNMENT.

Parties, succeeding against govt., recommended for their costs. *Supra*, p. 74, 5.

Grant of land, not necessarily conclusive in favour of the grantee, see title Land.

Clause in grant against alienation does not prevent sale in execution, *supra*, p. 163, 4.

Distinction between claim by govt. to property seized in execution, and claims by private parties, *supra*, p. 167.

Proof necessary to shew that a person is authorised to certify documents in his official capacity. See judgment in *Gibson v. Rodney*, *infra*, title Nantissement.

The S. Court has refused to receive a complaint by an officer of government, as to his dismissal from office: But where a complaint was preferred against a government agent, the S. C. referred it to the king's advocate. *Petition Book*, 1835, p. 128.

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## HABEAS CORPUS.

See title Imprisonment.

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## HEARING.

See Evidence, Practice, and other titles.

## HUSBAND AND WIFE.

Marriage, what valid between natives; Reg. 9 of 1822, page 214—Suit for divorce from forced marriage 214—Objections to registration; mode of proceeding 215—Bans, evidence of promise of marriage 216—Marriages, prior to Reg. how proved 216—If legitimacy questioned, some proof of marriage required 217—In Ceylon, wife may possess property, contract, sue, etc. 218—Deeds of separation binding on both, and husband not liable for her debts 219—Abandonment by husband; decree thereon 220—Among Moors; right to dowry property on separation 221—Kaycooly; right of widow and children 222—Dowry not liable for husband's debts 222—Unless fraud appear: And so seems the Kandyan law as to wife's property 223—Similar question in Batticaloa 224—Wife's land not divested out of her, by being registered in husband's name; nor liable to be confiscated for husband's treason (Kandyan) 224, 5—Husband and wife, joint parties, may appear for each other 225.

THE same difficulty, which prevented the writer of these notes from attempting to lay down any forms of procedure, under the 5th section of the rules of practice, touching the matrimonial jurisdiction of the D. Courts, still presents itself to him, in endeavouring to discuss in any general terms, applicable to the whole Island, the subject of Husband and Wife;—the variety of laws and customs, namely, by which marriages, and the questions incidental to that state, must be governed in Ceylon, according to the race or class, to which the parties may belong. He can therefore do little more than mention such cases, as appear by the records of the S. Court to have been decided on this subject.

As regards the question, what shall be considered a legal native marriage, the reg. No. 9 of 1822 enacted that no marriage in the Maritime Provinces, between natives, subsequent to 1 Aug. 1822, should be valid, so as to convey any right of property, unless registered as therein directed; and that, on the other hand, such registry, as well as that made in former registers or *Thombos*, if followed by cohabitation, should be sufficient evidence of marriage between natives, of whatever religion, sect, or cast, subject to exceptions as to affinity, etc. A D. Judge applied to the S. C. for instructions, under the following circumstances: A boy and girl, Malabars, both young, though their precise ages did not appear, had applied to the

D. C. to procure a dissolution of their marriage, which they both stated they had been compelled by their respective parents to enter into, though both were equally averse to the match. The marriage had been registered according to the reg., due publication having been previously made, in pursuance of the 6th clause. The D. J. doubted whether he had authority to annul marriages (vide infra, title Jurisdiction), and even if he had, whether sufficient grounds appeared for the annulment in the present case. The answer returned to this inquiry was, That as regarded the reg., it would seem that the marriage of these parties was not as yet complete, the registration not having been followed by cohabitation, such at least being the inference to be drawn from the libel and answer. The D. Judge was therefore recommended to call the parents of the parties before him, and to take evidence, if it should be necessary, as to that fact. If cohabitation had taken place, the marriage would seem to be complete; If it had not, the question would then arise, whether Tamul parents had the power of compelling their children to marry, contrary to their inclinations; a power which it was impossible to suppose could exist. It would be well, however, to inquire into the customary law of the Northern Province, as to the extent of the parental authority in this respect, and also whether any cases had been decided in the late Provincial Court, which might serve as precedents. L. B. 6, 13 Sep. 1834. What the result of this inquiry was, had not been made known to the S. C. before the writer left Ceylon.

The 9th clause of the reg. directs that any objection to the registration of a marriage shall be forthwith reported to the court, in order that the person objecting may be called on to substantiate his objection within ten days. A D. Judge inquired whether it was intended that parties should institute a civil action in the usual manner, to obtain damages, as provided by the 10th clause; or whether the objection should be heard summarily, and without stamps, in the manner of a criminal prosecution. On inquiry, the practice of the D. C. of Colombo was stated to be, "That on the objection being reported to the court, a notice issues to the opponent, or person

objecting, calling on him to substantiate his objections on a day appointed: This notice issues without stamp; but the objections, if reduced to writing, and all subsequent proceedings, must be on stamp." This, it will be observed, gives the proceedings the shape of a civil action, in which both the validity of the objection, and the claim of the marrying parties to damages under the 10th clause, if the objection be found to be false or frivolous, may be considered and decided. As there seemed nothing unreasonable or objectionable in that course, and as it was requisite that the several D. Courts should, in every practicable particular, adopt uniformity of practice, it was recommended to the D. Judge who made the inquiry, to pursue the same mode of proceeding. L.B. 25 Sept. 1 Oct. 1834.

In an action for a breach of promise of marriage, which the D. C. had dismissed, as insufficiently proved, the S. C. was inclined to hold that the publication of bans, in pursuance of the reg., both parties being present and assenting at each of the three publications, was sufficient evidence of a promise; but as the plaintiff had further evidence, which her proctor had waived as unnecessary, the case was referred back for the reception of it, after which the D. C. gave judgment for the plaintiff. No. 1134, Caltura, 24 June, 26 Aug. 1835.

The reg., it is to be observed, has no retrospective effect; and with respect to unions between natives, prior to August 1822, it would be hopeless to expect, and cruel to require, in all cases, any thing like regular and satisfactory proof of the marriage ceremony having been performed. It is not always easy to ascertain, what rites and ceremonies are necessary for the validity of the marriage contract, among the lower classes of natives. And as regards the ancient registers or *Thombos*, every day's experience shows how little they are to be relied on in themselves, and how frequently and easily they were falsified. Accordingly, in a case in which it was attempted to impeach the right of the occupants of certain gardens, on the ground that the children of the original proprietor were stated in the *Thombo* extract, several generations back, under the Dutch government, to have been born out of wedlock, the S. C. refused to allow the objection; observing that half the natives in the

island perhaps might be dispossessed of their property, if it were necessary for them to prove a regular marriage between their parents. No. 6715, Colombo, 6 Jan. 1836, to be mentioned more fully under title Land, or Prescription.

Where, however, the legitimacy of persons now living is disputed, and becomes a material question, they should be prepared to offer some evidence, either of the actual marriage of their parents, or, supposing the union to have taken place before the reg. was passed, of facts, from which a marriage may be inferred: Which being done, the law will presume legitimacy, unless the contrary be shewn; as we have seen *supra*, p. 109, 10, 120: Thus, the sons of a person who had died intestate having applied for administration, and being opposed by the sister of the deceased, on the ground that their mother had not been married to their father, the D. C. decided that it was for the sister to prove the illegitimacy. But the S. C., considering that the burthen of proof did not rest wholly on the sister, modified this decision, and referred the case back to the D. C., in order that the sons might be called upon to offer *some* evidence of the marriage of their mother, or of her having been treated by the father, and considered by the neighbours, as his wife, according to the custom of the country, and of the class to which the parties belonged. This evidence having been offered, —and the D. C. might safely content itself with slight evidence to this point,—the presumption of law would be, that the sons were the issue of that lawful connexion, unless the sister could offer positive evidence of their having been born out of wedlock. No. 1922, Chilaw and Putlam, 3 Dec. 1834.

The marriage, however, being established, the state of husband and wife in Ceylon (laying out of the question marriages solemnized elsewhere, each of which must be governed by the law of the place where it occurred) exhibits a very different view, as regards the relative rights and powers of the parties, from that which the English law of marriage presents. According to the latter, husband and wife are looked upon as one person; the very being or legal existence of the woman being suspended during the marriage, or rather incorporated and consolidated with that of the husband: So that, as a general rule,

the wife can possess no property independently of her husband, nor can she either contract with him, or with a third person, without her husband, or by his consent, express or implied. Whereas in Ceylon, the wife may possess property in her own right, may contract with and sue third persons in certain instances without her husband, may contract with and sue her husband himself, and if successful, may even have execution against his property, though not against his person; *supra*, p. 160, 1.

As regards the power of the wife to sue third persons: A married woman brought an action in the D.C. of Batticaloa, for the recovery of an inheritance in her own right, without her husband, who was however living with her. The D. Judge, being doubtful how far this proceeding could be considered regular, and the defendant having pleaded in bar of the action, applied for instructions, whether the libel should be amended by the insertion of the husband's name as joint plaintiff, or whether the case might be allowed to proceed in its present form. The S. Court directed an answer to be returned, That the necessity of joining a husband in an action by his wife must depend, to a certain degree, on the situation of the parties, and on the source from which the right of action is alleged to be derived;—that if, for example, a husband were out of the country, or had abandoned his wife, or were legally separated from her, or had refused without any just ground to join in the action, the wife ought not to be debarred from suing as a single woman, more especially if the property sought to be recovered by her, as appeared to be the case in the present instance, were claimed in her own right, and not in that of her husband;—that the better course, therefore, would be to call upon the plaintiff to state the circumstances, under which she was living with reference to her husband, and the reason why he had not joined in the action, and then to call on the husband either to become a party, or to assign his reasons for refusing;—that the result of that inquiry would, most probably, enable the D. Court to decide on the propriety of allowing the action to proceed, at the suit of the present plaintiff alone;—but that if any difficulty still remained, as to the proper course to be pur-

sued, the S. C. would most readily assist the D. Judge, with any further advice which he might require. L. B. 11, 23 June 1834. The case not having been again referred to the S. C., it is presumed that it proceeded without further difficulty.

With respect to the right of the wife to sue her husband: An action was brought by a married woman against her husband, for the arrears due on a bond, entered into by him on their separation, for her maintenance. The husband demurred to the action, contending that, though the bond was executed by him, he could not be sued upon it by his wife. The D. C. however gave judgment for the plaintiff, and on appeal the S. C., after consultation among the three judges, was prepared to affirm the decision, as regarded the right of action by the wife; but the matter was compromised. No. 839, Galle, 11 Sept. 1835.

But where a deed of separation has been entered into, the wife must consider it as binding on her, as well as on her husband; and if she exceed the allowance, she will have no right to look to her husband, to make good the deficiency. A separation took place in 1830, on which the husband, under the sanction of the then court of Kandy, agreed to allow his wife 20 RD. monthly, out of a salary of 85 RD. In 1832, the wife instituted a suit in the court of the judicial commissioner of Kandy, for an increase of allowance, and also to compel her husband to pay her debts, amounting to 250 RD. As to the first demand, the court of Kandy was of opinion that the allowance was sufficient: As to the second, the husband agreed to pay off the debts, by a further monthly instalment of 10 RD., which was accordingly sanctioned by an order of court. The wife appealed as to both demands, contending that 20 RD. were insufficient for her monthly allowance, and that her creditors would be importunate for immediate payment. The S. C., however, agreed with the D. C., that 20 RD. were as much as could be reasonably awarded, with reference to the defendant's salary: And as regarded the second point, the S. C. affirmed the order with this modification; that the new instalment of 10 RD. should be paid, not to the wife, but to the secretary of the D. C., or to some other person, authorized by the D. Judge to receive it, and who should pay over the sums so received in

*Morgan v*  
*cut. 54*

liquidation of the wife's debts. The S. C., so far from considering that the wife had any ground of appeal against the decision of the judicial commissioner, was very doubtful whether, if the case had come before it, as a court of original jurisdiction, it would have considered the defendant to be liable at all for these debts. It observed that, though separations between man and wife were not to be encouraged by courts of justice, yet when once they had been entered into, and had received judicial sanction, they should be adhered to on the one side, as well as on the other;—that when a wife received a separate maintenance, declared by a court of competent jurisdiction to be sufficient for her support, and to be fairly proportioned to her husband's means, she was bound to make that allowance suffice, and if she contracted debts, she, and not her husband, ought to be responsible for them;—that those who gave credit to a woman under such circumstances knew, or ought to know, that their claim against the husband was at best but a doubtful one, and it was their duty to inquire of the husband whether, if they trusted the wife, they might do so with his consent, and on his responsibility;—and that if this were otherwise, a woman might incur debts, which could only be satisfied by the consignment of her husband to a gaol. No. 4569, Kandy, 7 Dec. 1833. The principles here laid down are recognized, as regards the non-liability of the husband, even in England, where the wife is so much more dependent and irresponsible, than in Ceylon;—and this, though there be no deed of separation. 4 Camp. 70; 3 Esp. 250.

In an action by a wife against her husband, for having abandoned her and their children, the defendant denied the marriage; but that fact being satisfactorily established, the D. C. decreed in affirmation of it, and directed further, “that the wife be quieted in the possession of the garden and house in which she now resides, and of the field held and possessed by her.” On appeal, the S. C. affirmed the decree, as far as declaring the plaintiff to be the lawful wife of the defendant, but observed, with respect to the house and land, that the decree seemed to go further than the evidence (which was very weak as to the wife's possession) or the relative situation of the par-

ties, would warrant; that the exclusive right of possession, which the decree would give the plaintiff, of property, too, not proved to have been her's originally, seemed somewhat inconsistent with the relation of husband and wife, which it was one of the objects of the suit to establish, and might, as was urged by the appellant, operate as a hardship upon the defendant's other relations. That part of the decree was therefore thus modified: The defendant should be compelled to support the plaintiff, as his wife and the mother of his children, and to allow his said wife and children to reside in his house; if he refused or neglected so to do, the D. C., on complaint of the wife, would then award her a reasonable proportion of the defendant's property; or, if he should again abandon his wife and children, the plaintiff should, *in that case*, be maintained in possession of the estate mentioned in the decree. No. 64, Ratnapocra, 3 Sept. 1834.

Between Moorish parties:—Husband and wife having separated, the wife's father sued the husband for the dowry, which he had granted to the defendant on his marriage; and he relied partly on his right, as a matter of customary law, partly on an alleged agreement, entered into by the defendant on the separation, to give up the dowry. The D. C. dismissed the action; on the ground that, whatever right the *wife* might have to the dowry, the father had no claim upon it. On appeal, the S. C. made the following order: "That the case be referred back to the D. C., in order that evidence may be received on both sides, as to the circumstances under which the separation took place, and of any agreement into which the defendant may have entered, as alleged by the plaintiff. The court has consulted the Moorish assessors this day in attendance, eight in number, who have given their unanimous opinion on the following points, which may perhaps assist the D. C. in the prosecution of the inquiry: First, That if a wife leave her husband by her own desire, and contrary to his wishes, neither she, nor any one on her behalf, can claim any return of the dowered property: Secondly, That if the husband turn his wife out of his house, or, which is the same thing, if he desert her, she, or any one duly authorized to act on her behalf, may recover back such

property: Thirdly, That if they separate by mutual consent, such separation should be made the subject of an agreement, specifying the terms on which the separation was to take effect, and the proportion of property to be restored by the husband to the wife. After hearing the evidence, the D. C. should record its opinion, and that of Moorish assessors on the law or custom, applicable to the case as it will then present itself, and the proceedings will then be returned to the S. C.’ No. 98, Madawalenne, 9 May 1835. Up to March 1836, however, the proceedings had not been returned to the S. C.

An action was brought in the D. C. of Chilaw and Putlam, for a garden, which the plaintiff alleged had been granted first to his brother on his marriage, as *Kaycooly*, and after his death, and on the marriage of his widow by the plaintiff, had been, in like manner, granted to himself: And he endeavoured to establish his case, by proof of a verbal agreement by his father-in-law to give him the garden on his marriage, and also of possession. The D. C. considered the evidence insufficient, and dismissed the action. On appeal, the S. C. consulted assessors at Colombo, as to what would be the law or custom regulating the *Kaycooly* under such circumstances: Whether it would go with the widow to the second husband; or remain her separate property; or revert back to her father, who would be empowered to grant it again to the second husband? The assessors were of opinion that, on the second marriage, the *Kaycooly* ought to be secured to the child or children of the first marriage; but that, at all events, it became, on the death of the first husband, the absolute property of the widow and such children. The decree was affirmed. No. 4907, Chilaw and P. 26 June 1834.—These decisions, if so they may be called, are not sufficiently definite or precise, to be very satisfactory as authorities. But the writer is unwilling to omit a single recorded case, which goes any way, however short, towards assisting the future solution of questions of a similar nature.

It has already been mentioned (p. 94) that, according to the law of the Malabar districts, dowry property is not liable for the husband’s debts. The question arose on a prisoner for debt applying to the D. C. of Jaffna, to be discharged under the in-

solvent reg. 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 his schedule. The C. J. felt compelled to dissent from the opinion of the D. C., considering that one-half of the proceeds of the dowry 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 fuller consideration at Colombo. Having accordingly referred it to assessors there, 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 C. J. found that the decision of the D. C. of Jaffna was fully warranted by long established usage, and that the dowry property, and the rents and profits arising from such property, had constantly been excluded from the statements given in by insolvents. Without entering, therefore, into any discussion of the justice or equity of such exclusion, the S. C. was bound to affirm the decree of the D. C., as being supported by law, in the shape of constant and invariable custom. No. 2089, Jaffna, 15 Oct. 1834.

But a sale by the husband of dowry property, with the knowledge and assent of the wife, was considered by the S. C. binding on her, because if she were allowed to disavow such sale, she would be permitted to avail herself of her own fraud: *supra*, p. 199. A question of a somewhat similar nature arose in the court of Matelé. A woman claimed certain property as her own, which had been sequestered for the debt of one Wattua, with whom, as she alleged, she was cohabiting. In support of the sequestration, it was alleged that Wattua and the plaintiff were man and wife. From the evidence, the fact of the actual marriage remained doubtful; but it appeared that these two persons had been trading in partnership together, and that the property had been mortgaged on deeds executed by them jointly; though, Wattua having been declared bankrupt, the dealings were afterwards carried on in the plaintiff's name only, there being no doubt, however, that both were interested.

The court of Matelé, taking into consideration the joint mortgages, the joint trading, and the nature of the transactions in which they had been engaged, was of opinion that the property claimed might lawfully be disposed of, in satisfaction of Wattua's debts: And that the fraud, in which the plaintiff had participated, precluded her claim to exemption under Kandyan law, according to which the property of the wife would not, otherwise, have been liable for the debts of the husband. The S. C., when the case came before it in appeal, fully concurred in the view taken by the court below, observing that it was unnecessary to consider whether the plaintiff were really the wife of Wattua, or not; for her participation in his commercial speculations, and, it was to be feared, in his fraudulent evasion of the payment of his just debts, were too palpable to admit of a moment's doubt. No. Matelé, 25 Nov. 1833. It will be observed that the foregoing judgment of the Matelé court lays down, incidentally, the general principle, that by the law of Kandy, the wife's property is not liable for the husband's debts.

Property having been seized to satisfy an execution issued against a Conicoply in the district of Batticaloa, part of it was claimed by a woman, who admitted that she was the wife of the Conicoply, but averred that she had been separated from him for three years. The D. C. dismissed her claim, on the ground that the goods of the wife were liable for the husband's debts. On appeal, however, the S. C., on the strength of the previous decisions, which seemed to favour a contrary conclusion, at least in other districts, referred the proceedings back to the D. C., in order that it might be ascertained whether the wife had actually been separated and was living apart from her husband, at the time when judgment was recovered against him; and also whether, by the customary law, prevailing in the district of Batticaloa, the property of the wife would be liable for the husband's debts under such circumstances. No. 2912, Batticaloa, 11 Nov. 1835. The result of this inquiry was probably transmitted to the S. C., after the writer left Ceylon.

The following question was submitted to the S. C. by the D. Judge of Badulla: Land, stated to be the inheritance of a fe-

male, but entered in the public register in the name of her husband, was confiscated as his property, on his being convicted of treason under the British government; was this confiscation legal or otherwise? According to Kandyan law, the D. J. added, the property of all the family was frequently confiscated, if one member of it was guilty of treason. The opinion of the S. Court was conveyed in answer to the D. J., First, that the entry of the land in the register, as the property of the husband, would not affect the real right to it, supposing that right to be satisfactorily proved to reside in the wife, or in any other person;—unless indeed the wife, or other person, had procured or assented to the registration in the name of the husband, for a fraudulent purpose, *supra*, p. 199: Secondly, that if the property really belonged to the wife, it could not be legally included in the confiscation of the husband's property, more especially as this was an act of the British government; and that even supposing the confiscation to have taken place under the Kandyan government, and subject to the law or custom alluded to by the D. J., a court of justice would require the sentence of confiscation to be clear and explicit beyond all possibility of doubt or ambiguity, before it would go so far as to include in the confiscation of the traitor's property, lands or goods belonging to his wife or relations. L. B. 19 May, 2 June 1834.

The question was submitted to the S. C. by a D. Judge, whether, with reference to the 1st and 4th rules of sect. 1, husband and wife might appear for each other, or one of several brothers or other relations for the rest, where they were joint parties to a suit: And whether an exception should not be introduced into these clauses, allowing such representation, on production of powers of attorney. The D. Judge was informed in answer, That there appeared no necessity for any express exception to the effect proposed;—that if the husband and wife sued, or were sued, together, no objection ought to be made to one of them appearing for both, unless the adverse party claimed his right of examining both, a right which he undoubtedly possessed, and which, if insisted upon, would make the attendance of both parties indispensable;—that the same observation applied to brothers, or to any other sets of relations

or of parties, subject still to the necessity of attendance by all, if the adverse party or the court demanded their examination, or if the court should entertain doubts, whether the party appearing were really authorized to represent the others;—that if the husband and wife, the brothers, or other relations, were not joint parties, then the one ought not to be allowed to represent the others, because, if he were, the D. C. would be thrown open, as the late sitting magistrates' courts were, to any persons, however incapable or irresponsible, whom parties might elect to represent them. L. B. 12, 14 Dec. 1835.

As to the jurisdiction of the D. C. in matrimonial suits, see title Jurisdiction.

And see further, as to the rights of married women, especially Kandyan, title Land.

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## IDIOT.

See Lunatic.

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## IMPORT DUTIES.

See title Prosecution.

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## IMPRISONMENT.

False imprisonment, what is;—process, informal, or issued without authority;—officer, etc., when liable;—remedy; by action, prosecution, habeas corpus.

SEE titles Assessors, p. 42, Bail, Contempt, Execution, Debtor and Creditor (insolvents), 91 et sequ., Jurisdiction, Prosecution.

As to solitary imprisonment, see Jurisdiction.

False imprisonment is the legal term for any arrest, confinement, or detention, of a person, without lawful authority; whether it be a confinement, in the ordinary acceptation of the word, either in a prison, or private house, or a mere forcible

detention in the street or any other place. And an imprisonment, originally lawful, may become illegal, either by being prolonged beyond the period prescribed by the authority ordering it, or by any circumstances of cruelty or unnecessary severity.

The law of England makes a distinction between process of arrest, issuing from a court possessing jurisdiction in the matter; but the process itself being informal; and process issuing out of a court possessing no jurisdiction: In the former case, the officer, executing the merely irregular mandate, is not liable to the party wrongfully imprisoned; in the latter case, he is held responsible, because the proceeding emanated from one who had no judicial authority at all in the matter. Without presuming to question the wisdom of this distinction in England, where the officer, serving the process, may be supposed capable of understanding the limits of jurisdiction, allotted to the respective courts, it would seem to be highly unreasonable to expect any such powers of discrimination from the Peons attached to the courts of Ceylon. They must necessarily take it for granted that the court has authority to issue the process, which it puts into their hands to execute; and they seem therefore to stand, in this respect, on a different footing from D. Judges, when called upon to co-operate with other D. Courts in the execution of process, as we have seen above, p. 98. Any redress therefore for false imprisonment, under such circumstances, should be sought for from the court, which has issued process without legal authority. If indeed a peon, or any other subordinate officer, or any private person, take upon himself to arrest another of his own authority, without any warrant for that purpose, he does so on his own responsibility, and will be justified, or the reverse, according as there shall appear to have been good and legal ground for the arrest. Every one has the right, and is even bound to use his utmost endeavours, to arrest another, whom he sees committing a breach of the peace, or any other offence of a higher nature. (The English distinction between *felony* and *misdemeanour* is not recognized in Ceylon. See title Felony.) But if the act, which formed the ground of arrest, turns out to be innocent, or if the wrong person be ar-

rested, the officer or other person arresting is guilty of false imprisonment.

The remedy for the person, so unjustly imprisoned, is either by civil action for damages, or by prosecution at the suit of the crown, or by both. See title Judgment, p. 247, 8. And the damages or punishment to be awarded must necessarily depend on what the intention of the party arresting is proved, or may be presumed, to have been; that is, whether he appears to have acted from malice, or from interested motives, or from ignorant officiousness, or from a well-meaning, but mistaken desire to do his duty;—and the question of damages must also depend, in great measure, on the degree of injury sustained by the person arrested. If, however, the person wrongfully arrested be detained in illegal imprisonment, he has a remedy much speedier than either action or prosecution, by which he can at once procure his enlargement, leaving the further redress, to which he may be entitled, to be sought afterwards. This is by writ of Habeas Corpus, which the S. Court is authorized by the 49th clause of the charter to grant; and which it never fails to issue without delay, on the petition or application of any person, who complains of being illegally imprisoned. Such application may be transmitted through the fiscal, or gaoler, or by any other channel; and requires no formality of language, to ensure its reception; and immediate consideration. The question of the alleged illegality is thus brought at once to a decision, and the prisoner is either discharged or remanded, according as the imprisonment shall appear to be illegal or legal. The writer of these notes finds no case on the subject of the Habeas Corpus, among the records of the S. C., since the promulgation of the new charter.

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### INFANT.

See title Minority.

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### INFORMER.

See title Prosecution.

Not an incompetent witness, *supra*, p. 141.

## INHERITANCE.

See Land, and other titles.

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## INJUNCTION.

When may be issued by S. C.;—by D. Courts as matter of ordinary jurisdiction;—sequestration of land, or crops, in the nature of injunction;—injunction against an order to remove buildings under the police ordce.;—cannot be granted to prohibit or stop actions, etc.

An injunction is an order by a court, *injoining* a person to abstain from doing some act, alleged to be hurtful to another, till the right to do it, or to prevent its being done, is finally decided. The 49th clause of the charter authorizes the S. Court “to grant and issue injunctions, to prevent any irremediable mischief, which might ensue before the party making application for such injunction could prevent the same, by bringing an action in any District Court.” A D. Judge, being applied to for an injunction, to stay the sale of certain property, granted it, but entertaining doubts whether he had authority so to do, in other words, whether the clause above recited did not vest the power to grant injunctions in the S. C. alone, to the exclusion of the D. Courts, referred the matter to the S. C. for instructions. The Judges of the S. C. directed him to be informed in answer, That the D. C. was perfectly justified in directing the stay of sale, taking it for granted that sufficient ground was shewn for that step;—that so far from the 49th clause of the charter offering any impediment to the exercise of this branch of jurisdiction by the D. Courts, it would appear from the terms of it to be only in those cases, in which irremediable mischief might be apprehended, by waiting for the interference of the courts of ordinary resort, that the S. C. would be justified in interposing its authority, by issuing an injunction. L. B. 12, 13 June 1835. See also title Jurisdiction (equitable).

In another case, an action for land, the defendants moved the D. C. of Ratnapoora that the land might be sequestered pending the action, which application was opposed by the plaintiff, on the ground that such sequestration was not provided for by the rules of practice. The D. Judge applied to the S. Court for

instructions how to decide the point, observing that according to the rules acted upon by the former court of Ratnapoora, previously to the new charter, sequestration had always been granted, pending an action for land, on the application of the party interested. The S. Court directed an answer to be returned, That the sequestration, sought for by the defendants, appeared to be of a different description, and to have a different object, from that contemplated by the rules of practice;—that the sequestration, provided by the 15th and following rules, was for the purpose of compelling an appearance, or preventing the fraudulent alienation of property, by the *defendant*, whereas that which was sought for in the present case would seem to be for the purpose of preventing the *plaintiff* from committing some fraud, of which the defendant was apprehensive;—that it by no means followed, because the rules of practice did not point out sequestration as a remedy in this particular instance, that the D. Courts were not authorized to grant it;—that the present application was in truth in the nature of an injunction, to restrain the plaintiff from making away with the crop, pending the action;—that there could be no doubt that the D. Courts had power to grant injunctions, under the general and comprehensive terms, in which their civil jurisdiction is conferred by the charter, the 49th clause of that instrument being no restriction of the power of the D. Courts in this respect, but only authorizing the S. Court to issue injunctions in particular cases of emergency;—that the issuing sequestrations in cases like the present, therefore, was a matter which must be left to the discretion of the D. Courts, subject of course to appeal, in case either party should be dissatisfied with the exercise of that discretion;—but that the S. Court came to that conclusion, from a consideration of the terms of the charter and of the rules of practice, rather than of the former rules acted upon in the courts of the judicial agents, since it would be extremely inconvenient to have recourse to two different codes of rules, for the guidance of the present courts. L. B. 5, 11 Jan. 1836. On this latter point, it may be observed, that where any matter of practice is left unprovided for by the rules of practice now in force, a D. C. may properly have recourse to those followed by former courts; but

that where the practice is prescribed by the rules of 1 Oct. 1833, all former rules, as has already been observed, must give way: *Supra*, 39.

An order having issued from the D. Court, under the 39th clause of the Colombo police ordinance, No. 3 of 1834, for the removal of certain buildings, alleged by the Surveyor Genl. to be encroachments on the street, the defendant claimed the right of shewing by evidence, that the buildings complained of were no encroachments. The S. C. decided that such opportunity must, in fairness, be given; but observed, That there was another and much more summary remedy, of which any party who really felt himself aggrieved by the notice, served upon him according to the ordinance, might avail himself; by moving the S. C. for an injunction, which would be granted at once, if sufficient grounds were shewn for that purpose: And such inquiry would then be directed, as would enable the court to decide whether the injunction should be dissolved, or declared perpetual. No. 592, Colombo (criminal), 3d Nov. 1834; *infra*, title Police. The grounds contemplated by the above suggestion must, however, be shewn to be some "irremediable mischief," such as hindering the intended sale of the premises, if the notice were allowed to remain affixed to them till the matter was decided by the D. C.; for otherwise, the S. C. would not appear to have authority, under the terms of the 49th clause of the charter.

The occasions, on which injunctions may be beneficially granted by D. Courts, may be defined nearly in the words of that clause of the Charter, when limiting the jurisdiction of the S. C. in this respect; viz., to prevent any irremediable mischief, which might ensue, before the party applying could prevent the same, by an action in its regular course. And the necessity of preserving a crop, pending an action for the land itself, as mentioned above, furnishes a very frequent example of this class of cases. That species of injunction, which is of common occurrence in England, viz., to prohibit a party from commencing or continuing an action in the ordinary courts, cannot be granted under the present system of judicature in Ceylon. The Supreme Court is, indeed, expressly forbidden, by the

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proviso at the end of the 49th clause of the Charter, to grant injunctions to prevent parties from suing, or appealing, or from insisting on any ground of action, defence, or appeal. Nor can any such injunction be necessary, since a party can obtain all that it would or ought to afford him, by the very extensive power which he possesses of appealing, at any stage of the case, against any judgment or order, final or interlocutory. And in case of any usurpation or encroachment on the jurisdiction of one D. Court by another, the Supreme Court, if necessary, would issue a writ of prohibition, by virtue of the 36th clause of the Charter, to the D. Court which was exceeding its jurisdiction, and would transfer the suit or prosecution, in which such excess of jurisdiction had occurred, to the court to whose cognizance it properly belonged. See title Jurisdiction, towards the end.

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## INQUEST.

Should be held immediately;—if by headman, it is not a *court*; nor on oath; but neighbours bound to attend;—must be translated, before sent to S. C.; and accompanied by explanations by D. J.

This mode of inquiry, into the cause of all violent or sudden deaths, is unfortunately of too frequent occurrence in Ceylon, and is, therefore, too familiar to those whose duty it is to hold them, to make any general explanations necessary, as to the nature and tendency of them. The 23d rule of sect. 2, directs the course to be pursued when, owing to distance or other causes, the D. Judge is unable to hold the inquest in person. The rapidity of the work of decay in that climate would often make a single day's delay, in examining a body, subversive of the object of examination;—the discovering the cause of the death, while the traces of it are yet fresh and uneffaced. The rule was, however, intended to be framed, so as to take from inquests, held by any other than the D. Judge, the character or semblance of *courts*, the legality of which would be very questionable under the 4th and 29th clauses of the Charter. But it was considered, that the report of the Headman and his asses-

sors, the number of whom on the inquest were purposely left indefinite, in order to do away with the juridical idea of a jury, would answer all the purposes of an inquest upon oath: Especially as persons are never tried in Ceylon on the verdict of the inquest, which, in truth, is chiefly used to guide the more formal investigations of the higher authorities, and to ensure the testimony of credible witnesses, if a regular trial should become necessary, as to the appearance of the body and other circumstances, as soon as possible after the death.

It will be observed that the rule, in directing that the Headman shall “inquire into the cause of the death,” is silent, and intentionally so, as to any oath to be administered to the persons giving information on such inquest: And when a D. Judge inquired of the S. Court, whether informations, so taken by the Headman, were to be received on oath, as had been the practice under regn. No. 6 of 1823; he was informed in answer, that informations so taken must be merely in the shape of *declarations*, and not on oath, which no one but the D. Judge would be legally authorized to administer. L. B. 30 Oct. 1 Nov. 1833.

A D. Judge applied to the S. C. for instructions how to compel persons, in the neighbourhood of a place where a dead body might be lying, to accompany the Headman, as directed by the 23d rule; and whether the 10th and 11th clauses of reg. No. 6 of 1806 could be acted upon, in enforcing such attendance. He was informed in answer, That the Headman had a right, when acting in the capacity of a peace-officer, in which character he must certainly be considered, when proceeding to execute the duties imposed upon him by the 23d rule of sect. 2, to call upon all persons to assist him in the execution of that office; and that if any person refused that assistance, he would be liable to such moderate punishment, as the D. Court should think necessary, so that the clauses of the reg. referred to might be considered as merely declaratory of the general law on this subject;—but that, when once the necessity of obedience in such cases should be known, few instances, it was hoped, would occur of its being withheld. L. B. 19, 21 Oct. 1833. And as far as has come to the knowledge of the writer, this is a difficulty

which has never presented itself, at least to any extent deserving of notice.

Application was made by a D. Judge to the S. C., to be permitted to send the informations on inquests in the originals, without translations, except in cases of interest or importance; on the ground that the interpreter of the court, the only person capable of translating, was fully occupied with other business. The Judges, however, after consideration of the subject, were obliged to convey their opinion to the D. Judge, that in all cases of violent or sudden deaths, the depositions should be translated, previously to their transmission to the S. Court; for it may and sometimes does happen that, though the death may be ascribed to mere accident, circumstances appear in the depositions, which would lead to a different conclusion, or which, at least, would demand further inquiry: And the Judges were the more strongly impressed with the necessity of adhering to the former practice, by finding, on inquiry, that the translations, heretofore sent to the office of the colonial secretary, were to be discontinued. Unless, therefore, the S. Court were still furnished with translated copies, the crown officers would have no means of information on subjects, which it was so essentially necessary for the purposes of public justice, that they should be intimately acquainted with. L. B. 10, 30 Jan. 1834.

On the transmission of depositions taken on an inquest, they should always be accompanied by any explanation which the circumstances of the case may seem to require, and the D. Judge should also state, whether any and what further investigation has taken place. L. B. 28 April 1835.

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## INSOLVENT.

See title Debtor and Creditor.

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## INTEREST.

In what cases, and at what rate, allowed.

THE regulation No. 18 of 1823 directs, That interest shall be

allowed,—In all cases in which it is expressly stipulated for, or in which an intention that it should be paid may be inferred from custom, or the usual course of dealing :—On all bonds or other written securities, payable on a certain day, from that day, in default of payment :—On all debts, from the date of a demand in writing, or, if no demand, from the commencement of the suit :—And if no rate be specified, it shall be allowed at 9 per cent.

Very few decisions present themselves on this subject, on the records of the S. C.—An action was brought on a bond for the delivery of arrack, and payment of money, on or before 31 Aug. 1826. No interest was stipulated; but it was agreed that, if the payment and delivery were not made by the day, the plaintiff might recover the amount by the sale of certain property, mortgaged as security. Two payments were indorsed on the bond, one of which was expressed to be “for part payment of principal and interest.” The question before the S. Court in appeal was, as to the right of the plaintiff to claim interest. That court was inclined to think that, putting out of the question the indorsed receipt, which was not very distinct, interest would still be demandable under the 3d clause of the reg., from the day on which the payment became due, since the plaintiff had not availed himself of the power reserved to him, of recovering the amount by sale of the mortgaged property. The case was, however, referred back to the D. Court on another ground. No. 1048, Caltura, 22 July 1835.

By bond, dated Dec. 1829, for 100 RD., the obligor (or person binding himself) mortgaged a field as security, which he agreed to cultivate, and to pay half the produce to the obligee (the person to whom he was bound) in lieu of interest, till repayment of the 100 RD. On an action brought on the bond, the defendant admitted the debt, but averred payment of the produce for 1830 and 1832, and that the crops of the other years had failed. These averments of the defendant were established by evidence, and the D.C. gave judgment for the plaintiff for the principal, without interest. The S. C., however, on appeal, considered that, the original contract as to produce having been put an end to, the defendant ought to pay interest

at 9 per cent. from the day on which the suit was instituted, till final payment. No. 918, Negombo, 1st April 1835. This case has already been mentioned with reference to the subject of costs, *supra*, p. 72, 3.

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## INTERPRETER, TRANSLATOR, ETC.

Important functions of, well performed; but caution against over confidence, page 236—Precautions on appointing substitutes 237—Documents not to be translated by other persons, unless by consent or admission 237—If disputed, translation should be referred to interpreter, 238, 9—His opinion should not be taken on the legal effect of instruments 239—Must be sworn; otherwise, proceedings invalid 239—Fees for translations 240—Inquests translated 240.

THE important duties which these officers have to perform, and the absolute necessity for their intervention, more or less, in almost every suit instituted in the courts of Ceylon, are too obvious to escape notice. And it is not too much to say, that on the intelligence, skill, and integrity, of the interpreters, must in great measure depend, whether the laws be justly or unjustly administered. As far as the experience of the writer of these notes will enable him to form an opinion, he has nothing but praise to bestow on the persons filling these situations, whether in Colombo, or in other districts, in which the S. Court is called upon to hold its sessions. His commendations, indeed, as regards their skill as linguists, must be received with this somewhat material drawback; that he is wholly unacquainted himself with the native languages. But judging from the observations of those who do possess that knowledge, while watching the progress of criminal trials, he should say that errors in translating the evidence of witnesses are rare; and that when mistakes or misapprehensions do occur, it is in giving the charge of the Judge, or the address of the advocate or proctor to jurors or assessors, especially if these be delivered in long sentences. He has no reason to believe that this evil prevails to any extent; but the mere existence of the danger should make interpreters extremely cautious, and should induce them to apply to the speaker for explanation, whenever they feel the slightest doubt

of his true meaning, however frequent may be the interruptions thus occasioned, rather than endeavour to earn a reputation for quickness and fluency, at the possible expense of misinterpretation. The high character for respectability and integrity, which these officers in general enjoy, is too well known to require comment; and is attested by the fact, that two out of the three permanent assessors, first appointed, were chosen from among the interpreters.

Such being the confidence necessarily, and it would seem deservedly, reposed in these officers, it is obvious that it is to them; and them only, that the courts can look with safety for the discharge of their important functions. And when it is proposed that a person, not regularly appointed as interpreter, should act in that capacity, even on a temporary occasion, great caution should be observed, in ascertaining that he is duly qualified; and as a matter of precaution against future objections to the decision, it would be well that the consent of the parties to his acting, be taken and recorded, where distance, or other circumstances, will not permit of a regular appointment. L. B. 26 Oct. 6 Nov. 1835.

A representation was made to the S. Court by a D. Judge, recently appointed to one of the Northern districts, that the secretary of the court had been accustomed to draw pleadings and translate documents, which the D. J. had put an end to; considering that it could not be permitted, with justice to others, who did not possess the same advantages of access to the records of the court, and other privileges attached to the office of secretary. It was also represented that translations of documents were received, by whomsoever rendered, and were often either wholly unintelligible, or so incorrect, that it was impossible to come to a safe conclusion upon them. And the D. J. suggested, that in all cases, in which proctors were not engaged, documents should be translated by the interpreter, who, as well as the proctors, would be answerable for any inaccuracies; some of which, there was reason to believe, were committed wilfully. The S. Court directed an answer to be returned, approving of the discontinuance of the practice of allowing the secretary to draw pleadings and translate documents, as no registrar or secre-

tary of a court ought to be allowed to take any part in the proceedings of the litigant parties. With respect to the persons; by whom translations of documents filed in a case ought to be made, so as to fix upon them the stamp of authenticity, the S. Court observed that there was no person, not even a proctor of the court, to whom the Judge could safely or legally give that implicit credit, except to a sworn translator or interpreter of the court;—unless indeed the party, adverse to him who produces the translation, admits it to be a correct one: That where a translation was filed with the original document, the usual and most convenient course was, to direct the interpreter or translator to compare the two, in order to ascertain whether the translation were a correct one. L. B. 25 Nov. 30 Dec. 1833. Id. 20, 26 Feb. 1834. It is believed that the office of translator, as distinct from that of interpreter, exists in very few, if any, of the D. Courts.

A somewhat similar representation, against allowing pleadings and documents to be translated by persons wholly unauthorized, and unconnected with the court, was made by another D. Judge, who recommended as a remedy “that the proctors should be the only persons allowed to translate pleadings, bonds, and other papers.” To this representation, an answer was returned by the S. Court, That the evils complained of by the D. Judge seemed to arise from two causes distinct in themselves, and to require separate consideration and remedy;—that the one related to the drawing of written *pleadings*, the other to the translation of *documents*, two objects of the greatest importance, as regarded the duties respectively involved in them, but the performance of which duties could not conveniently be assigned to the same class of persons. After providing for the restriction of drawing pleadings to the proctors (as to which see title Pleading), the answer of the S. C. went on to observe, That with respect to the translation of documents, there would be this obvious inconvenience in confining this office to the proctors, that a party would then be bound to admit, as correct, a translation furnished by the proctor of the adverse party,—an admission which it would often be unreasonable to expect;—that the best course appeared to be, to allow any

party, or his proctor, to file the translation of any bond, deed, or other piece of documentary evidence, subject however to be challenged as incorrect by the opposite party;—and that, in the event of its accuracy being so disputed, the instrument should then be referred to the interpreter of the court, who should be directed to furnish a correct translation, on payment, by the party producing it, of the fee usually paid to translators in the district, to be recovered ultimately with other costs in the suit. L. B. 18 Sept. 6 Oct. 1835.

But the functions of these officers should be confined to those of interpretation and translation, and their opinion as to the legal effect of instruments should not be received, at least when delivered in the character of interpreter or translator. Thus, where a D. Judge, in a case which turned on the distinction between ground-share and planting-share, recorded the opinion of the interpreter on a disputed agreement, that “if the plantation alone had been intended, the agreement ought and would have specified the plantation,” the S. C. observed: The opinion of the interpreters is the best that can be obtained, it must be presumed, as to the precise meaning of each word and expression; but the opinion here recorded as that of the interpreter, can scarcely be received, for it is not so much a matter of interpretation of language, as of law or custom: And if the interpreter be sufficiently acquainted with the custom to give evidence of it, there would be no objection to his being asked, not as *interpreter*, but as *witness*, what the custom of the country was, with respect to the wording of deeds, in distinguishing between ground-share and planting-share. Colombo, No. 7991, 6 Jan. 1836. This distinction, between receiving the opinion of a man, sworn as a witness, or in his character of an officer of the court, is by no means a mere formal or technical one; as will be seen by a moment’s consideration of the mode in which witnesses are examined, and of the responsibility under which they give their evidence.

Every interpreter must be sworn to interpret faithfully, either on being appointed to the office, or for the particular occasion, if he be not the regular officer of the court. And where, on appeal from the conviction of a D. Court for theft, it appeared

that the interpretation of the evidence had not been given under the sanction of an oath, the S. Court considered this a fatal objection, and set aside the conviction and sentence. No. 376, Hambantotte (criminal), 6 May 1835.

With respect to the fees to be allowed for translating documents, the S. Court had occasion to state to a D. Judge, that as there was no fee allowed by the table of 1 Oct. 1833 for this service, the payment ought to be regulated by proclamation of 20 Aug. 1801; and that this had been the practice hitherto observed in the D. C. of Colombo, by whomsoever the documents were translated. L. B. 25 May 1835.

Inquests, as we have seen under that title, p. 234, must be translated, previously to transmission to the S. Court.

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## INTERVENTION.

**PARTIES** may intervene in a suit at any time, even after execution, provided the proceeds have not been paid over to the plaintiff. Sup., p. 167, where an inaccuracy is pointed out in the 32d rule of sect. 1, on this subject. See also L. B. 27 Nov. 1834, on case No. 7728, from Amblangodde, where the S. C. directed other partowners to be called on to intervene, if they thought proper, in preference to dismissing the action, and driving the plaintiff to the necessity of instituting fresh proceedings.

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## INTESTATE.

See title Administration.

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## ISSUE.

Of fact;—of law;—general, or special.

As this is a word which must frequently occur in legal proceedings, it may be useful to some few of those who cast their

eyes over these notes, to observe that by the word "issue" is intended the point or points, to which the pleadings, examinations, and admissions of the parties, have at length reduced the questions, on which they are still at variance, and on which therefore they ask the judgment of the court. And it is called either an issue of *fact*, as, whether a person has or has not signed a certain deed; or an issue of *law*, as, supposing the deed to have been executed, what the legal effect of it shall be; (And see p. 16,7, as to the meaning of a demurrer.) The *general* issue is the term used to designate the simple, direct, contradiction by the defendant of the fact alleged by the plaintiff; as, that he never did sign the deed in question. A *special* issue is where the defendant, without disputing the principal fact alleged by the plaintiff, (the execution of the deed, for instance,) answers some matter, which still forms a defence to the action; as, payment, or some other satisfaction of the debt, for which the deed was given. This, it is believed, will be a sufficient explanation of the word, for all practical purposes in Ceylon, where pleading is, or ought to be, so extremely plain and simple. One only observation suggests itself; that the main object of all pleading, that of reducing the points "in issue" to the smallest number and the narrowest compass, should never be lost sight of by the D. Courts; and that in the attainment of this object, the examination of parties, both by each other and by the court, will be of the greatest assistance, by clearing the way of all those facts, which are either irrelevant or immaterial, or which may be admitted by either side. Vide supra, 107, 8, 9.

See Judgment, Pleading, Practice.

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## JUDGMENT, DECREE, ETC.

How pronounced; dismissal, without assessors, void, page 242—Conduct of parties may be animadverted upon 242—When conclusive; between same parties, on same points, though erroneous 243—So, though a new claim be set up, if it might have been put forward on the first trial 243—But dismissals on points of practice, or sometimes for want of evidence, not final 245—Even final judgments are only conclusive between the same parties 245, 6—Or whose interests are identical 246—Disclaimer of interest by party in

former suit, equivalent to a judgment against him 247—Prosecution and action for the same offence 247—Judgment in one, no bar to the other; but discretionary with D. C. 248—Amendment of judgments; for error in computation 249—Or in copying, or drawing up judgments 251—But not to supply omission of former court, as to costs: Will action lie for costs, so omitted? 251, 2—Judgments conflicting: Into other districts 252.

THE 30th clause of the charter directs, That every final sentence or judgment of the D. Courts, every interlocutory order, having the effect of a final judgment, or of postponing the final judgment, and every other order which may appear to the D. Judge of adequate importance, shall be pronounced in open court, in the presence of the assessors, who shall give their opinion and vote, as directed by that clause. We have already touched on the question, what orders make the intervention of assessors indispensable, *supra*, 42, 3, 60. And on this point, the D. Judge, by the terms of the charter just cited, is to exercise his discretion, *except* as regards final judgments or orders, and postponements. Therefore, where a D. Judge dismissed an action for libel, by simply indorsing on the defendant's answer, that the complaint was of too frivolous a nature to be entertained, the S. Court, on appeal, referred it back, to be proceeded with in regular course; observing that, independently of the right of the plaintiff to have his complaint inquired into, however trivial it might appear, the mere indorsement by the D. Judge was an absolute nullity;—that no final decree could be valid, unless pronounced in the presence and hearing of assessors, whose names, and whose assent to or dissent from the decree, should be recorded. No. 7506, Kandy, 11 Nov. 1835.

The only other point, which appears to have been brought to the notice of the S. C., as regards the mode of delivering judgments, relates to the terms of censure, which the conduct of litigants may call forth. An action against a Cutcherry Modlear, who appeared by the evidence to have acted fraudulently, was brought by appeal before the S. Court; and a separate petition was presented by the defendant, complaining of the harsh terms employed by the D. Judge, in recording the judgment of the court. The S. C., after recording its own judgment on the merits, *supra*, 89, 90, observed, with reference to this

petition, That it often became necessary for courts of justice to comment on the conduct of parties, in terms of reprobation; that intemperate language was certainly not justifiable, but that there was nothing in the judgment then before the court, which exceeded what the occasion seemed to require. No. 2095, Trincomalee, 2 May 1835.

As a general rule, a judgment, when pronounced and recorded, and either acquiesced in, or, if appealed against, affirmed, is for ever conclusive of the facts decided, as between the parties litigating, *supra*, p. 115: And this, even though it should appear to have been erroneously pronounced. Pothier *ad Pand*: Lib. 42, tit. 1, s. 2, par. 27; *supra*, 175. Thus, in an action for land, the plaintiff adduced strong evidence in support of his claim, but the defendant produced a decree of a former court in 1819, in his favour, as plaintiff, against the present plaintiff, as defendant. The decree appeared manifestly to have proceeded on bad grounds, and insufficient evidence; but the losing party, the present plaintiff, had never appealed from it, and the defendant had been in possession of the land for many years. The S. C., on the case being brought to its notice, observed that though the decree of 1819 ought to have been reversed, if it had been appealed against, it would be unjust, and would establish a dangerous precedent, if the decision, so long acquiesced in, were now to be impugned. No. 195, Korne-galle, 13 June 1835. L. B. 3, 15 June 1825.

In another case, a D. Judge applied to the S. Court for instructions, whether a second trial between the same parties, and for the same property, could be permitted under the following circumstances. The plaintiff, in 1831, claimed certain land under a deed of gift from the proprietor, his sister, but which was proved to have been written after the death of the alleged donor; and a decree was accordingly passed in favour of the defendant, by virtue of a deed of prior date to that produced by the plaintiff. The same plaintiff now claimed as heir at law, and as having “rendered assistance” (according to Kandyan law) to the proprietor up to her death. The S. C. returned the following answer: “A second trial, between the same parties, and for the same property, can only be permitted, where the

point in issue is not the same, so that the plaintiff had no opportunity, on the former trial, of proving that which he seeks to establish by a second inquiry; or where the court is satisfied, by circumstances above suspicion, that new evidence has arisen, which was not before within the plaintiff's reach. On looking over the proceedings, however, it would appear that the plaintiff, though not suing now in precisely the same character as before, advances no claim, which ought not to have been brought forward for decision, on the first trial. He was then, as at present, heir at law, though he then endeavoured to establish his right in the character of donee, under a written deed. He failed in that attempt, and failed too under circumstances, which convey no impression of the justice of his case. But there seems to be no reason why, on the failure to establish the deed, his right as heir at law should not have been put forth and considered. Then the question would arise, could his naked claim as heir at law, supposing it to be established, countervail the right of the defendant under *his* deed, which has been pronounced by the decree of 1831 to be valid, and unshaken by the evidence then adduced by the plaintiff? Certainly not. With respect to the assistance, alleged to have been rendered by the plaintiff to his deceased sister, that again is a point, on which he ought to have been prepared, on the first trial, to offer whatever evidence was then in existence; especially as the supposed alteration in the intentions of the deceased are alleged to have taken place on the ground of assistance. Evidence was indeed gone into of that assistance, and of those intentions: If better and stronger evidence be in existence, why was it not then produced? If not, and if the plaintiff contends that the evidence which was adduced was sufficient to entitle him to judgment, why did he not appeal against the decree of 1831? As, therefore, there is no point in favour of the plaintiff, which might not and ought not to have been raised on the former trial, nor any reason assigned why the evidence, which it is now proposed to adduce, might not have been brought forward on that occasion, a second trial could only be resorted to, for the purpose either of admitting evidence which ought not now to be received, or of correcting the former decision on the same

evidence, which it is now too late to do." L. B. 10, 20 May 1835.

These two decisions proceeded on the principle above laid down; that a judgment is conclusive of the facts decided between the parties. But there is one class of cases, which must be distinguished from final judgments in this respect, and which indeed cannot properly be said to decide *any* facts at issue between the parties. The cases here alluded to are those which are dismissed summarily, either on account of some irregularity of proceeding on the part of the plaintiff, the penalty of which is dismissal; or from his not being prepared with sufficient evidence to support his case, and to make it necessary to call on the defendant for his defence. As regards the first of these two grounds of dismissal, it would make the penalty quite disproportioned to the fault, if the plaintiff were to be absolutely and for ever precluded from reasserting his claim. The costs of the action dismissed may fairly be considered a sufficient punishment for his deviation from the rules of practice; and in most instances, therefore, a plaintiff so situated ought to be allowed to bring a fresh action, on payment of all the costs of the first. With respect to the second ground, the plaintiff cannot always hope for the same indulgence, the granting or withholding of which must depend on the causes, which may appear to have left him unprovided with the necessary proof, on the first hearing of the case. If those causes were out of his power of control, or even if he should have been honestly mistaken as to the evidence which it was necessary for him to produce, a court would not be too strict in the exercise of its discretionary power of receiving his second action. If, on the other hand, all the proof, which he proposes to bring in support of such second action, were within his reach on the former occasion, and above all, if any thing like bad faith appeared in his proceedings, as in the case just cited, he ought to be considered as finally precluded from reasserting his claim. The several dismissals, or nonsuits, which have been brought to the notice of the S. C., especially for irregularity, will be mentioned under title Practice.

A judgment, however, which has proceeded on a regular

hearing of the evidence on both sides, is only conclusive upon the same subject of litigation, and between the same parties; or where the interests of the parties, in the decided case, are identical with those of the parties who wish to try the question again. See Voet, lib. 42, tit. 1, par. 29, and the whole of that title, as to the subject of *Res judicata*, generally. An action was brought for a piece of land, which had been decreed to the defendant in a former action against another person, of which action the present plaintiff admitted she was aware, but did not take part in it, because the defendant had promised her a share if he succeeded. The D. Judge, having referred to the S. C. for instructions, whether the former decree ought to be held conclusive, was informed, That as the former case was not between the same parties, the decree was not conclusive in the present action;—that the present defendant might have had a preferable claim to the defendant in the former suit, and yet might possibly not have a good title, as against the present plaintiff;—that the action should therefore be proceeded in, and must be decided, not by the decision in the former case, nor even by the evidence, as recorded, on which that decision was founded, but on the testimony to be adduced on this trial;—for though much of the evidence, on which the defendant relied in the former action, would probably be again had recourse to on the present occasion, it must all be delivered de novo, and must not be read or referred to from the former proceedings (vide supra, p. 146, 7), because otherwise, the present plaintiff, who was not the party opposed to the present defendant on the former occasion, would have no opportunity of objecting to, or cross-examining the witnesses. L. B. 14, 21 Nov. 1834.

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Where, however, the interests of the parties, endeavouring to institute fresh proceedings, are identical with those against whom the former decree passed, it is the same thing, as regards this question, as if the parties were individually the same. Thus, where a woman sued for land which had already been awarded to the same defendant, by two separate decrees against the son of the present plaintiff, the D. Court considered these decrees conclusive, and dismissed the action: And the S. Court

affirmed the decree of dismissal, observing that, though the plaintiff, literally speaking, was not a party to the former suits, yet her interests must be considered identical with those of her son, and it was impossible to suppose that she was ignorant of the suits, to which he was a party. No. 1855, Kandy, 2 May 1835. So with respect to brothers, No. 6311, Ratnapoora, 14 Jan. 1835.

In an action for land, it appeared that the plaintiff had been one of five defendants in a former suit, brought by the present defendant for the same land;—that in that suit, the plaintiff had disclaimed all right to the land in question, and after a protracted trial, judgment was given against the remaining defendants in favour of the present defendant, then plaintiff. The present plaintiff endeavoured to insist on his right to a new hearing, on the grounds that there was no judgment recorded against him; and also, that the land was not the same. The D. Court, however, the identity of the land being established, dismissed the action; and the S. Court affirmed the decree of dismissal, considering that the plaintiff's disclaimer in the former action was equivalent to a judgment. No. 991, Matele, 20 Feb. 1836.

While considering the effect of a former judgment between the same parties, it may be well to mention that the civil law permits, in many instances, both a civil action and criminal prosecution to be instituted, for one and the same offence; as indeed the English law does in cases of assault, and other misdemeanours against the person. And such would also seem to be the customary law of the Kandyan districts. Certain persons were tried in the Seven Korles for assault and robbery, and were convicted, sentenced, and punished by flogging and imprisonment. An action was afterwards brought against them, for the value of the property they had stolen; on which they presented a petition to the Chief Justice, which was referred to the D. Judge, in order that it might be ascertained whether, according to the law or custom in force in the Kandyan districts, a party guilty of an offence, which the person or property of another is injured, be liable both to punishment for the offence committed against the public, and also to damages for the loss sustained by the individual. In answer to that refer-

ence, the D. Judge stated that he had known several instances in the Kandyan districts, in which offenders had been proceeded against both civilly and criminally, this mode of procedure having been allowed by the late judicial commissioner;—that he had moreover consulted several of the most intelligent of the Kandyan chiefs of the district, who stated that persons convicted of theft or robbery under the Kandyan government, were both sentenced to punishment, and also obliged either to make restitution of the stolen property, or to make good its value. On this answer being received, the D. Judge was recommended to let the civil action proceed, leaving it to the defendants to appeal, if they thought proper so to do. L. B. 1, 5, 30 Aug., 3 Sept. 1834.

In such cases, therefore, the previous conviction on the criminal prosecution could not be pleaded as an absolute bar to the civil action; still less could an acquittal be so pleaded, because a person may be civilly responsible for an injury, though the evidence is perhaps insufficient to fix the criminal offence upon him; *supra*, p. 115, 6. It may often, however, be a proper subject for the discretion of the D. Court, whether the action should be entertained, or at least whether damages should be awarded, after sentence for the same offence. Thus, where a woman sued her nephew for damages, for having disturbed her in the possession of a garden, and it appeared that the defendant had already been fined on the criminal side of the court, on the complaint of his aunt for the very same trespass; the D. Court refused to award damages, and dismissed the action. The S. Court affirmed the decree of dismissal, observing, That when a party had already been punished criminally for a wrong committed, it was discretionary with the court, whether it would entertain a civil action for the same act, or not, and certainly this did not appear to be one of those cases, which would call for the double infliction;—that it would be well, however, to let the defendant understand, that if he persisted in molesting his aunt by similar trespasses (some fear of which appeared to have been entertained), the punishment or damages awarded against him, on any future complaint, would be of a more serious character than the fine which had been imposed upon

him. No. 1035, Galle, 6 May 1835. — In England, when an action and prosecution are instituted together for an assault, it is usual for the Attorney-General to stop the prosecution, unless the complainant will discontinue his action.

Although, as we have seen, a judgment, acquiesced in or affirmed, is in general conclusive between the parties, even though it may have proceeded on erroneous grounds, there are occasions, on which the courts may be permitted to amend their decisions, where such error, especially if it have been produced by fraud, is plainly and distinctly brought to their notice. This subject has already been very fully discussed under title Execution (parate), supra, 173 et sequ. Shortly after the case which occasioned that discussion had come under consideration, another presented itself from the D. C. of Galle, which was referred to the S. C. under the following circumstances: An action, pending in the late Sitting Magistrate's court, was regularly referred to arbitration, and an award was made, founded on the admissions of the parties; but the S. Magistrate's court entered up judgment for the plaintiff, in Nov. 1832, for more than was warranted by the award, that is, for one-fourth of the land in dispute, instead of one-tenth, and the minor court of appeal, in July 1833, affirmed the decree in general terms, without discovering the error. The present action was brought in the D. Court to enforce the decree, so erroneously given and affirmed. The question was, whether that court would be justified, with the sanction and under the direction of the S. Court, in correcting the original decree, by reducing it to the amount awarded by the arbitrators. The following answer was returned to the D. Judge:—"The majority of the Judges are of opinion that the error, committed in the late Sitting Magistrate's court, may yet be corrected. The ground of that opinion is, that any court of justice has the power of rectifying a mere mistake in its own decree; and that the D. Court, having succeeded to all the powers and functions, as well of the S. Magistrate as of the provincial court, may lawfully rectify the error, which the Magistrate's court, if it were still in existence, would be called upon to set right. It is true that the decree was affirmed by the minor court of appeal. The general terms, however, in which

that affirmatory decree was passed, shew plainly that the question of the proportionate division of the land was not agitated before the appellate court; and they will also prevent the decree of affirmation from interposing any technical obstacle to the proposed amendment: For when the original decree is amended, by the reduction of one-fourth to one-tenth, it will still be covered by the terms of the decree of the Minor Court of Appeal. In giving this opinion, however, the Judges do not mean to say that the remedy proposed is dependent on the general terms of the decree of the appellate court. The remedy would, in their opinion, have still been attainable, even though the Minor Court of Appeal had, in express terms, adopted the error of the Magistrate's court, though not precisely by the same route. If it had been necessary to alter the terms of the decree *in appeal*, an application for that purpose must have been made to the S. Court, which has succeeded as well to the minor courts, as to the late High Court of Appeal: And the mistake in the minor appeal court being satisfactorily shewn, the S. Court would not have hesitated to set it right. With respect to the effect of the amendment, when made, any party to the former suit, considering himself aggrieved by it, as well as any party to the present suit, who may be dissatisfied with the decision of the D. Court, whether that decision be founded on the amendment of the former decree, or not, must be at liberty to appeal." L. B. 5, 23 June 1834. The following authority, which was cited by the learned second P. Justice in the course of the discussion, seems strictly in point, admitting the question to be one of law, rather than of practice; as to which, *vide supra*, 181. It shews that the amendment, according to the civil law, was perfectly within the power of the D. Court to make, without even having recourse to the more sweeping remedy of the *Restitutio in integrum*;—and seems indeed to demonstrate that the proper remedy was *correction*, not *annulment*, of the decree. "Nor can a matter once decided be *set aside*, on the ground of erroneous computation; for if decided cases could be tried over again on this pretext, litigation would be endless." . . . . . "If, however, the error of calculation be contained in the decree itself, it may be corrected without appeal, nor will the decision

be any obstacle to such correction." Pothier ad Pand. Lib. 42, title 1, s. 2, par. 29. And he supposes that a Judge were to decide thus:—"As it appears that A. owes B. 50 under one head, and 25 under another, *therefore* I decree that A. shall pay B. 100:" This being a mistake in reckoning, it may be amended without any necessity for appeal.

Where, in a decree of affirmation, the officers of the S. Court made a mistake in the date of the decree of the D. C. thereby affirmed, the mistake, on being pointed out by the D. Judge, was corrected by the S. Court. L. B. 10, 13 Sept. 1834. And on another occasion, where, by the mistake of the Chief Justice, in drawing up a decree in appeal, a reservation of the planter's share was erroneously introduced, the error was rectified by the C. J. himself, on its being brought to his notice by the D. Judge. L. B. 21, 30 March 1835.

But though the S. Court has shewn itself thus willing and anxious to assist parties, where obvious injustice would have been the consequence of refusing to amend the judgment; it would never sanction this course, unless in the case of mere verbal error, or unless a strong case of necessity were made out, and still less if there appeared the remotest possibility of such amendment being productive of injustice. Of the four cases of amendments which have been mentioned, the first (that of the parate execution, p. 174) was for the purpose of relieving against alleged fraud; the second was to correct an error of computation made in drawing up the original judgment; the two last were the setting right of mere verbal mistakes, in drawing up the decrees of the S. Court in appeal. But where a defendant in an action brought in a late Sitting Magistrate's court and dismissed, without anything being said as to costs, applied to the D. C. to amend the decree of dismissal, by awarding costs, the S. C., on reference by the D. Judge, considered that it was too late to allow the amendment sought for. "It is very possible," the Judges observed, "that the omission to mention the costs proceeded from inadvertence: But it is also possible, that the Magistrate may have intended each party to bear his own costs. And though it would have been much better that the intention of the court, whatever it was, should

have been distinctly expressed, it would be going too far now to take it for granted that, because the court was silent on the subject, therefore its intention was to give the defendant his costs. If the defendant had appealed against the decree as it stands, which he ought to have done in due time after it was pronounced, the plaintiff might have had good ground for opposing any alteration in it. So far, therefore, from the defendant shewing that strong case of necessity or injustice, which would alone induce the court to alter a judgment finally decided and acquiesced in, it would be unjust towards the plaintiff, to supply this supposed omission in the way prayed for. Whether the defendant could maintain an action for the costs, is a different question : That course would at least not be open to the objection, that the plaintiff was taken by surprise." L. B. 2, 9 Oct. 1835, on No. 9585, Galle, sup. 74. On this latter point, which, as judgments unfortunately are often silent as to costs, is one of some importance as a general rule, doubts may be entertained. According to Voet, lib. 42, tit. 1, par. 21, " If nothing be decreed by the court as to costs, the successful party has no right of action against the loser, to recover them : " Nor, until more modern times, would he have had any right of appeal on this ground : Id. Ibid. In Ceylon, the costs are a good ground of appeal, and form indeed the daily subject of it. And if the time for appealing be past, there seems no reason why an action should not be maintainable, unless the D. Judge had been changed during the interval ; in which case, the new Judge would feel the same difficulty as to the intention of his predecessor, as presented itself to the S. Court in the case from Galle just mentioned, and would be obliged to decide, from the bare perusal of the proceedings, and without the advantage of personally hearing the witnesses and parties, on which side the costs ought to fall.

Where there are two conflicting judgments, it has been recommended that the first should have preference in point of execution : Sup. title Execution, p. 161, 2, where the course to be pursued is pointed out : And how a judgment is to be carried into execution, in another district, see p. 162.

## JURISDICTION.

Anxiety, in framing the charter, to prevent conflicting jurisdiction, page 253—Only one D. C. in each district 254—Reasons for the mode adopted, in subdividing the district of Colombo 255—Civil jurisdiction of D. C.; tests of; residence of defendant or cause of action; one item of an account 257—Joining a fictitious defendant does not give jurisdiction 258—Claims to land seized in execution should be tried in the D. where land situated 258—If D. J. be a party, any adjoining D. C. is competent; division of provinces has no relation to jurisdiction 259, 267—S. C. refused to transfer such action, without strong grounds 260—Equitable jurisdiction of D. C.; relief against fraud; discovery, by examining parties; injunctions; *fidei commissa* 261—Testamentary, and over lunatics 262—Matrimonial, judgment of S. C. in favour of 262—Revenue 266—Criminal; Offences committed partly in one district, partly in another, cognizable in either 266—D. C. may inflict imprisonment, whipping, and fine, or any two of them, for the same offence; reasons 267—Solitary imprisonment; caution as to its exercise 270—Remanding insolvents 272—When revenue cases fall within the criminal jurisdiction of D. C. 272 to 280—Confiscation, in the nature of civil proceeding; fine, criminal; D. C. may confiscate to any extent, fine only to 10*l.* 272, 3—But confiscations must be sued for in name of K. A. 273—Distinction between 25th and 28th clauses, and 41st clause of charter 274—10th R. of sect. 2 does not preclude K. A. from prosecuting minor offences 276—All breaches of revenue laws, for which penalty, fine, or punishment is awarded, to be prosecuted criminally; others, civilly 276—Fine by D. C. above 10*l.*, set aside by S. C. 280—S. C. has no power of remission, if conviction legal 280—Jurisdiction of D. Courts not conflicting, but co-operative, with each other 281—S. C. refused to call on K. A. to produce a letter, reflecting on a D. Judge; reasons 282—Cases transferred from one D. C. to another 285—S. C. refused to transfer, on ground of, D. J. being a witness (the objection coming from complainant) 286—Or of alleged partiality of interpreter 286—Transfer can only be within the same circuit; expediency of this limitation? 287—Plaintiff having made his election of D. C. cannot transfer the case to another, merely because either has jurisdiction 288—Still less after judgment 288—Residence of witnesses, alone, insufficient 288.

THE first observation which occurs to one, on entering upon this subject, is the anxiety shewn by the framers of the Charter to avoid the possibility of any conflicting jurisdiction; whether between the Supreme Court and the District Courts, or between any two of the D. Courts: And also to prevent any of the judicial powers of these latter courts from being delegated to other hands. As was observed by the S. Court, in answer to a sug-

gestion by a D. Judge, that the secretary should be allowed to take down the statements of parties, The most scrupulous jealousy is observable throughout the Charter, of any exercise of the judicial functions of the D. Courts, except by those courts themselves. *Supra*, 156. And even as regards the S. Court, wherever it is invested with other powers than those incidental to its criminal or appellate jurisdiction, the Charter seems to guard most cautiously against those powers being exerted in any instance, except in such as are expressly marked out. This is particularly observable in the 49th clause, as regards the issuing of injunctions. The exclusive jurisdiction of the D. Courts, in general, is declared in the most positive and prohibitory terms by the 29th clause: And it must be confessed that much uncertainty and delay in the administration of justice are obviated, and simplicity and uniformity of procedure are greatly promoted, by thus limiting and defining the authority of each court, beyond the possibility of misapprehension, either by the courts themselves, or by parties litigant. One or two instances will be presently given of the distinction between usurpation of jurisdiction, and the co-operation of one D. Court with another, where such assistance is required. *Infra*, 281, 2.

The 20th clause of the Charter directs, "That within each and every district of the island, there shall be one court, to be called the District Court of such district." A D. Judge, finding the business of his court greater than he could hope to get through, suggested to the S. Court, among other methods of lightening it, that his court, and that of the adjoining district, should be blended together; all the civil business of the united district being given to one D. Judge, all the criminal business to the other. The S. Court, however, returned for answer, That no discretionary power was vested in the Judges, to make or sanction the change proposed;—that on referring to the terms of the Charter, it could not but be observed, how studiously it was provided that there should be but one D. Court in each district, which court, again, should exercise both civil and criminal jurisdiction;—that in the first place, therefore, the erection of a second D. Court would be absolutely illegal, and its proceedings mere nullities;—and that in the second place, no D. Court

could, consistently with the 24th and 25th clauses of the Charter, legally refuse to exercise either branch of its jurisdiction, civil or criminal, whenever called upon so to do. L. B. 1, 18 July 1834.

While on this branch of the subject of jurisdiction, it may be well to explain the reasons, which induced the Judges of the S. C. to adopt the mode in which the different districts, forming the subdivisions of the entire district of Colombo, are distinguished; viz. by numbers, instead of by the names of the places, where the courts are respectively held. There is, no doubt, an apparent awkwardness in this method, which requires some explanation to justify it. The question has indeed been asked, and very naturally, why the "District of Colombo" should not be confined to those limits, to which the jurisdiction of the D. Court, sitting at Colombo, extends; and why the other portions of the *entire* district of Colombo (taking that term as distinguished from the three circuits) should not be called by the names of the principal places? As Negombo, instead of Colombo No. 2, Caltura instead of Colombo No. 4, etc., as indeed they are called in familiar language. The reasons why that course was not adopted in the proclamation, subdividing the island into districts, in pursuance of the 19th clause of the charter, were these: The 18th clause ordains, "That, for the purposes of the administration of justice, the island of Ceylon shall be divided into the district of Colombo, and three circuits," to be called and limited as therein directed. Then the 19th clause, and indeed the whole of the charter (especially the 46th, 47th, 48th, 49th, and 51st clauses) constantly speak of this division of the island "into circuits, exclusive of the district of Colombo;"—always contradistinguishing "circuit" from "district of Colombo." If, therefore, the term "district of Colombo," as referable to the jurisdiction of the D. Court, were to be limited to the extent, over which the court, actually sitting in the town of Colombo, exercises jurisdiction, some other expression must be adopted, to signify that circle which is excluded from the three circuits; because confusion would be constantly arising, if the same expression were used to signify both the more extensive, and the more limited, tract of coun-

try. But whatever might be the term substituted, it must not be confined to the 18th clause, by which the division of the island into the district of Colombo and the three circuits is established :—The substituted term must be made to run through the whole charter ; or the present term of distinction, occurring in the clauses above referred to, would be without meaning, or at least without its intended meaning. An alteration so extensive, or at all events so frequently recurring through the charter, as this would be, the Judges thought would be more regularly made by any instrument which H. M. might be pleased to issue for amending or explaining the charter, than by a proclamation by the governor on the recommendation of the Judges. They considered that the proviso, at the end of the 18th clause, only gave authority to alter the division laid down by that clause, (the effect of such an alteration will be considered immediately) but not to interfere with the distinctive terms, used throughout the charter, as to what should be considered circuit, and what the home district of Colombo distinguished from circuit, as regards the jurisdiction of the S. Court. And this opinion induced them to recommend the course they did, of subdividing the entire district of Colombo into smaller districts, as regarded the jurisdiction of the D. Courts; still preserving the distinction, so studiously made by the charter, between the circuits and the district of Colombo in its larger extent; and with that view maintaining the word “district” both as regards the Supreme Court and the District Courts, without violating the 20th clause of the charter, which directs that there shall be *one* D. Court within each district. It is true that, under the proviso of the 18th clause, the judges might have recommended a change in the original division of the island, by which change the “district of Colombo,” as opposed to circuit, might have been reduced to the limits of the district now designated as Colombo No. 1. But it must be recollected that, the moment that limitation had taken effect, every place beyond those narrow limits, though within a mile or two of Colombo, would (unless the term ‘district of Colombo,’ employed throughout the charter, as opposed to ‘circuit,’ had been altered, as above suggested) have become transferred to one of the three circuits: In which case,

the jurisdiction of the S. Court could only have been exercised, towards places so situated, under the same restrictions, and at the same intervals, as over places at the extremities of the island; and consequently, at a proportionably increased expenditure of time and money.

As regards the several branches of jurisdiction to be exercised by the D. Courts, and the local limits, by which the powers of each D. Court are to be regulated:—*Civil* jurisdiction is given by the 24th clause of the charter to each D. Court, to hear and determine all suits, etc., in which the defendants are resident within that district, *or* in which the act, matter, or thing, in respect of which such suit is brought, has been done within that district. It may appear scarcely necessary on this, and probably on several other occasions occurring in these notes, to insert the provisions of an instrument, so well known as the Charter of Justice must be supposed to be in Ceylon. But so many occasions have occurred, in which it has been necessary for the S. C. to refer parties to this and other clauses of that instrument, that the insertions may not be deemed altogether superfluous. See L. B. 10, 13 Dec. 1833, and 26, 29 Aug. 1834, where D. Judges were reminded, in answer to questions on the subject, that the 24th clause gave jurisdiction, *either* where the defendant resided, *or* where the act was done, within the district. If the cause of action arise within the district, which indeed is tantamount to the second alternative laid down by the 24th clause, though in different words, the plaintiff is equally entitled to sue in that district, as if the defendant were resident within it. No. 2099, Jaffna, 30 April 1834. An action was brought in the D. Court of Galle, for 374l., on a balance of accounts. The defendant pleaded to the jurisdiction, on the ground that he, the defendant, was resident in Matura, and that no act, etc., had been done within the D. of Galle, except a payment of 300 R.D. by the plaintiff, at Galle, on the defendant's order, drawn at Matura. To this the plaintiff replied, that most of the transactions took place at Galle; and he moved to be allowed to go into evidence in support of that allegation, which the D. Court ordered accordingly, and also that the defendant should answer to the merits of the action, and on his

appealing, the S. C. affirmed the order. No. 1434, Galle, 31 Dec. 1834. In that case, part of the cause of action arose, according to the defendant's own admission, in the district of Galle. Independently of that admission, evidence would have been necessary, to shew whether the D. Court of Galle had jurisdiction, or not.

But plaintiffs must not be allowed, in order to suit their own convenience, or perhaps for worse purposes, to bring their actions under fictitious pretences, in courts to which the jurisdiction does not fairly belong, under the 24th clause. An action for land, situated in the district of A., was brought in the D. Court of B. against two defendants, the first of whom resided in B., but disclaimed all right to or interest in the land, and the second, who was the only real defendant, resided in A. The matter being brought to the notice of the S. Court, it was ordered that the case be transferred to the D. Court of A., as being the court, under the jurisdiction of which the decision of the case properly fell. If it were permitted to the plaintiff, the order observed, to carry on the suit in B., merely on the ground of the first defendant, who had no interest in it, having been joined in the action, a plaintiff might always choose the court, in which he would prefer the action to be tried, by including, as defendant, a person wholly uninterested in the matter at issue. The D. Court of B. was recommended, before transferring the proceedings, to dismiss the action, as against the first defendant, with costs. No. 632, Matele, 16 May 1835. This decision, it will be observed, is not to be considered a transfer of a case from one D. C. to another under the 36th clause, which we shall consider presently: It was merely declaring to what court jurisdiction, in the first instance, belonged.

In an action brought in the D. Court of Colombo at the suit of the Loan Board, on the mortgage of land situated at Putlam, several claimants appeared and stopped the sale in execution, and petitioned the S. C. that their claims might be heard and decided at Putlam, on the ground of the expense which would be occasioned by the examination of their witnesses at Colombo. The S. C. was inclined to accede to this petition, but the registrar, on the part of the Loan Board, consented that the wit-

nesses should be examined on interrogatories at Putlam. Petition Book of 1835, p. 170.

The 24th clause provides, That no D. Court shall have jurisdiction in any suit, etc., in which the Judge is a party; but such suit, etc., shall be cognizable in the court of district, immediately adjoining. Two cases have occurred on the construction of this proviso. One was an action, brought in the D. Court of Trincomale, against a late government agent of the Eastern Province, as first defendant, and the assistant agent of Molletivoe, as second defendant, for cooly hire and wages, earned in the service of government. The D. Court entertained the action against the first defendant, for work done in the district of Trincomale, but dismissed it as against the second; recommending that the action be commenced against him in the D. Court of Jaffna, as being a resident in the Northern Province. The second defendant held the office of D. Judge of the Wanny. The plaintiffs having appealed against this dismissal, the S. C. reversed that part of the decree, and referred the case back to the D. Court of Trincomale, to be there proceeded with, against both defendants. "A little confusion," the S. Court observed, "appears to have arisen between *Province* and *District*. It is the judicial division of *district*, and not the revenue division of *province*, which must decide the question of jurisdiction. (So, as to committing prisoners for trial before the S. C., *infra*, 267.) The D. Court has considered that, as the plaintiffs were employed in the Northern Province, and as the second defendant is a resident of that province, the claim against him "must be referred to the D. Court of that province." But there is no such thing, properly speaking, as the District Court of a province. The island is divided, by the proclamation of 1 Oct. 1833, into provinces, as regards revenue matters: It is divided by the charter into circuits and the district of Colombo, and is again subdivided by the proclamation into districts, as regards the administration of justice. The questions to be asked, therefore, under the 24th clause of the charter, in order to decide what court has jurisdiction, are, "In what district does the defendant reside? or, "In what district did the cause of action arise? The answer to the first question

is, The district of the Wanny. But then the second defendant, it appears, is judge of that district. According to the proviso of the 24th clause, therefore, the suit against him became “cognizable in the court of any district, immediately adjoining.” The district of Trincomale does immediately adjoin that of the Wanny. The court of Trincomale, therefore, is competent to entertain the case, as against the second defendant; and having been elected by the plaintiffs, as one of the districts immediately adjoining, it is bound to hear and decide it, unless some very strong reason should be shewn, for transferring it to another court. From the nature of the action, it might have been presumed that the government would have intervened, and taken the place of both the defendants. But as that has not been done, the question of jurisdiction must be decided, as regards the second defendant, with respect to whom alone this appeal has been brought, by referring to the residence of that gentleman, and the districts adjoining.” No. 2432, Trincomale, 6 Jan. 1836.

The other case was an action brought against the D. Judge of Manar, by one of his servants, in the D. Court of Jaffna. The defendant applied to the S. Court, to transfer the case from that court, either to that of Chilaw and Putlam, or to that of Anarajapoorā; alleging that both those courts were nearer to Manar than Jaffna, and that the latter court had been selected by the plaintiff, for the purpose of creating inconvenience and annoyance to the defendant. The Judges of the S. C., however, returned for answer, That they should not feel justified, in removing the case from Jaffna to another district;—that the only limitation, imposed by the proviso of the 24th clause, was that the action should be brought in some district, immediately adjoining that, over which the Judge who is a party presides;—that as there could be no doubt that the district of Jaffna adjoined that of Manar, the letter of the proviso had certainly been complied with;—that if, indeed, the choice of an adjacent D. Court had been made evidently with a view to produce vexatious inconvenience, or if such choice were likely to prevent justice being done between the parties, the Judges would not hesitate to exercise the power, vested in them by the 36th clause

of the charter, and transfer the case to some other court, notwithstanding the literal compliance with the terms of the charter;—but that no ground appeared, in the present instance, for imputing vexatious motives to the plaintiff, in his choice of an adjacent court, or for apprehending “that justice would not be done in the court, in which the action had been commenced;”—that as regarded distance, Manar appeared nearly equidistant from Jaffna and from Putlam, and much nearer to Jaffna than to Chilaw, where the D. Court was held half the year;—that it must not be forgotten, moreover, that Jaffna, as the capital of the Northern Districts, was the place which a suitor would naturally select, if he had the choice, and where he would be able to obtain the best legal advice and assistance;—for which last reason, and considering that an action against a gentleman, high in authority, ought to be conducted with as great a regard to solemnity, and with as much assistance from experience, as could be afforded to it, the S. Court would by no means consider it proper to remove a case from Jaffna, to a court so recently instituted as that of Anarajapoorra, merely because the latter might be somewhat nearer to Manar;—that as Jaffna, therefore, even if the selection still remained to be made, would be at least as proper as any other adjacent district, it would be a very strong act, and one of which a plaintiff would have a just right to complain, if, after he had taken the journey to Jaffna, and had actually commenced his action in that district, the S. Court were to compel him to retrace his steps, and to travel back upwards of 100 miles, for the purpose of recommencing proceedings. L. B. 4, 17 Aug. 1835. Vide *infra*, 285, etc., cases which the S. C. has transferred to other D. Courts; and other cases in which such transfer has been refused.

*Equitable* jurisdiction, as distinguished from *civil*, is not given by the charter in express terms; it having been considered by the framers of that instrument, that all cases brought before the D. Courts should be decided, as in the civil law, according to the rules of equity, blended with those of strict law. See what is said upon that subject by Mr. Justice Norris, *supra* 177, 8, 9; and the judgment of the S. C. on the matrimonial jurisdiction of D. Courts, *infra*, p. 262, 5. We have already seen

that D. Courts possess the most extensive powers of relieving against fraud, a very important branch of the jurisdiction of English courts of equity; supra, p. 197. Another very extensive branch of that jurisdiction, the compelling parties to reveal what their adversaries are in justice entitled to know, which is done in courts of equity by means of bills of discovery, is effected under the present system in Ceylon by a much simpler, speedier, and more effective mode, that of the examination of parties by each other and by the court; supra, p. 151 et sequ. The power of granting injunctions, also, we have seen under that title, p. 229, is vested in the D. Courts, by the general and comprehensive terms, in which their civil jurisdiction is conferred by the charter; but not for the purpose of prohibiting the commencement or prosecution of any action, p. 231, 2. The D. Courts have also the power, under certain circumstances, to dissolve *fidei commissa*; sup., p. 190, 1.

*Testamentary* jurisdiction is conferred by the 27th clause, and has been considered under title Administration: Over *idiots and lunatics*, by the 26th clause; and what little occurs upon that subject will be given under title Lunatic.

*Matrimonial* jurisdiction not being conferred, in express terms, on the D. Courts, by the present charter, the question, whether they could legally exercise it, was raised in the D. Court of Colombo in the early part of 1836; and being brought by appeal into the S. Court, was there decided in the affirmative, as far as regards the general power of the D. Courts to exercise jurisdiction in matrimonial cases. The following judgment, pronounced by the Chief Justice, but concurred in by the whole court, gives, it is believed, the facts of the case, and the arguments used against this branch of jurisdiction, sufficiently for the purpose of intelligibility; and may also be useful, as shewing the view taken by the S. Court, of the jurisdiction of the D. Courts, in general.

“The plaintiff in this case sues before the District Court, to be divorced from his wife *a vinculo matrimonii*—on the ground of adultery. This court is anxious to separate the general question of jurisdiction, from the ulterior and more delicate one, whether the D. Court has the power of granting this ex-

treme remedy; which must depend on the nation to which these parties belong, on the law which governs that nation, and on many other circumstances, which can scarcely be ascertained, without going, at least in part, into evidence. And as a speedy decision has been asked in this case, on the ground that some of the witnesses are about to leave the island, it seems expedient that the evidence of those witnesses should be taken at once; leaving the question, as to the extent to which the D. Court is competent to afford relief, for further and separate consideration. The grounds, on which it has been urged that the D. Courts of Ceylon have no matrimonial jurisdiction at all under the present Charter, are—That this instrument must be presumed to have been framed with reference to, and on comparison with, the former Charter of 1801;—that if it had been intended to confer on the D. Courts all the different kinds of jurisdiction, exercised by the late Supreme Court, all and each of those kinds would have been enumerated;—that though several kinds are expressly enumerated, namely, civil, criminal, over idiots and lunatics, testamentary, and revenue, by the 24th, 25th, 26th, 27th, and 28th clauses, no mention is made, as in the former Charter, of a *matrimonial* jurisdiction;—that this branch cannot be said to be included under the general term ‘civil jurisdiction’ in the 24th clause;—that it never could have been *intended* to invest the D. Courts of this island, some of which must be considered, without disrespect, as an inferior class of courts, with such extensive powers, transcending those exercised by every court of England, except the High Court of Parliament itself;—that if such powers were vested anywhere, they ought to reside in the Supreme Court;—that as the S. Court does exercise original jurisdiction in criminal matters, in issuing writs of Habeas Corpus, and injunctions, so there is no reason why it should not exercise a matrimonial jurisdiction, unless specially prohibited;—that it is not so prohibited, because the 29th clause only declares that the jurisdiction, *before* given to the District Courts, shall be exclusive, and as this particular jurisdiction is *not* before given, the Supreme Court cannot be excluded from exercising it;—that the Supreme Court, and not the District Courts, corresponds with the High Court of Holland,

by which latter court this jurisdiction was exercised;—that the D. Courts might as well take upon themselves to exercise an equitable jurisdiction, as a matrimonial one, neither being expressly given;—that no appeal from the decision of cases of this nature could be carried home to England, inasmuch as the second condition of the 52d clause of the Charter limits such appeals to decisions, involving property to the amount of 500*l.* or upwards;—that the D. Courts would be obliged to inquire into the laws of every country in the world, according to the nation to which litigants might belong;—and finally, that, if the Supreme Court should not feel itself competent to exercise this jurisdiction, the parties must resort to the courts of their own country for redress. These arguments certainly seem to leave nothing unsaid, which could be urged in support of this appeal. The main fallacy, however, consists in supposing that the terms of the 24th clause are insufficient to confer, and that they do not confer, a jurisdiction in matrimonial matters. Those terms are of the most general and comprehensive nature: ‘Each District Court shall be a court of civil jurisdiction, and shall have cognizance of, and full power to hear and determine, all pleas, suits, and actions.’ ‘All suits’ comprehend matrimonial suits, as well as others. The word ‘civil’ is to be taken in the 24th clause, as contra-distinguished from ‘criminal,’ which is used in the following clause; rather than to be put in opposition to ‘matrimonial,’ or any other sub-division of civil jurisdiction. Then, again, somewhat too much stress has been laid on the enumeration of certain branches of jurisdiction, and on the omission of that in question. The argument can scarcely be said to arise at all out of the 26th or 27th clauses; because it might have been doubted whether the custody of lunatics, or the power to grant probate or administration, would have fallen within the words ‘pleas, suits, and actions.’ As regards the 28th clause, however, the argument certainly does hold to a certain extent: For there can be no doubt that revenue cases would have been comprehended within the terms of the 24th clause; and it must be admitted therefore that, if it was considered expedient, as a matter of precaution, to give a revenue jurisdiction by express declaration, it might have been as well,

in conformity to the Charter of 1801, to have given it in matrimonial cases also. But the argument of *expressio unius exclusio alterius* can only prevail, where the intention of the legislature is doubtful; indeed it has been urged that it never *could* have been intended to give this jurisdiction, so difficult in its exercise, so important in its consequences, and so dangerous in its abuse, to the District Courts. But it is perfectly within the knowledge of this court, that it was the intention of those who framed the Charter to confer the most extensive jurisdiction on the D. Courts, in all but criminal matters of a grave nature, and a matrimonial jurisdiction among others. With respect to the Supreme Court exercising this jurisdiction, it is sufficient to say that, as the 24th clause does, in the opinion of this court, vest it in the District Courts, it must be exercised by those courts, under the terms of the 29th clause, *exclusively*. The power of granting writs of Habeas Corpus by the S. Court is rather an appendage to its criminal jurisdiction; and that of issuing injunctions is only in aid of the District Courts, in cases where irremediable mischief might ensue from the delay in going to the D. Courts. (Vide supra, p. 229.) Nor would the supposed analogy between the Supreme Court and the High Court of Holland assist the appellant; for this branch of jurisdiction, and even the power of dissolving the matrimonial tie altogether, would seem to have been exercised by the courts of ordinary jurisdiction in Holland, subject no doubt to appeal: Voet. Lib. 24, tit. 2. An equitable jurisdiction undoubtedly *is* vested in the District Courts, if the administration of the civil law, and the vivâ voce examination of parties, as now practised, can leave any necessity for their intervention, as courts of equity. Vide supra, 261. And this also was the expressed intention of the framers of the Charter. It might appear, at first sight, that parties would be without appeal to the King in council, where no value appeared, as the measure of the injury sought to be redressed: But this court would certainly supply that apparent omission, by considering every case of this description as above the value of 500*l.*, and truly so; since questions of this nature can scarcely be measured, as to their importance, by money to any amount. It is true that the District Courts may, in the

exercise of this branch of jurisdiction, and in some others, be obliged to inquire into the laws and customs of other countries: This is a difficulty, which must be met in the best way that the knowledge of the District Judges, assisted as it will always most readily be by that of the Judges of this court, and corrected, when necessary, by the decision of the Supreme Court in appeal, will admit of." No. 11,016, Colombo, 6 Feb. 1836.

*Revenue* jurisdiction, as we have just had occasion to see, p. 264, is conferred on the D. Courts, with certain limitations, by the 28th clause. What occurs on this branch, will be given more conveniently under the remaining head of criminal jurisdiction.

*Criminal* jurisdiction is given to each of the District Courts by the 25th clause, "to inquire of all crimes and offences, alleged to have been committed, wholly or in part, within its district; and to hear, try, and determine, all prosecutions for such crimes, etc.: Provided that this jurisdiction shall not extend to any crime, punishable with death, transportation, or banishment, or imprisonment for more than 12 calendar months, or whipping exceeding 100 lashes, or fine exceeding 10l." As regards the local limits, by which this branch of jurisdiction must be regulated, it will be observed that crimes are cognizable by the court of a district, if committed wholly or in part within that district;—an alternative well calculated to remove doubts and difficulties as to jurisdiction, as regards those crimes which usually induce change of place, as cattle-stealing and similar offences. Thus, a person was apprehended for cattle-stealing in the district of Cultura, and taken before the court of that district; but the D. Judge, finding that the theft had been committed in the district of Amblangodde, transferred the prisoner to that court. The latter D. Judge, doubting whether he could regularly enter upon the inquiry of a case which had been begun in another court, referred to the S. Court for instructions; and was informed, That the investigation having been commenced in one D. Court, formed no objection to its being taken up and continued by another, if it appeared that the ground of prosecution arose in that, to which it was transferred;—that in the present instance, the prosecution might have been carried on in either district, because every moment's possession of the

stolen property by the thief was a fresh offence;—but that the inquiry would most conveniently be carried to a conclusion in Amblangodde, where the original offence was committed, and where the most material witnesses must be supposed to reside. L. B. 5, 8 Nov. 1834. So, escapes, as we have seen under that head, *supra*, 104, may be tried either in the district where the original act of escape occurred, or in any other, in which the offender may be found. One or two mistakes have occurred, in the commitment of prisoners for trial before the S. C., by not adverting to the distinction, above alluded to, p. 259, between the division of the island into circuits and districts, as regards judicial matters, and into provinces, as regards revenue;—the latter division having no reference to judicial jurisdiction.

A question of very great and general importance was raised, in one of the D. Courts, on the construction of the proviso contained in the 25th clause just recited, as affecting the criminal jurisdiction of the D. Courts: Whether, under the terms of that proviso, those courts were authorized to inflict at one time, and for the same offence, the three punishments of imprisonment, whipping, and fine, or any two of them; or whether they were limited to the selection of some one of those modes of punishment. The S. Court, after very mature consideration, was of opinion that, by the terms used in the charter, the D. Courts were not prohibited from inflicting any two of these punishments, or even all of them, to the extent to which each is limited, if a case should ever arise, which could justify this threefold infliction. But on this latter point, the Judges suggested that a case of such a nature must be of very rare occurrence indeed. Fine and imprisonment, or imprisonment and whipping, respectively, might be often beneficially united; but it could seldom happen that the same offender could be considered a fit object both for fine and corporal punishment;—still less for all three. This opinion was communicated to all the D. Judges, by a circular letter, 22 May 1834. But as the S. Court was not unanimous on the point, and as the view taken by the majority was certainly not on the popular side, it may be right to state the grounds, on which the Chief Justice rested his opinion, and in which the Second P. Justice expressed his entire concurrence.

The proviso in question, from the terms of it, evidently contemplated a scale, established by law, of crimes and punishments, apportioned to each other. No such scale being in existence in Ceylon (1), the limitation of the criminal jurisdiction of the D.

(1) About ten years since, the judges of the S. Court, Sir R. Ottley and Mr. Marshall, were called upon by His Excellency the late Sir Edward Barnes, under the directions of the Secretary of State, to shew what the existing state of the criminal law was in Ceylon, and by what scale the courts regulated their sentences, as regards crimes and punishments; and also to state their own views of this important subject. They accordingly addressed the governor, at considerable length, on the various topics connected with the criminal law of Ceylon. Among others, after enumerating and distinguishing the different gradations of punishment, usually imposed in Ceylon, from simple imprisonment up to the extreme penalty of death, they observed: "But there is, properly speaking, no 'scale' by which the infliction is proportioned to the offence: That is, there is no such scale fixed by law; though every judge, no doubt, has a standard of his own, by which he graduates the punishment, according as his own ideas of the magnitude of the offence, the frequency of its recurrence, and the character of the offender, may suggest. We, for instance, have agreed upon a certain scale, according to which, for the sake of consistency, we apportion, as nearly as possible, the punishments which we are called upon to inflict, whether acting conjointly or separately: And so, we presume, did our predecessors. But we feel it to be our duty, most earnestly to deprecate this fluctuating state of the law, by which an offence, punished by the conscientious severity of one judge with hard labour for fourteen years, might possibly, by the equally honest tenderness of another, be considered sufficiently expiated by one year's imprisonment. We should wish to see the penal consequences of crime as accurately defined by positive enactments as possible: Enough must always be left to the discretion of the judge." After some remarks on the effect of the different modes of punishment on the natives, and on their respective tendency to repress crime, the judges submitted, for the consideration of H. M. Government, their views of a scale of crimes and punishments, in the formation of which they availed themselves largely of stat. 9 Geo. 4, ch. 74, by which the acts, then lately passed for the amelioration of the criminal law of England, were in substance consolidated and applied to India. If the writer of these notes were now to give his opinion on the subject of the proposed scale, he would probably modify the recommendations contained in the letter, especially as regards capital punishment: But his opinion, that some rule of apportionment, more definite than the casual view taken of each case by the presiding judge, would be desirable, still remains unchanged. And it was only because he considered that the matter was in the hands of H. M. Government, and that it would therefore be unbecoming in him to agitate it in Ceylon, unless called upon from that high quarter so to do, that he abstained from bringing it forward, while he held a seat in the Legislative Council.

Courts is rather imposed by implication, than directly expressed ; but it is not the less binding on that account. If an offence be *not* punishable with any of the degrees of severity, enumerated in the proviso of the 25th clause, the D.C., putting the charter out of consideration, could have no power to pass such a sentence : If the offence *be* so punishable, it is placed out of the reach of the D. C., by the express prohibition of the proviso. And this supplies the criterion, by which to try the question, whether a D. C. has exceeded its jurisdiction, and by which alone the S. C. would be justified in setting aside any sentence of a D. C., as going beyond its authority. The questions to be asked are these—Was the crime, with which the defendant was charged, punishable with death, or transportation, or banishment, or imprisonment for more than 12 calendar months, or whipping exceeding 100 lashes, or fine exceeding 10*l.* ? Or, has the D. Court imposed any one of these punishments ? If both these questions be answered in the negative, the D. C. seems clearly to be within the limits of its jurisdiction ; and the S. C. would as clearly seem to be exceeding its authority, if it were to interfere with any such decision on the ground of jurisdiction. It has been contended that, after a D. C. has awarded the full amount of any one of the three punishments, to which a maximum is affixed by the proviso, it would have no power to award either of the other two ;—because, when either imprisonment, or whipping, or fine, to the full extent to which each is limited, has been imposed, the addition of either of the other two, whether in whole or in part, would make the punishment *more than* imprisonment for 12 months, or than whipping of 100 lashes, or than fine of 10*l.* But the words of the proviso are not “crimes punishable with *more than imprisonment* of 12 months, or with *more than whipping* of 100 lashes,” etc. ;—the words are, “crimes punishable with *imprisonment for more than 12 months*, or by *whipping exceeding 100 lashes*,” etc. But even supposing this argument to be valid, there would still be nothing to prevent the D. C. from stopping short of the maximum of each punishment, and imposing part of all. As regards the *intention* of those who framed the charter, it must be inferred that it never was contemplated to limit the D. Courts to

the exercise of one of these three punishments in each case ; or else, that such limitation would have been introduced, in express terms. The gentleman, who framed the present charter, had made himself intimately acquainted, both by personal observation, and by the reports of those conversant with the subject, with the authority and practice of the several courts, especially in their criminal jurisdiction ; he must frequently have witnessed the simultaneous infliction, by the Sitting Magistrates, of two of these punishments on the same offender, and was perfectly aware of various regulations, authorizing such compound punishment : He would certainly, therefore, not have failed to tie down the new D. Courts, in express terms, to the selection of one of these punishments, to the exclusion of the other two, if he had thought that they ought to be so restricted. As a matter of *expediency*, too, as far as that consideration may be allowed, in the construction of a public instrument, there is no doubt that imprisonment and whipping, or imprisonment and fine, may often be most beneficially imposed ; or that many instances have occurred, of minor offences too, in which any one of these punishments, singly, would not have been productive of the desired effect. Again, if it had been intended to prohibit the D. Courts from imposing a larger measure of any two punishments, than might be considered as amounting in the whole to the maximum of any one of the three, a scale would have been introduced for that purpose ; as, for instance, that if two-thirds of the maximum of imprisonment were awarded, it should only be lawful to add one-third of that of whipping or of fine.

The different modes of punishment, as the most effectual means of repressing crime, and reforming offenders, the employment of criminals, while under sentence, and indeed every point connected with the conduct and discipline of gaols, must always be subjects of the highest interest, whether in a judicial or legislative point of view. The question was proposed to the S. Court, whether a D. Court would be justified in sentencing a prisoner to *solitary* confinement. A lad of 18 had been convicted of stealing his master's watch ; and the D. Judge, not intending to inflict corporal punishment upon him, thought it

desirable to adopt this mode of imprisonment, in order that the boy might escape the contamination, which he could scarcely fail to incur, if he were associated with the usual inmates of the gaol. The S. C., acting on the principle above laid down, that this mode of punishment was not one of those interdicted by the charter, returned for answer, That there was nothing to prevent a D. Court from sentencing a person convicted of a criminal offence to solitary imprisonment, when satisfied from the circumstances of the case, that such a sentence would have a more beneficial effect, than ordinary imprisonment at hard labour;—but that the term of imprisonment awarded must be duly considered, with reference to the severity of confinement, which, when strictly solitary, was increased in a double ratio, as its duration was extended. L. B. 15, 17 Aug. 1835. This latter caution should indeed never be lost sight of, in imposing this species of imprisonment; and a D. Judge would do well also to inquire what means of separate confinement the gaol affords, before he determines on it. To give full effect to this mode of correction, it is not sufficient that the convict be merely corporeally separated from his fellow-prisoners: He should be kept free from the contagion of their conversation, especially if he be a young offender. It is the silence, added to the solitude, which has always been found to constitute the severity of the punishment; as well as the means of reformation. The gaols in Ceylon, it is feared, afford but scanty facility for this total seclusion, without endangering the health or even life of the prisoner; which might be the case, if he were to be immured in cells, such as are safely and properly used for that purpose in more temperate climates. The experiment of solitary confinement, except during the hours of labour, and accompanied by absolute silence even while the convicts are at work, has been tried on a very extended scale in the United States of America; or, to speak more correctly, is still in a course of trial, for its complete success seems yet a matter of controversy. Its efficiency, as regards the severity of the punishment, being indeed substituted for that of death, in those States in which capital punishment is abolished, appears to be undisputed. But it has been questioned whether the system of solitude and silence, combined,

can safely be carried to the extent, in point of duration, to which it has been attempted to prolong it, for offences of the more heinous description. It has been said,—but this again is a disputed point,—that total alienation of mind has, in some instances, been the consequence. Unless, however, the writer's memory fails him in this respect, those instances of derangement have occurred, at least chiefly, where the prisoners have been left, for a great length of time, to the dreary tediousness of silent and unoccupied solitude, unrelieved by the comparatively more endurable intervals of work, which, by those of more active bodies and elastic minds, is unquestionably hailed as a relief. Whether labour would ever be considered an alleviation of imprisonment, by the indolent inhabitants of the tropics, may be questioned. It may be interesting to those, whose attention is directed to this subject, to know that the *Académie Royale de Médecine* of Paris lately appointed a committee to examine into the subject of mortality and insanity, arising from the penitentiary system; which committee has expressed itself decidedly in favour of the mode of solitary confinement, used in the penitentiary at Philadelphia, and recommended for adoption by M. Christophe, inspector-general of the prisons of France.

As to the authority of D. Courts, to remand insolvents, on proof of misconduct, for imprisonment, not exceeding three years, notwithstanding the limitation of their criminal jurisdiction by the 25th clause of the charter; vide *supra*, 92, 3.

Not many months after the promulgation of the charter, doubts arose on the construction of the 25th and 28th clauses, the first relating to the *criminal*, the last to the *revenue* jurisdiction of D. Courts; whether these courts, in the exercise of the latter jurisdiction, had power of confiscation, where the value of the property to be condemned exceeded 10*l*. The point having been maturely considered by the S. C., the Judges unanimously determined, “That the D. Courts had authority, under those two clauses, to confiscate property to any amount, such confiscation being rather in the nature of a civil action, at the suit of the crown, or the informer, or both, than of a criminal proceeding: But that, with respect to fines upon offending parties, this being purely a criminal proceeding, the jurisdic-

tion of the D. Courts was limited to 10*l*.” A circular letter to the above effect was accordingly written to all the D. Judges on 12 May 1834.

Soon afterwards, another doubt was started by a D. Judge, as regarded the construction of the 41st clause of the charter, and of the 10th rule of sect. 2, taken in conjunction with the 25th and 28th clauses of the charter just referred to. The 41st clause directs, “That all crimes and offences shall be prosecuted, and all fines, penalties, and forfeitures, be sued for and recovered, by information, in the name of the King’s advocate:” But provides that “the S. C. may, by rules of court, make more convenient provision for prosecuting before D. C. breaches of the peace, petty assaults, and other minor offences of the like nature.” The 10th rule of sect. 2, accordingly directs that in all such minor offences, the D. Judges may take the complaint from the party injured, verbally or in writing, without any libel or formality of proceeding being necessary. The doubt entertained by the D. Judge was, whether, under the 41st clause, *any* criminal prosecution, for an offence against the revenue laws, were cognizable by the D. Court, unless prosecuted by information in the name of the K. A.; even though the punishment, which might follow a conviction, should not be beyond what the court was competent to award under the 25th clause: And the ground on which the D. Judge felt this doubt was, that offences against the revenue laws appeared to him to be crimes of greater magnitude than “breaches of the peace, petty assaults, and other minor offences,” and therefore fell within the principal enactment, and not the proviso of the 41st clause. The S. Court, on this question being submitted, after referring the D. Judge to the circular letter of 12 May 1834, as regarded the distinction between confiscation and fine, proceeded to discuss the necessity of prosecutions, in such cases, being instituted in the name of the King’s advocate. They observed, That where the fine, penalty, or forfeiture, sued for, did not exceed the sum of 10*l*., the case might, with perfect propriety, be considered to fall within the term “minor offences” in the 41st clause of the charter, and might consequently be entertained by the D. Court, under the 10th rule of sect. 2, without libel, or

other formality of proceeding;—that an offence against the revenue laws was not, necessarily, “a crime of greater magnitude than breaches of the peace,” etc., and, indeed, if unaccompanied by force, being mere infractions of positive prohibitions, and not acts inherently wrong in themselves, would seem entitled to be considered in a still milder point of view:—That, on the other hand, if the amount in question did exceed 10*l.*, the prosecution should be in the name of the K. A., whether it were for a fine, or for a mere confiscation of property;—that the distinction drawn by the S. Court between confiscation and fine had proceeded on the ground that confiscation of property illegally imported, or under any similar liability to forfeiture, did not fall within the term “fine,” as used by the 25th clause, or “punishment,” as occurring in the proviso subjoined to the 28th clause;—that the words of the 41st clause were much more comprehensive, directing not only that all crimes and offences should be prosecuted, but that all fines, penalties, and *forfeitures*, should be sued for, in the name of the K. A.; words which could not but include confiscations, as well as fines. L. B. S, 9 July 1834.

The D. Judge, to whom this letter was addressed, not feeling satisfied on the subject, and considering that if confiscation and fine were both included in one class as regarded the 41st clause, they must also be so included with reference to the 25th and 28th clauses, applied to the Chief Justice for further explanation, which was readily afforded him, and with which he afterwards expressed himself perfectly satisfied. As the same difficulty may suggest itself to other D. Judges, and the same explanation may possibly be equally satisfactory, the writer is inclined to insert the substance of it here; and the rather, because it will give opportunities for criticizing his view of the subject, and correcting it if it should be fallacious. He could not, with propriety, have blended it with the letter, officially addressed to the D. J., because that letter had been agreed to by the three Judges, whereas he must be exclusively responsible for the following reasoning:—“The charter imposes two different and distinct limitations to the jurisdiction of the D. Courts; or, to speak more correctly, it imposes a *limitation* and a *condition* to

that jurisdiction. The *limitation* is imposed by the 25th clause, which prohibits the D. Courts from taking cognizance of offences, punishable with death, etc., etc., or by *fine exceeding 10l.*; and this limitation is expressly extended, by the 28th clause, to 'prosecutions for any offences, committed against the revenue laws.' As regards confiscation of offending property, the S. C. has considered that, as this was a proceeding *in rem* rather than *in personam*, it did not come within the spirit of the words 'any crime punishable by fine exceeding 10l.,' as used by the 25th clause, or the word 'punishment,' as occurring in the proviso of the 28th clause. Confiscation is not a 'fine,' nor is it necessarily a 'punishment;' for the property condemned may not belong to the person accused of the offence: Nay, the owner of it may often be unknown; in which case, its confiscation would be impossible, if it could only be obtained by means of a criminal prosecution against the person. Therefore, a D. C., in condemning property above 10l., is not trying an offence, 'punishable by fine exceeding 10l.' The *condition*, imposed by the 41st clause, that all offences shall be prosecuted, and all fines, penalties, and forfeitures be sued for, in the name of the K. A., except as provided for by the subsequent part of the clause, is perfectly distinct from the *limitation* of jurisdiction, as to punishment, by the 25th and 28th clauses. Its object is wholly different, the terms used are more comprehensive, and it applies to the S. Court, as well as to the D. Courts. By keeping this distinction in view, the difficulty felt by the D. Judge will, it is hoped, disappear. The words, 'fines, penalties, and forfeitures,' in the 41st clause, *do* include confiscations, as well as fines; but the terms of the 25th and 28th clauses *do not* include confiscations. There is nothing to prevent confiscations and fines being included under one class, as regards prosecutions by the crown officer, and being separated and distinguished from each other, as regards jurisdiction of the D. Courts. The limitation of jurisdiction, and the interposition of the K. A., are two objects, so essentially differing from each other, that there is no reason why the limitation and condition must be considered as necessarily co-extensive; and if any reason did exist, it has not been acted upon, for different terms of definition have been

used, and must be interpreted accordingly. So far from there being any inconsistency in this distinction, it is consonant with the known object of the charter, which was to give the D. Courts the most extensive and exclusive original jurisdiction, in all suits of a civil nature (within which category the S. C. considers mere confiscation of property, sinning against the revenue laws, to fall), while it limited their jurisdiction in matters purely criminal." L. B. 21, 22 July 1834. Whether the opinion here given be a sound one, may be matter of discussion, as the writer would wish it to be, if any doubt should exist. Like many other questions of construction, it is perhaps of no great importance, which way it may be decided, so that one uniform mode of proceeding be ultimately recognized and established. It may be observed, however, that it would often be a serious inconvenience and loss to all parties, claimants as well as seizers, if the question of confiscation or release of suspected goods were made to await the holding of the next criminal session of the S. C., whether on circuit or at Colombo; which it must do, if prosecuted criminally, and the value exceeded 10*l.*

There was one other point, arising out of the letter of the D. Judge, on which the Chief Justice gave his opinion: That the 10th rule of sect. 2, following the 41st clause of the charter, only declares that in the prosecution of the "minor offences," a libel or other formality of proceeding shall not be *necessary*; but that this by no means *precludes* the crown officer from proceeding before the D. Court in the more formal manner, if he should deem it expedient so to do.

The question, whether the revenue jurisdiction, in general, of the D. Courts, should be ranged on the civil or criminal side of the courts, was again brought under consideration of the S. Court by the King's advocate, on a subsequent occasion. A D. Court having decided that a prosecution for a fine or penalty must be conducted on the criminal side, the prosecutor appealed, and the S. Court affirmed the decision in the following terms. "The King's advocate has raised the general and somewhat important question, whether all prosecutions for penalties, under the revenue laws of Ceylon, should not be considered as civil actions, like that class of suits in England brought

by the informer, and usually designated 'Qui tam actions.' In England, several distinctions have been made on this subject, between statutes which are purely penal, those which are purely remedial, and a third class, partly penal and partly remedial. On some statutes, the remedy for their infraction is by indictment, in others by action, in some by both: And many acts of parliament, indeed, prescribe a specific mode of proceeding. It appears very desirable, however, that one uniform course of proceeding should be laid down for the guidance of the District Courts of Ceylon in this respect. And in determining what that course shall be, the Supreme Court must be very much governed by consideration of the charter, of the practice hitherto in force, and of the consequences to parties, which the adoption of one or the other kind of proceeding would produce. The 28th clause of the charter declares that "all causes affecting the revenue, and all prosecutions for the punishment of offences against the revenue laws, shall be cognizable by the D. Courts, in the same manner as any other suits or prosecutions:" And it afterwards provides that "no such prosecution, for any offence committed against the revenue law, shall be cognizable by the D. C., where the punishment may be of greater degree or amount, than the D. Courts can award on prosecutions for other offences." This clause makes an evident distinction between civil suits, and criminal prosecutions. In the former class, would be comprized actions for non-payment of instalments by renters, for the recovery of rent reserved on land or houses, for resuming possession of land, where the conditions of the grant have not been complied with, and for all other causes of complaint, which would form the subject of civil actions between private persons. The latter class would seem to comprehend proceedings against all persons, accused of any of those transgressions of the revenue laws, whether acts of omission or commission, which those laws have declared to be penal; in other words, on which the court is to inflict "punishment," in whatever shape, whether as fine, either to the king, or to the informer, or to both; or as imprisonment, with or without hard labour; or as corporal punishment. Even supposing, therefore, that prosecutions for the recovery of pe-

nalties were treated as civil actions, as regards the form of proceeding, the D. Courts would be limited in their civil jurisdiction, quoad this description of action, to the sum of 10*l.* For it would be quite impossible, in the opinion of this court, to take a case, in which the fine to be imposed exceeded that sum, out of the proviso of the 23th clause, merely by calling the proceeding a civil action. The crown or the informer might call the penalty claimed a *debt* due to the crown or to the informer; but, as regards the defendant, it would be, to all intents and purposes, a “punishment” for an “offence against the Revenue Laws.” The S. C. possesses no original jurisdiction in civil actions at all. If, therefore, these prosecutions for offences against the revenue were treated as civil proceedings, all prosecutions for penalties exceeding 10*l.* must either be abandoned, or they must drop their character of civil suits and assume that of a criminal proceeding, in order to give jurisdiction to the S. Court; a sort of amphibious character, which ought not to be given to them for mere purposes of convenience. The King’s advocate indeed has urged that, by the charter, revenue cases form a distinct class of themselves. And that is true, as regards the subject matter of them; and the same may be said of Matrimonial, Testamentary, or any other class of cases, relating to particular subjects. But the distinction between civil and criminal matters still remains, and is forcibly pointed out in this clause of the charter, by the respective expressions “*causes* affecting the revenue,” and “*prosecutions for the punishment of offences*, committed against the revenue laws.” Again, many of the revenue enactments substitute imprisonment at hard labour, in default of paying the penalty imposed. It is scarcely necessary to say that this judgment could not be passed on a defendant in a civil action. The King’s advocate suggests that this difficulty might be got over, by suing for the penalty only, and disclaiming all right to demand the alternative of hard labour. But the question would still remain, whether an act or omission, which a regulation declares shall be visited, in case of non-payment of the fine, by imprisonment at hard labour, be not thereby marked and pointed out as a punishable offence, and not merely as the ground of a debt, accruing to the King or the informer. With

respect to the practice heretofore observed in this respect;—the appellant states in his petition of appeal, that “the practice prescribed by regulation (No. 9 of 1825), and which was acted upon for a series of years,” is in favour of civil proceeding. There certainly appears nothing in the regulation, to warrant this assumption. And as far as this court has had experience on the subject, the practice of former Provincial and Sitting Magistrates’ Courts would seem to be all the other way. In some of the courts, indeed, the judges and magistrates appear to have leaned too much to the criminal proceeding; and to have imagined that every case, in which the King appeared as the complainant, must be received on the criminal side of the court, even though the claim was purely a civil one. Then, as regards the consequences to the defendant, by considering the proceeding as a civil or criminal one; there appear very strong reasons for inclining the court in favour of the latter. The payment of stamps, if judgment passed for the crown, would, in truth, be an increase of penalty. But as regards the summoning of witnesses, this might operate sometimes as an absolute bar to his making his defence. For the penalty sued for, would often raise the case to a class, which would put the expense of subpoenas quite out of the reach of persons, sued for breaches of revenue enactments, who are frequently common coolies. It may be said that such persons might apply to defend as paupers: But this court does not think that their defence, to a prosecution for penalties, should be made dependant on the contingencies, on which alone the indulgence to sue or defend as a pauper depends. As a general rule, therefore, the court feels disposed to say that all infractions of the revenue laws, on which penalty, fine, or other description of punishment whatsoever is imposed, shall be proceeded against criminally. If, however, the King’s Advocate will point out to the court any specific offence or offences, with respect to which an exception may be made, and which may properly be treated civilly, the court will consider the distinctions so pointed out. With respect to those cases, in which confiscation of property is the sole object, this court has already conveyed its opinion, by the circular letter to the District Judges, of the 12th of May

1834, that confiscation is rather in the nature of a civil action, than of a criminal prosecution. And that opinion the court still retains." No. 98, Colombo, 16 Dec. 1835. On the next court day, 23 Dec., No communication having been made to the court by the K. A., with respect to any line of distinction, to be drawn in revenue prosecutions, it was ordered that the judgment of the court should stand, as pronounced on the 16th instant.

The penalty contemplated in this judgment, and which is classed with fine, or other *punishment*, must not be confounded with the penal sum, or 'penalty' as it is usually called, inserted in recognizances, which, when forfeited, are properly sued for by civil action, as in the case of any other description of bond or obligation. L. B. 12, 16 Aug. 1834.

A person having been convicted by a D. Court, of having illegally removed arrack, contrary to the proclamation then in force in the Kandyan Districts, the arrack was confiscated, and the defendant was fined according to the terms of the proclamation; but the fine exceeded 10*l*. On appeal, the S. Court ordered that the sentence of the D. C., as far as it related to the fine imposed on the defendant, be set aside, and that the defendant be discharged from imprisonment, on account of the said fine: And the D. Judge was referred to the Circular Letter of 12 May 1834, as to the distinction between fine and confiscation, *supra* 272, 3. In that case, the D. Judge recommended the defendant to the consideration of the Supreme Court, for a remission both of the fine and confiscation, on the ground that he did not appear to have acted wilfully in contravention of the law. On that part of the subject, the S. Court observed, That it would gladly listen to the suggestions of the D. Judge, in favour of the defendant, as regarded the confiscation; but that the duty of the appellate court must or ought to be limited to the inquiry, whether the conviction were legal, and supported by the evidence;—that in the present case, it was impossible to say that the defendant had not "removed arrack from one part of the Kandyan Provinces to another, without the requisite license," or that he had not therefore been brought within the proclamation;—that as the prosecution had been instituted,

and pressed to a conviction, the S. Court was bound to affirm it, as far as it fell within the jurisdiction of the D. Court, leaving it to the defendant to apply for remission to the Governor. No. 170 Kandy (criminal), 24 Sept. 1834. Similar applications, it may be observed, have frequently been made to the S. Court, for remission or mitigation of penalties or confiscations; the answers to which have necessarily been, that if the conviction be legal, such remission is entirely out of the province of the S. Court, and that application can only be made to the executive government. The S. Court would no doubt recommend a case to the favourable consideration of government, if circumstances appeared to call for such recommendation: But to attempt to interpose judicially in such cases, by way of remission, would be to interfere with the rights of the crown, and consequently to provoke that collision with the executive administration, which the secretary of state, in the instructions accompanying the present charter, declared himself so anxious to prevent.

We have already observed on the anxiety displayed by those who framed the charter, to prevent the possibility of any conflict of jurisdiction between the D. Courts themselves, as well as between any one of these courts, and the S. Court; *supra*, p. 253, 4. Nor have any instances occurred, within the writer's knowledge, of any such usurpation or encroachment. In one case, indeed, a plaintiff got judgment in one court, and took it at once to another, from whence he obtained execution; but it was presumed that the circumstance of the judgment having been pronounced in another court, must, by some means, have escaped the notice of the court, which issued the execution: *Supra* 162. It is only necessary, therefore, to point out those cases, in which D. Courts have been called upon to co-operate with each other, and which are therefore distinguishable at a glance from obtrusive or uncalled-for interference. Thus, in the case arising out of the Mutiny Act, fully reported *supra*, 95 *et sequ.*, where a warrant of arrest, issued out of the D. C. of Colombo, was transmitted to the D. J. of Kandy for indorsement and execution; and the latter court, finding that it was rendered powerless, by the terms of the act, to enforce the war-

rant, ordered the defendant to be discharged; the S. C. considered that it was incumbent on the D. C. of Kandy to inquire into the legality of its powers, which it was called upon to exercise, before it ventured to do so;—and that the discharge of the defendant was no interference in the jurisdiction of another D. C., but merely a decision, and a correct decision, on the extent of its own jurisdiction. With respect to the examination of witnesses in a distant district before the D. J.: As observed by Mr. Cameron, “This course is no violation of the system of exclusive local jurisdiction, established by the charter; it is *subservient* to jurisdiction, but is no *part* of jurisdiction.” *Supra* 133, 4. And the same observation may be applied to other auxiliary acts. It is scarcely necessary to observe that all acts, done by one D. C. in furtherance of the proceedings of another, are done not by *order* of the court requiring assistance, for all the District Courts, as we have already seen, are co-ordinate, and have no power to issue mandates to each other; but as the acts of one independent court, in aid of another independent court, in common obedience to the rules governing the whole machine, of which each forms a part.

The writer of these notes does not recollect any case, in which the jurisdiction of the Supreme Court has come in question, except incidentally, as regards the issuing of injunctions, *supra*, 229, the power of remitting penalties, 280, or as it may impliedly be involved in the consideration of the different branches of the jurisdiction of the D. Courts. The following decision of the S. Court, as to the propriety of its interference, in a particular case, with the duties of the law officers of the crown, and bearing also on the general question of attempts to exercise jurisdiction, without the certainty of possessing legal authority to support and enforce it, may not be out of place here. A. D. Judge, having heard by private information, that a letter, accusing him of partiality, had been addressed to the King’s Advocate, applied to that officer for a copy of the letter. The K. A. declined complying with the application, on the ground that “no one could demand the publicity or inspection of a letter, addressed to him in his official capacity, without the written command of the governor, authorising him to pro-

duce it; that if the object of the application were to institute a legal proceeding, he, the K. A., was the proper authority to decide on the expediency of it; and that if any other mode of vindication were contemplated, he might, by the unnecessary production of the letter, find that he had made himself accessory to a breach of the peace, or some more serious mischief." The D. Judge then applied to the S. Court, to call on the King's Advocate for the production of the letter, in order that, if it should be found to contain the alleged accusation, the judges might call the author of it before them, to ascertain whether the imputation were founded in truth, or whether it were the rash and intemperate effort of a party in a case, wantonly to assail and impugn the integrity of the judge. The following is the substance of the answer, which the S. Court directed to be returned to the D. Judge by the registrar.

"The Judges of the S. C. are anxious to assure you, that they will ever be ready and willing to afford the D. Judges that protection, which they have a right to expect from the Supreme Tribunal of the Island. But in order to render such protection real and efficacious, care must be taken that the authority of the S. C. be interposed in those cases only, in which such interposition can legally and constitutionally be exercised; in which the end proposed is distinct and obvious; and in which the means to be employed are adequate for the attainment of that end. Any other attempt at interference by the S. C. can only have the effect of diminishing the respect due to the court itself, without benefit to the person, in whose behalf the interference may have been attempted. With respect to the application now made by you, the Judges much regret to be obliged to state, that they feel great difficulty on all those points. They very much doubt, in the first place, whether they would be legally justified in calling upon the King's Advocate for the production of a letter, received by him in his official capacity, from a defendant in a case before a D. C., or indeed from any other quarter, unless the production of such letter were necessary, in the course of some judicial inquiry. H. M. Advocate would probably comply with such requisition, as a matter of courtesy towards the King's Judges: But if he were to refuse, it may well be ques-

tioned whether the S. C. would have the right to enforce it. And that court would act with very little regard for its own dignity, or the maintenance of its real authority, which should ever make a demand, a compliance with which was optional with the person from whom it was made. There may, however, be reasons, which would and ought to induce the K. A. to withhold the letter in question. Exercising the very extensive powers which he does, as to public prosecutions, he may probably consider a letter from a defendant in a criminal case a privileged communication, to be exhibited to no person, and in no court, unless legal proceedings were to be instituted, and a judicial decision given, compelling its production. That the contents of a letter, addressed to the crown officer, should have obtained publicity at all, seems somewhat singular; but as the purport of it has been communicated to you, the same source of information, it may be presumed, will furnish you with the means of initiating any measures which you may think it right to adopt, without the intervention of the S. C., in a way so extraordinary and unprecedented. But supposing that the Judges were to make this requisition on the K. A., and that officer were to comply with it, by the production of the letter, the S. C., I am directed to state, would still feel itself in equal difficulty with respect to the end proposed, and the mode of attaining it. The S. C. could only call the author of the letter before it, as a defendant in a criminal prosecution: It could only ascertain whether the supposed imputation be founded in truth, or in rash and wanton aspersion, by means of a trial at the bar of the court. This would be, on the first blush of the proposition, a direct invasion of the discretionary authority vested by the charter in the K. A., of deciding on the propriety of a prosecution. The S. C. must take it for granted, unless the contrary be distinctly shewn, that the crown officer would, of his own motion, commence a prosecution, if the case required such a proceeding. If indeed a party, more especially a gentleman holding any judicial office, were to complain to the S. C. that the K. A. had refused to prosecute in a case in which public justice, or the character of the complainant, demanded a prosecution,—a possible but very improbable contingency,—it would

then be for the Judges to consider what steps should be taken to prevent a denial of justice. Such a case, however, I am to observe, is very far from being established in the present instance. The appeal which you make to the S. C. is not, as the Judges understand it, against any refusal by the K. A. to institute a prosecution, but against his declining to furnish you with evidence, on which to found a prosecution; or which may enable you to take such steps, to use your own expression, as you may deem necessary. Whether the K. A. be justified, or not, in withholding the document in question, must depend on the terms of it, the circumstances under which it was received, the relative situation of the writer, and on many other points, on which that officer must be allowed to exercise his own discretion. The S. C. would be slow to condemn the reluctance of the K. A. to produce a letter, which, it must be presumed, was addressed to him in the confidence due to his official situation." L. B. 4, 6 Nov. 1835.

It still remains for us to mention those few instances, only two in number, in which the S. Court has felt itself called upon to exercise the power, vested in it by the 36th and 38th clauses of the charter, of ordering the transfer of suits or prosecutions from one D. Court to another; as also those instances, in which such transfer has been applied for, and refused. In one of the first-mentioned cases, we have seen that the suit for probate of a will was transferred, from the district in which the testator was domiciled, to that in which the executors, witnesses, and heirs, resided; *supra* 7. The other case was a charge of robbery, made before the D. Court of Hambantotte; but it appearing that the alleged offence had been committed within the district of Alipoot, the D. Judge, following the test of criminal jurisdiction, prescribed by the 25th clause of the charter, directed the complainant to institute proceedings in the D. C. of Alipoot. A representation being made to the S. Court on the subject, and it appearing, on inquiry, that the parties accused, as well as the complainant, were resident in Hambantotte, and that it would be for the convenience of all parties, that the complaint should be inquired into in the latter district: It was accordingly ordered, That the case be resumed and proceeded in

by the D. C. of Hambantotte, in like manner as if the offence had been alleged to have been committed within that district. L.B. 7, 11 Jan. 1836. And see p. 266. See also p. 260, 1, where the S. C. observed, that if the choice of the D. C. (supposing a choice to exist) appeared to have been made with a view to produce vexatious interference, the Judges would not hesitate to exercise their power of transfer.

In the following instances, the S. Court refused to transfer the cases from the D. Courts, in which they had been respectively instituted. A clerk of the custom-house of Manar, having been dismissed from his situation, was desirous of prosecuting the Cangany and Peon of that establishment, for a conspiracy in misrepresenting his conduct to the government agent. Having instituted, or being about to institute, proceedings in the D. C. of Manar, he applied to the S. Court to transfer the case to some other D. Court, out of the limits of the Northern Circuit, on the grounds that the D. Judge of Manar was a material witness for the complainant; that the interpreter was prejudiced against him; and that the courts of all the Northern districts were influenced by the government agent. The S. Court returned the following answer to this application:—First; The circumstance of the D. Judge being a material witness for the petitioner forms no objection to his taking the preliminary informations; since, from the nature of the charge which it is proposed to establish, the trial must ultimately take place before the S. Court: (It may be observed here, that if a *party accused* were to complain that the D. Judge was a witness on the part of the prosecution, to prove, not merely what took place before the D. Court, but facts connected with the prosecution itself, it would be very proper that the inquiry should take place in another D. Court: And in such case, the D. Judge himself, if he felt his evidence to be material, might probably wish not to sit upon the case. But it could scarcely be permitted to a *complainant* to transfer the inquiry to another district, by his mere assertion, that he intended to call the D. Judge as a witness.) Secondly, If the interpreter of the D. Court cannot be trusted to give a fair translation of the evidence, and the petitioner can satisfy the D. Judge of that fact, another person should be appointed to

that office ; but the Supreme Court will not interfere in such dismissal or appointment. Thirdly, Even if the S. Court could believe that all the Northern District Courts were under the influence of the government agent, as alleged by the petitioner, it would still be out of the power of the S. Court, to transfer the case out of the limits of the Northern Circuit. L. B. and Petn. Book, 10 Oct. 1835.

As regards the last of these three grounds of decision, it is to be observed, that the power, conferred by the 36th and 38th clauses, is “to transfer any cause or prosecution, depending in any one D. Court within any circuit, to any other D. Court within the same circuit.” The 46th clause gives the Supreme Court the same jurisdiction within the limits of the district of Colombo, as on the circuits ; which, consequently, includes authority to transfer cases from one of the districts, into which the entire district of Colombo, as distinguished from circuit, is sub-divided (sup. 255 et seq.) to any other of such sub-divided districts. But no case, it is apprehended, can be transferred from one circuit to another ; or from any circuit, to a district not comprized within any of the circuits ; or from any such latter district, to a district within any of the circuits. The writer of these notes has already had occasion (1) to express his opinion, that it would be very desirable that this power of transfer should be given in more unlimited terms, as regards the district, to which such transfer may be made. It has more than once happened that the ends of justice would have been furthered, and the convenience of all parties consulted, by a transfer of proceedings to another court, which the S. Court has been precluded from ordering, by the circumstance of the two districts, though adjacent perhaps to each other, not being within the same circuit. There seems no reason, why the S. Court should not have power to remove any suit or prosecution, when satisfied that the justice of the case requires it, whether the courts, from and to which such transfer would be made, were within the

(1) In the suggested amendments of the charter, which he submitted to the Secretary of State in 1836 ; a copy of which suggestions, he transmitted to the Judges of the S. C. from the Cape of Good Hope.

same, or different circuits ; or whether both, or one, of those courts were within the district of Colombo.

In a case, in which the cause of action arose in district A., and the defendant resided in district B., so that the plaintiff would have had his option of bringing it in either, the proceedings, which had been commenced in a former Provincial Court, were transferred to the D. C. of A., to which transfer the plaintiff assented, or at least expressed no dissent at the time, and the case was proceeded with, one step, in that court. Afterwards, however, the plaintiff applied to have the case transferred to the court of B., but without shewing any special ground for that application. The S. Court considered that as the plaintiff had made his election,—and whether that election were pronounced by the original institution of the suit, or by assenting to its transfer, made no difference in this respect,—he could not now be allowed to change his mind, and to remove the case to district B., without at least some stronger ground for such removal, than the mere circumstance, that either court was competent to entertain it. L. B. 5, 15 June 1835. Still less can a party be allowed to take his chance of a favourable decision, and after a judgment against him, to object to the court by which it has been passed. Petition Book of 1834, p. 165. In that case, it was the defendant who made this tardy objection ; but the principle would be the same, whether such objection were attempted to be made by a plaintiff, who had selected the D. C., or by a defendant, who had assented, by his silence, to that selection. In one case, the S. C. considered that the residence of the witnesses did not form a sufficient ground, for transferring a case to the district in which they resided. Petition Book of 1834, p. 190. And certainly such ground would not, of itself, be sufficient to satisfy the S. Court, in the terms of the 36th clause, “that there was reason to conclude that justice would not probably be done in the D. C. in which the suit had been commenced.” In the testamentary case above-mentioned, p. 7, the transfer was for the convenience of all parties, and no opposition was made to it : Justice, therefore, would *not* probably have been done, so effectually, in the court where the testator died. And the same reasoning applies to the prosecution for the robbery ; *supra* 285.

## JURORS.

Europeans, how summoned—Burgher lists only altered by order of S. C.—How summoned from districts within the province of another Fiscal—How chosen when parties disagree.

1. The trial by Jury has now been so long in use in Ceylon, having been established for nearly thirty years in the Maritime and for six years in the Kandian districts, the inhabitants of which latter country may be said indeed to have been already familiar with it, under the name of Assessors, that no general observation on this subject seem necessary, unless, indeed, to bear testimony, as the writer of these notes has on all occasions been anxious to do, to the conscientious, intelligent and independent discharge of their important duties, by all classes of Jurors in Ceylon.

As regards the beneficial effects of trial by Jury on the native public, he could but repeat the remarks he has already offered on the subject of Assessors, Sup: p. 38, 9. It only remains, therefore, to mention the few points which have been brought to the notice of the S. C. on the subject of Jurors.

2. The course prescribed for summoning Jurors under the former Charters having been found adapted for the objects in view; the same course is directed to be followed by the 1st rule laid down by the S. C. for the exercise of its criminal jurisdiction on the first introduction of trial by Jury into the Kandian districts. The Fiscal of the Central Province applied for instructions as to the selection of European Jurors at Kandy, and whether Military Officers could be summoned to serve in that capacity. The S. C. returned for answer, that the course which had always been adopted in the Maritime districts was to return to the court a list of all, being British, not being Military men, resident at the place at which the sessions were held. If when a trial took place requiring an English Jury there should not be a sufficient number, the deficiency was supplied

from the officers quartered at the place, and if there should still be an insufficient number, the noncommissioned officers, or even the privates would be resorted to, in order to make out the requisite panel, as had some times happened at "Galle and at Jaffna." L. B. 26th November, 2d December 1833. The Fiscal was afterwards informed that the S. C. had in accordance with its usual practice abstained from directing a British Jury to be summoned previously to the sessions, in order that by waiting till a day was fixed for trial of the only case in which they would be required they might be spared any attendance which was not absolutely indispensable. In answer to a question by the same Fiscal, whether, as there was no case in the calendar in which the defendant was a Burgher there would be any necessity for summoning the Burgher Jurors, most of whom were clerks in the public offices at Kandy and other Towns in the Kandian districts; the S. C. observed, "That it by no means followed because there was no case in the calendar, in which the prosecutor or prisoner or both were of that class, therefore the attendance of the Burgher Jury should be absolutely dispensed with, that it had always been found extremely convenient, where a native prosecutor and a native prisoner were of different castes, to have recourse to a Burgher Jury; (neutral class) most of them being conversant with the native languages, by whom justice would be better, or at least less suspectedly done between the parties, than if the Jury were to be selected from the class either of the prosecutor or of the prisoner, or indeed from any of the native castes; but that as the S. C. was unwilling to cause any unnecessary inconvenience, whether public or private, the Fiscal was authorized to dispense with the attendance of Burgher Jurors who were not resident within the Town of Kandy or its immediate vicinity; and that even with respect to those who did reside within those limits their attendance would not be insisted on, unless specially called for, of which due notice would be given." L. B. 24th, 30th December 1833. It is to be observed that in all the Maritime districts the Burgher classes being much more

numerous than at Kandy, a Burgher Jury is constantly in attendance during the criminal sessions.

3. The several lists of Jurors in their respective classes as approved of and established by the S. C. can only be attended, whether by the addition of new names or by withdrawing any of those contained therein with the sanction and by order of that court. And on one occasion it was decided that a native Juror could not entitle himself to be placed in the Burgher list by assuming the European dress. Petition book of 1835 p. 149.

4. We have already had occasion to observe on the distinction between the division of the Island into circuits and districts, as regards the administration of justice, and into provinces as regards revenue matters, Sup. 259, 267. As the division into circuits does not coincide with that of provinces, and as the duties of Fiscal are performed by the Government Agents, of whom there is one over each province it must necessarily happen that some districts within the respective circuits do not fall within the Fiscal's Jurisdiction, or of the Agent acting as Fiscal for the place where the sessions of the S. C. is held on circuit. Thus the Districts of Seven Korles, and that of Four Korles are within the Western Province, though they are comprised in the Eastern Circuits. In these and similar cases the Jurors are summoned by mandate from the S. C. directed to the Fiscal of the province within which each District is situated; for no other Fiscal would possess the requisite knowledge or indeed the requisite authority to summon them, L. B. 25th October, 3rd November 1834. The names of Jurors summoned from districts so situated must be transmitted by the Fiscal or Deputy Fiscal who summons them to the Fiscal acting at the sessions, for which their presence is required, in order that the names may be included in the lists returned by the latter officer to the S. C. at the opening of the sessions, L. B. 20, 27, January 2d 1836.

5. The 3d Rule for regulating the proceedings of the S.

C. in its criminal jurisdiction, provides that if the Crown officers and the prisoner's Counsel cannot agree upon a class from which the Jury shall be chosen, the Judge will decide upon such Jury, as he may think most likely to give an impartial verdict in the case. On the occasion of the approaching trial of certain Kaudians for high treason, this difficulty of agreement occurred, as indeed in a case of that nature might naturally be expected. The S. C. before whom the matter was brought at Colombo previously to the sessions being opened at Kandy, intimated to the parties that, in the event of its becoming necessary for the Court to decide on the class from which the Jury should be summoned, the first class list of Colombo Native Jurors would be joined to the list of the same class of Kandian Native Jurors, from which united list a Jury must be struck before the Judge who was to hold the sessions. Afterwards, however, a list of Jurors, partly European, partly Native, was agreed to by the King's Advocate and the Proctor for the prisoners, and an order was issued to summon the persons named in that list who accordingly sat together, without any difficulty or objection on their part. Criminal minutes. Colombo 31st December 1834.

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## KANDY.

Notes of Sir J. D'Oyley and Mr. Sawers.—Paragraph 1. [A] Unsettled state of Kandyan Law.—Par: 2. Lands and Tenures—3. Service Tenure and when due—4. Rajekarea and when commuted—id.—No prescriptive right by old law—id.—Different kinds of Lands, enumerated. Paragraphs 5 to 35. *Ninde Game* Tenures and services enumerated, 11, its sign.—Crown service abolished in 1832. Services to “Ninde” proprietors reserved, 22. Their remedy against servants refusing; two cases of ejection similarly with Roman Dutch Law, 22. 23.—Rules of inheritance to Land 36.—Owner of Land may dispose of it away from the heir—and by the old Kandian Law, according to Sir J. D'Oyley without deed, 37—Others hold a deed necessary, expressing cause of disherison and even consent by the heir; cases contra 38 and 39—But such transfers to be strictly watched,

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I. If this title were to be limited to the cases arising out of the Kandyan districts, and which have been decided by the S. C since the promulgation of the new Charter, its contents, as may be supposed, would be comprized within very narrow limits, but it would be unpardonable, and almost indeed impossible for any one to touch on the laws of Kandy, especially as regards land and inheritance, without bringing to the notice of his reader, the memoranda, respectively made by the late Sir John D'Oyley and by Mr. Sawers on these subjects, and bequeathed by those gentlemen to their successors in the Court of Kandy. The notes of Sir John D'Oyley touch on a variety of subjects; they give an account not only of the lands and tenures of the Kandyan districts, the substance of which we shall presently avail ourselves of, but also of the constitution, police and division of the Kingdom of Kandy, of the different classes of inhabitants and their respective duties, of crown and temple villages, of the mode of administering justice and of the jurisdiction exercised by the great Court and by the respective Headmen, of crimes and punishments and of the different kinds of oaths in use in judicial proceedings. But though all these subjects are historically curious and interesting, and though it may sometimes be highly useful to refer to Sir John D'Oyley's notes on these subjects in the course of judicial investigation, they are not of a nature to furnish materials for a book of mere legal reference, more especially when it is

considered that the Kandyan institutions, as relating to most of the subjects above enumerated, have been either entirely abrogated or very much modified by the British Government. The following passage, under the head "institutions and customs," is important, as shewing the state of the law, if indeed mere traditional custom applied or not to each case which presented itself according to the pleasure of the sovereign, can be called by that name, before the Kandyan Provinces became amenable to British Courts of Justice: "The Kandyans have no written laws, and no record whatsoever of judicial proceedings was preserved in civil or criminal cases. In cases of land only written decrees called "*Sittu*," and, if decided by oath, the two "*Divi Sittus*," were delivered to the party, to whom the Land was adjudged, and continued as title deeds in his family. There was, therefore, nothing to restrain the arbitrary will of the Judge, and nothing to guide the opinion of the Sovereign, Judge and the Chiefs, but tradition and living testimonies; and for want of written authorities the following outline of those principal institutions and customs which seem to be most generally acknowledged and sanctioned by precedents and existing practice, will, I fear, be imperfect and liable to many errors."

2. The doubt which Sir John D'Oyley here expresses as to the accuracy of the account he is about to give must naturally be entertained as regards the extracts which we are going to avail ourselves of, whether from Sir John D'Oyley's notes or from those of Mr. Sawers, and such must be ever the case where laws rest on mere oral tradition, liable, as such tradition must constantly be, both to unintentional mistakes and wilful perversion. For though in every country the common or unwritten law, as distinguished from the written or Statute law, must be founded originally on tradition, still it is impossible that a country can arrive at any great degree of civilization, without such customary law being reduced to writing, either in the shape of a code bearing the stamp of Legislative authority, or of a compilation by persons whose knowledge and station impart the weight of authenticity to it, or of a series of Judicial

decisions, by which the principles of the traditionary law are recognized and established. To Sir John D'Oyley and Mr. Sawers are certainly due the credit of having first attempted to reduce the principles of Kandyan law to some shape, by the second of the three processes just referred to. And imperfect and uncertain as these compilations necessarily and avowedly are, they furnish a foundation upon which it may reasonably be hoped will arise, by degrees, a solid and well constructed system of recorded decisions by which the law of property in the Kandyan districts may be as clearly ascertained and laid down as in any other part of the Island. Neither of those collections of notes, it is believed, has yet been published.

3. The subject on which we shall refer most largely to the notes of these two gentlemen, is that of inheritance, and first as regards the right of succession to landed property. Among other sketches, Sir John D'Oyley gives a brief description of the tenures by which Kandyan lands were held, and of different kinds of land in those provinces, containing definitions and explanations which cannot fail to be highly useful in the investigation and decision of cases relating to lands there situated; and though the services formerly due to the Crown, in respect of the Tenure of Lands, have been given up and generally abolished by Order in Council of 12, April 1832, still it is often necessary for the decision of questions respecting land to take into consideration the tenures and conditions by which such land was originally holden, and on which therefore it must be presumed to have been granted. In cases of disputed possession too, parties often rely in a great measure on the performance of Government service by themselves or their ancestors which cannot be duly estimated without some knowledge of what the service consisted. The following then is the substance of Sir John D'Oyley's notes on these subjects, where, as they refer to things as they formerly existed rather than as they now are, the past tense is substituted for the present.

“OF LANDS AND THEIR TENURES.”

4. “It is well known that Service Tenure prevailed throughout the Kandyan Provinces, the possession of land was the founda-

tion of the King's right to the services and contributions of the people, and on the other hand persons not possessing lands were, in general, liable to no regular service or duties, but in some instances to light and occasional ones. Lands which, properly speaking, subjected the possessor to regular public services and contributions were low paddy lands which can be cultivated every year, but not [with some few exceptions] gardens or high grounds. *Lekam Mitiye*, or Registers of persons liable to regular service were kept by the Chiefs of the provinces <sup>or of the</sup> and of many departments to which they respectively belonged. He who openly abandoned his land, (which sometimes occurred, particularly in the latter years of the late Kandyan King's reign, on account of the severity of the duty) was no longer called upon to perform service or to pay duties. Service land, thus abandoned became, strictly speaking, the property of the Crown, and in some instances the King exercised the right by taking the crops and regranting the land. But according to more general custom, the crop was appropriated or disposed of by the Chief of the province, village or department, to which the land belonged, or it was regranting by him to another, subject to the same service, and frequently on payment of a suitable fee. Land abandoned, if reclaimed by the original proprietor, or even by his heir, was usually restored on payment of a suitable fee, unless it had been definitively granted to another, or possessed many years by another family performing service. No person retaining his land could without the King's permission, change his service, that is abandon his proper department and service and restore to another. All lands were alienable by the proprietor, but continued liable to the same service. Hence persons of high caste seldom purchased the lands of low classes, especially if the service were that of any handicraft or menial. All service land might descend to, or be acquired by females who either paid a commutation in money, or, if required, provided a substitute to perform personal service. *Rajekarea*, which may properly be interpreted, "*King's duty*," implies either the personal service, or the dues in money or in kind, to which

any person or land was liable. Personal service was in very many instances commuted for a money payment, which was considered the legal perquisite of the Chief. 1st. Universally in the case of the *Attēpāttoo* and *Hewawasum* people and *Koditowakku* people of the Desawaniyas, the *Lekam* people and persons of some other departments in the other districts, who performed, in rotation, regular *Mura* or duty at the house of their Chief, or at other fixed stations: All absentees beyond the number required to attend paying a fixed sum, called *Mura ridi* which varied in different places and departments from one to five *Ridis* each, for 15, 20 or 30 days' service. 2ndly. In the case of the same and other persons who were bound to attend at public festivals in Kandy, and who paid to their Chiefs a fixed sum each for failure. 3rdly. In the case of the classes above-mentioned and some others, when called on to furnish timber, erect buildings, or perform other public service, all absentees, whether excused by favor, or disabled by sickness, or detained by urgent private concerns, paid a commutation in money called "*Game-hege*."—The Chief being held responsible for the expedition of the work assigned to him, the King seldom inquired minutely the numbers employed. And hence the reason of the practice abovementioned, of the Chiefs receiving crops or emoluments to be derived from vacant service lands. But he could only dispense with the *personal* service, for it was an invariable rule that the Chief, enjoying the benefit of the crops, must deliver into the Royal Store, the revenue chargeable upon the land. Every field, with few exceptions, has attached to it a garden and a jungle-ground called *hena* or *chena*.

#### *Of the different Species of Lands.*

5. The Singhalese word "*Gama*" properly implies village, but in the Kandyan Country it is also frequently applied to a single estate, or a single field, the latter is often called *Panguwa* or share. Villages properly so called are of these following kinds:

6. *Gabadagama* or Royal village, may be described, generally, as containing *Muttettu* lands, which the inhabitants cultivated gratuitously and entirely for the benefit of the Crown,

and other lands which the inhabitants possessed in consideration of their cultivating the *Muttettu*, and rendering certain other services to the Crown. \*

7. *Wihara Gama*, a village belonging to a Temple of Budhoo.

8. *Dewale Gama* a village belonging to a Temple of some Heathen Deity.

9. *Vidane Gama* a village under the orders of a *Vidahn*, and usually containing people of low caste liable to public service.

10. *Ninda Gama* a village which, for the time being, is the entire property of the grantee, or temporary Chief, when definitively granted by the King with *Sannas*, it becomes *Parveny*;—it generally contained a *Muttettu* field which the inhabitants, in consideration of their lands, cultivated gratuitously for the benefit of the grantee, besides being liable to the performance of certain other services for hire. "

The following account given by Mr. Sawers as an addition to the article of *Ninda Gama Tenure*, will most conveniently be placed here.

11. The *Ninda* proprietor held his *Ninda Gama* on condition of furnishing a certain Quota of men in war &c. It would be impossible to define all the Tenures upon which lands are held under a *Ninda* proprietor, as these are different in every village and as they rise from that of the *Oligakkaria* [whose condition appears to be little better than that of a slave] to that of a person who merely pays homage, by appearing in particular seasons, or at festivals with a few beetel leaves, which he presents to the *Ninda* proprietor.

12. The lowest are those, just mentioned, who hold their portions of land for what is called *Oligakkaria* service, who are generally *Padoowas* and other low caste people liable to carry the chief's palanqucen or any other low or menial service, which general custom allows him to have performed for himself or family.

13. The *Nilakareyas*, who possess their portions, on condition of cultivating a certain portion of *Muttettu* field [as

presently mentioned more fully] or any other defined service, which may have been attached to the service portion of land held by *Nilakareya*.

14. The *Hewanneheya* and *Pattabandias*, who are always of the *Rattē* and village caste: their services are various according to original contract, but they are seldom liable to service of a mean character and especially on the *Ninda Gama* of Four Korles. Their duties are commonly such as accompanying the *Ninda* proprietor on a journey, carrying his *Talipot*, watching his field, or keeping watch at his house.

15. The *Wattukareyas* who possess gardens, and pay a certain portion of the produce yearly to the *Ninda* proprietor, and are generally liable to be called on to assist him, being paid or fed by him for their labor.

16. The *Asweddummakareyas* who have brought pieces of waste lands into cultivation on certain conditions which are so various as not to be defined. If such a holder has paid money for the *Aswedduma* he may emancipate himself from the control of the *Ninda* proprietor, by having his *Aswedduma* entered in the *Lekam mittiya* of any of the public departments, as a service *Pangoowa*.

17. Lastly, persons who possess lands within the limits of the village, subject to no service to a *Ninda* proprietor beyond that of rendering him some slight token of homage, as Chief of the village.

18. All the above named descriptions of tenants, except the last, either hold their lands in perpetuity, liable to the service due to the *Ninda* proprietor, or they may hold at the will of the *Ninda* proprietor only, viz: in the former class are all those who held their lands before the *Ninda Gama* was granted to the present proprietor, or who got possession of their service *Pangoowas* from the same authority which originally granted the village to the family of the present proprietor; and they can only be punished for failing to perform the service due for their *Pangoowas*. In the latter class are those who have received their service *Pangoowas* from the present proprietor, or from his family subsequently to the grant being made to him.

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19. The *Ninda* proprietor had both a Civil and Criminal Jurisdiction over all inferior cases which occurred among the people of the village, but his jurisdiction was not well defined. It seemed to depend on the situation of the proprietor at the time being: If he happened to be a Chief high in Office, he adjudicated on all cases, short of capital crimes, and decided all disputes about the hereditary right to the service *Pangoowas* of the village, besides inflicting fines and imprisonment for the neglect of services due to himself.

20. If the *Ninda* proprietor could not protect his *Niwekareyas* and others from being called on by the headmen to perform public service in the *Rattawassan* or *Dissawassan* or if he allowed them to perform it he forfeited his own claim, as *Ninda* proprietor, to services and dues. Latterly, therefore, he generally paid the tithe himself, the undertenants having in some instances attempted to get rid of their vassalage, by paying tithe for their *Pangoowas* to Government.

21. Lands within the limits of *Ninda* villages held and doing suit and service under any public department or Temple, were taken out of the jurisdiction of the *Ninda* proprietor. The proprietor of a *Ninda* village was liable to furnish a certain number of persons for general public services, and these services his vassals were liable to perform under his order as their Chief, such as service in war, according to their caste and condition, dragging timber, making roads &c.

22. It may be well to remind the reader that by His Majesty's Order in Council of 12th April 1832, all services to the Crown in respect of tenure or of caste or otherwise are abolished; with a proviso that the Order in Council is not to affect the services due from the tenants of lands in Royal or Temple villages, or the service which tenants of lands in other villages in the Kandyan Provinces are bound to render to the proprietors of such villages, as long as they continue tenants of such lands.

Two cases have come before the S. C. from the District of *Ratnapoore* in which the remedy of the *Ninda* proprietor against

a tenant refusing to perform the service due from him, came in question. In the first of these cases the plaintiff claimed the services of the defendant in respect of two fields held by him in the plaintiff's *Ninda Game*, which services the plaintiff alleged had always been performed till the last year, when the defendant refused to perform them, in consequence of which the plaintiff demanded that the defendant should restore the lands to him. The defendant claimed the fields as his own *Parveny* property, denied that the plaintiff had any claim on him for service, or that he had even performed service for the fields in question, though he admitted that he had done service in respect of other lands, for which however he had received payment. The witnesses for the plaintiff, and indeed those for the defendant also, proved that service had been performed for the fields in question by the defendant and those who had preceded him for forty years. On this evidence, the D. C. considered that the defendant had forfeited his right to occupy the fields and decreed that the plaintiff be put in possession of them. On appeal to the S. C. the following order was made. "That the case be referred back to the D. C. in order that the law or custom existing in the Kandyan districts may be enquired into and recorded, for the information of this Court, as to the course which ought to be pursued on the refusal of a person holding land as the defendant has done, subject to service to the owner of the Village to perform that service; whether the tenant must necessarily be ejected at once from the land or whether there be not some intermediate course of proceeding, either by the imposition of a penalty or otherwise, by which the performance of the service may be enforced, or by which the tenant may at least have an opportunity of retracting his refusal. In the present instance the S. C. by no means considers that the D. C. has come to a conclusion not warranted by the circumstances of the case. But it would be more satisfactory to know that no milder course which the customary law of Kandy would sanction, had been omitted before the extreme measure of actual ejection had been enforced. If the de-

“defendant persists in his contumacy, there seems to be no doubt, “that this extremity must be resorted to.” In answer to this order of reference the D. Judge informed the S. C. that every opportunity had been offered to the defendant by means of repeated remonstrances on the part of the Court as well as of the plaintiff to change his determination, but that he still absolutely refused to perform service. And it was also reported that the penalty attached to such refusal by the Kandyan law was the resumption of the land by the *Ninda* proprietor. On receiving this return, the S. C. affirmed the Decree of the D. C. No. 211. Ratnapoora, 19th November, 29th December 1834. As to the right to these services being prescribed by a neglect to claim them for ten years. See title Prescription, par. 10.

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23. The other case presented itself to the D. C. under circumstances similar to that just mentioned, and that Court, after repeatedly admonishing the defendant as to the consequence of a persistence in his refusal, at length decreed the possession of the lands to the plaintiff, the *Ninda* proprietor: The defendant appealed to the S. C. and on the case coming on for hearing, he expressed in open Court his willingness to perform the required services and prayed the Court to restore him to the possession of the land, on condition of his fulfilling that offer. The S. C. however, observed, that it should not feel itself justified in such an interference with the rights which the customary law, especially recognized and preserved as that law was by His Majesty's Order in Council, had vested in the plaintiff, and in other *Ninda Gama* holders, that the defendant had repeatedly and pertinaciously refused to perform the duties, by which alone he was entitled to retain possession of the land, and had set at defiance both the proprietor, to whom those services were due, and the D. C. which had endeavoured to reason him into the necessity of complying with what the law required of him, that it was to the plaintiff, therefore, that the defendant must address himself for restoration to the land, which he had forfeited by his own obstinate misconduct, that if

the plaintiff consented to restore him on his engaging to pay those dues, and perform those services, which the plaintiff had a right to require from his tenants, such conduct would reflect great credit on the plaintiff's moderation and generosity, but that it was an act of forbearance which no Court of Justice had a right to compel a party to perform. "The decree of the D. C. was accordingly affirmed. No. 210." Ratnapoora 7th February 1835. It may be worth observing, though the Roman Dutch Law forms no part of the law of Kandy, that the course of ejectment pursued in these cases, is similar to that which Voet describes as adopted against refractory vassals by the Roman feudal law, and tempered by the same spirit of moderation in attending the tenant as "Locus pœnitentiæ," "Voet Lib: 38." Digressio de Feudis; par: 113.

We now return to Sir John D'Oyley's description of the different species of lands.

24. *Yatatgame* a species of village in the lower part of the Four Korles, the Three Korles and part of Saffragam, and sometimes bearing that name.

25. Other villages and lands, which it is unnecessary to specify here, are called from the Department to which they belong, as *Kuruwa Gama*, *Muttange Gama*, *Attepattoo Gama* &c.

26. *Keta* is a <sup>field</sup> Royal village, it is the same as the *Muttettu*.

27. *Parveny* land is that which is the private property of an individual, properly land long possessed by his family, but so called also if recently acquired in fee simple. As all lands in the Kandyan country were subject to service, the distinction of service *Parveny* is little known.

28. *Muttettu* lands—fields sown on account of the King or the proprietor, or temporary grantee or Chief of a Village distinguished from the fields of the other inhabitants of the village who were liable to perform services, or to render dues are of two kinds; 1st *Ninda Muttettu* which is sown entirely and gratuitously for the benefit of the proprietor, grantee, or Chief, by other persons in consideration of the lands which

they possess. 2ndly *Ande Muttettu* which is sown by any one, without objection, on the usual condition of giving half the crop to the proprietor. *del*

29. *Ni'la Pangoowa* is land possessed on condition of cultivating the *Muttettu* or performing other menial service or both, for the proprietor, grantee or Chief of a village: the possessor of such land is called *Nillakareya*. In some instances he is proprietor and cannot be displaced, so long as he performs the service; in others, he is a tenant at will, and removable at pleasure. ✕

30. *Aswedduma* or *Dalupota*, is land lately brought into cultivation, as a paddy field, or more recently than the original field. ✕ In the Royal and *Vidahn* villages and in some other instances, in the upper districts, the possessors of *Aswedduma* lands performed some King's service, but not so much as the proprietors of original lands: if brought into cultivation by a stranger from the estate of another, particularly in the Dissavonies, he paid by agreement a small annual sum to the proprietor, and besides assisted him in country work and attended him on journeys, receiving Victuals unless inscribed, which rarely happened, in the *Lekam Mittiya*, he performed no public service for it. If cultivated by the proprietor, who performed service [for the lands originally in cultivation] he was liable to no extra service for the *Asweduma*

31. *Piduvelle* is Land offered by individua's to Temples, and there are many of this description in all parts of the Country. They are usually *Aswedduma* of small extent, or more rarely small portions of the original service land. It is held that, in the upper districts, they could not properly be offered without the King's permission, but it was sometimes done, with leave of the Chief only. In the Dissavonies, they are usually offered with the consent of the *Dissave*, but sometimes without it, if of trifling extent. As neither the King's service nor his revenues were diminished by the act [of offering], the King's sanction was deemed less important. See par. 37. ✕

32. *Anda* land is, what is delivered by the proprietor to

another to cultivate on condition of paying the proprietor half the crop as rent : this is the condition, on which fertile lands are usually let.

33 *Otu* is of three kinds: first a portion of the crop equal to the extent sown, or to one and half or double the extent sown, in some paddy fields or *chenas*. It is the usual share paid to the proprietor by the cultivator from fields which are barren, or difficult to be protected from wild animals, particularly in the Seven Korles, Saffragam, Hewahette and some *chenas* in Harispatton. In many royal villages in the Seven Korles lands are paying *Otu* to the Crown. 2ndly the share of 1-3d paid from a field of tolerable fertility, or from a good *chena* sown with paddy. [3rdly the share which the proprietor of a *chena* sown by another with fine grain, cuts first from the ripe crop, being one large basket full, or a man's burthen.

35. *Hena* or as it is commonly called *Chena*, is high jungle ground, on which the jungle is cut and burnt for manure, after intervals of, from five to fourteen years, and the paddy called, *Ell wee* or fine grain, or cotton or sometimes roots and other vegetables are cultivated ; after two or at the most three crops, it is abandoned till the jungle grows again.

36. We are come to the "Memoranda of the laws of inheritance" by Mr. Sawers, whose long experience, and extensive acquaintance with the laws and customs of the Interior of the Island, and the care which he seems to have taken in procuring the best native opinions on these subjects, and in collecting them when they differ, give a weight and value to the collection, as far as it goes, which no learning, merely legal, and unassisted by local observation and practice could lay claim to. That this collection, as Sir John D'Oyley observed of his own sketches, sup. par. 1 will be found, "imperfect and liable to many errors." it is scarcely necessary to say that more than one instance indeed will occur, in which the several opinions will be found at variance with each other; which will not appear surprising, when it is recollected that these opinions were probably given on different cases as they arose at different times,

and by different Chiefs. It has, however, been considered better to give the notes as nearly as possible as they stand, than to attempt to reconcile or decide between conflicting doctrines, which can only be safely and satisfactorily done by further inquiry and discussion on the spot.

The first step towards rectifying the errors and supplying the imperfections of this collection is to place it before the public eye for criticism and correction. It is, therefore, proposed to take these "Memoranda" as the text of the Kandyan law of inheritance, interweaving with them such decisions of the S. C. pronounced up to March 1836, as shall be found to relate to the several positions laid down by Mr. Sawers: no further liberties will be taken with the phraseology, than sometimes to elucidate what may seem to be not quite clear. We shall probably have recourse to Sir John D'Oyley's notes again more than once while on the law of inheritance. Each proposition will be numbered for the sake of facility of reference, in the order in which the propositions are arranged in Mr. Sawers'. Mr. Sawers' will be somewhat altered where the respect in subjects seems to require the change.

37. It is stated unanimously by the Chiefs who have been consulted, that a person having the absolute possession of [and right to] real or personal property has the power to dispose of such property unlimitedly; that is to say; he or she may dispose of it either by gift or bequest away from the heirs at law. [But to the unlimited power of disposing of landed property there was this exception, that lands liable to Rajakarea or any public service to the Crown or to a superior, could not be disposed of either by gift, sale or bequest, to a *Wihare* or *Dewala*, without the sanction of the King, or the superior, to whom the service was due. (1) But some of the principal Chiefs

(1) The reader cannot fail to be struck with the analogy between this restriction imposed by the Kings of the Kandy, on the power of alienation to Buddhist Temples, and the English Statutes of Mortmain, by which similar transfers to religious houses were prohibited without license from the King or from the intermediate Lords of whom the lands were held, nor is the analogy confined to the respective attempts to prevent alienation. The same desire to evade the law, both on the part of the superstitious donor and on that of the religious communities, is observable in the Kandyan Land holders, and in our Anglo Normau ancestors, in the Temples of Buddha, and in the Cloisters of the English Convents.

who have a strong bias in favor of the Church say, that though it was required to have such sanction, before lands registered in the *Lekam Melliya* and liable to service, were made offerings of to Temples, yet it was not customary to annul them when once made, and as in most instances it was only part of the service *Pangua* which was offered, the services for the whole *Pangua* became chargeable on the part of it which remained unoffered; if the whole was offered, without sanction, the Temple was obliged to perform the service or pay the dues. "On the subject of this right of disherison the absolute exercise of which, as we shall presently see, forms almost to this day, a controverted question, the following opinions of Sir John D'Oyley are extracted from his observations: "On Deeds and transfers"—Donations of land are made either by oral declaration, or by writing; and oral gifts, if clearly and satisfactorily proved, are held to be of equal validity with written. The proprietor has full power to dispose of his whole landed or other property to his adopted son, or even to a stranger, in exclusion of his own children, but rarely does so, without just cause. It has been alleged, I understand by some Chiefs, that a written deed is absolutely necessary to give a title to the adopted son or stranger, and to disinherit the legal heirs. But I conceive from the decisions which have taken place, establishing the validity of verbal Gifts, in favor of the wife or one of the children, that this opinion rather referred to the necessity of full and incontrovertible proof of the fact, which after lapse of time, would otherwise be uncertain and difficult, than to any virtue in the writing, I find it generally admitted that such an oral donation to any one, proved recently after it took place, by respectable and undoubted witnesses, must be held valid. The disherison of the legal heir [unless only remotely connected] with the motive for such disherison, is usually, and ought, in propriety, to be specified, whether it be a written or oral will; and if the legal heir be a son or daughter, or near relation, naturally dependant on the testator, the omission will scarcely take place, for it is held incumbent on the intended heirs, and the witnesses to suggest their situation to

his notice." It is to be observed here, that Sir John D'Oyley does not go the length of saying that the motive of disherison must absolutely be mentioned and that the act of disherison will be void, unless the motive be specified, but only that it ought to be, and usually is, mentioned; the omission, therefore, though it would naturally excite suspicion, and in a doubtful case, would raise a presumption against the act of disherison, would not and ought not, to be necessarily conclusive against the disherison, supposing the act to be satisfactorily established by other evidence. See the cases on this subject in following Par. 38 to 44:

38. The principle laid down both by Sir John D'Oyley, and by Mr. Sawers in the preceding Par. that the owner of landed property may dispose it away from the heirs, though certainly supported by the majority of the decisions on this subject [See No. 6,347, Kornegalle, 14. Decr. and 416, Kornegalle, 23rd November 1833, where the S. C. expresses itself of that opinion] would not appear to have been universally recognized by the Kandyan authorities, many of whom have held that the heir cannot be disinherited, unless for some good cause; which must be expressed in the deed itself; nay, some have insisted that the consent of the heir to his own disherison is necessary, and must even appear in the deed by which such disherison is effected. The following case will shew the opinions entertained on this subject by many persons of great experience in Kandyan customs, while it demonstrates the impossibility of obtaining unanimous expositions of unwritten laws, resting only on tradition, as their authority, and on custom for their enforcement.

A plaintiff claimed a field by right of inheritance from his father *Walgame Mudianse*. The defendant's answer, as far as necessary to make the points intelligible, was that the *Mudianse* had allotted half the field to his son, the plaintiff, and the other half to one *Meddumarale* who died, but that afterwards, being displeased with the widow of *Meddumarale* he transferred the whole by deed to the defendant, with the sanction of the plaintiff himself, that he the defendant had retained possession of the field ever since and had rendered assistance to

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the *Mudianse*, in fulfilment of the conditions of the transfer, for one year, when the *Mudianse*, removed to the house of the mother of *Meddumaralle's* widow, where he died two or three days afterwards, and that his death took place ten years ago. The deed produced by the defendant was dated 1737<sup>15</sup> and purported to be on account of the *Mudianse* having incurred, debts which the defendant was to take upon himself for assistance which the defendant was to render; and of the *Mudianse's* eldest son being consigned to the protection of the defendant. The court of Judicial Commissioner considered it unnecessary to go into evidence, the deed appearing invalid

1st because it contained no mention of the plaintiff's consent, as alleged by the defendant and without which consent so expressed, the plaintiff could not in the opinion of the court be disinherited

2ndly because the defendant had made no allusion in his answer to the payment of debts, as stipulated in the deed. The court accordingly gave judgment for the plaintiff as heir at law, reserving the right of the defendant, to recover back any expenses which he might have incurred. The defendant appealed to the Governor [this was before the promulgation of the new charter] by whom the case was referred back for reconsideration; on the grounds, 1st that the assent of the son was not necessary, 2ndly that the father had not divested himself, by the first allotment, of the power of otherwise disposing of the property, and 3rdly that the defendant's omission to mention the debts in his answer amounted only to a suspicion against the deed, but was not sufficient of itself to annul it. The case having been reconsidered, the Assessors delivered the following opinions: "If a son prove undutiful the father may give his land to a third person, in consideration of assistance, but in such case, the deed must specify the causes of disherison. If a son be unable to render assistance to his father, the gift to another person must be by his consent. The present deed is not a remuneration for assistance given or debts paid, but a stipulation for assistance to be given and debts to be paid: and evidence is unneces-

sary because the donor quitted the defendant's house, before his death, which of itself, is sufficient to vitiate the deed of gift [see No. 3,660. Kornegalle, *infra*: par: 44 as to this point] and therefore the defendant could only claim to be paid for his expences. The members of the Court concurred in this view of the case, and in that state, the proceedings were brought up to the S. C., upon which had then devolved appellate jurisdiction all over the Island. The following order was there made: That the case be refered back to the D. C. to hear evidence on the following points: 1st whether the plaintiff's consent to the deed of gift were expressed by him or not;—2ndly how long the defendant supported the plaintiff's father, and when the latter left the defendant's house,—3rdly whether the defendant paid any debts for the plaintiff's father, and to what amount, and 4thly when the plaintiff's father died, and how long the defendant had been in possession. The S., C. then observed, "that it could not but be somewhat startled at the proposition, so broadly laid down, that the consent of the son was absolutely necessary to enable his father to dispose of his property (1) even though the son and heir should be so poor [according to the second opinion of the Assessors] as to be unable to render the required assistance, that if this were correct, the father might perish, because his son refused to sanction his parting with his property to enable him to procure support, a position which was not only unreasonable in itself, but was also [if pushed to the extreme extent insisted upon by the Assessors] at variance with the general rules of Kandyan Law, as far as the S. C. had been enabled to ascertain those rules, and which would seem to be contradicted by many of the numerous decisions of the courts in the Kandyan Districts, confirmed too by the court of the Judicial Commissioner, which were then lying before the Judges of the S. C. for revision [See No. 3010 and 5323 Kornegalle, *infra* par. 39] that the judgment of the

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(1.) It may be observed as matter of analogy that by the common law of England, a man could not give by will away from the heirs at law without the heirs consent till the 32. Hen: 8. ch: 1. enabled him so to do.

Court below however went still further, and decided that the consent of the heir, openly and expressly avowed, was not sufficient to legalize a deed of transfer unless such consent appeared in the deed itself, in other words, unless the heir were a party to the deed—that no law or custom, however venerable by age could sanction fraud, whereas, if the defendant's statement were true, the plaintiff's conduct had been fraudulent in the highest degree, since if he did express his assent to the transfer which he now disputed, such assent must be presumed to have contributed to induce the defendant to afford that support and assistance to the plaintiff's father, which without such assent he would probably have refused, but that even if the deed should, on further evidence, turn out to be invalid as an absolute transfer, it must at least be considered that the defendant had a virtual mortgage on the land for any expence which he might actually have been put to, for the father's support or for the payment of his debts, and therefore that he had a right to hold it as a security for repayment. That in case of the deed being ultimately rejected, therefore, the defendant, instead of being turned out of the land and then left to his remedy at law, should be first repaid his expences, and then be decreed to give up possession." On the proceedings being again returned to the S. C., it appeared by the evidence that the deed had been given for the considerations assigned by the defendant, that the condition had been fairly fulfilled, and that the defendant had been many years in possession, and judgment was accordingly finally decreed for the defendant, No. 4380. Kandy 9th October 1833 and 24th May 1834.

Legal  
mortgage

39. Two cases have just been referred to, in par: 38, as being at variance with the decision of the court of Kandy, as regards the necessity of the heir's assent to the property being disposed of to his prejudice. In one of them the claim was for four fields which had been sold to him by one *Menickra'le* whose wife had neglected him, and who, by that sale deprived his wife and child of the right of succession. The case was inquired into with great care by the Court of the Judicial Agent

which gave judgment for the Defendant on the strength of the deeds, which were satisfactorily proved, and of long possession. This judgment was confirmed by the Court of the Judicial Commissioner at Kandy, but there certainly was no proof of any assent on the part of the respective heirs in that case, And though the length of possession by the Defendant may be supposed to have strengthened his case, yet it must be recollected that in No. 4,380 from Kandy par: 38, one of the points urged by the Defendant in his answer, was possession, for upwards of Ten years, which he afterwards established by proof. The S. C. affirmed the decisions of the Court below No. 3010 Kornegalle 9th October 1833. In the other case, also, the question was whether a deed of gift, under which the Defendant claimed, and by which the Plaintiff, the son and heir of the Donor, was disinherited, had been satisfactorily proved. The Court of Judicial Agent was of opinion, that it had not, and accordingly decreed for the Plaintiff. The Court of the Judicial Commissioner, on appeal, was of a contrary opinion, and gave judgment, for the Defendant. In this case again no consent on the part of the Plaintiff, as son and heir, was proved, or even asserted. The S. C., however, on the case coming before it, agreed with the original Court, that the Deed was not satisfactorily proved, and on that ground decreed that the Plaintiff should be put in possession of the Land in question No. 5323. Kornegalle 8th October 1833.

40. There can be no doubt, however, that every transfer of property, by which the heirs of the Donor or Testator are to be disinherited, should be vigilently watched and strict proof required of any Deed, by which such transfer deviating from the usual course of natural feeling and affection is to be effected. In the case just mentioned No. 5323 Kornegalle, The S. C. decided against the validity of the deed, on the ground of certain discrepancies and contradictions in the Evidence, which were entitled to the greater weight, from the consideration that the effect of the instrument was to disinherit the son, and heir at law: And where such transfers purport to be in con-

sideration of assistance it is equally incumbent on the Courts to see that the Conditions have been faithfully and strictly performed. The following cases will shew the view taken by the S. C., on this subject, when first it was called on to decide on the Kandyan law of inheritance. An action was brought for certain Lands claimed by the Plaintiff, as having been granted to him by his uncle *Kieralle* in consideration of assistance which the Plaintiff rendered to his uncle for six months until his death. The Deed was disputed by the widow of the deceased, on behalf of herself and her child and she averred that though the plaintiff had persuaded *Kieralle* in his illness to leave his own house and go and reside with the plaintiff, she had succeeded in bringing him back to his home where he died. The plaintiff proved that he had rendered assistance to his uncle, and also called several witnesses to prove the execution of the deed, but not the writer of it. The assessors now were of opinion that as the plaintiff had proved the deed and assistance, he was entitled to judgment, and the Judicial Agent being of the same opinion, a decree was passed in his favor accordingly. On appeal to Kandy, the assessors in that Court were of opinion that the decree should be affirmed: the Judicial Commissioner, that it should be reversed, partly because the plaintiff's deed asserted that *Kieralle* had no children, partly because the plaintiff's services did not entitle him to a grant by which the heir at law was disinherited. In consequence of the difference of opinion, the case was referred to the S. C. where the following order was made. "That the D. C. should take the evidence of the alleged writer of the plaintiff's deed, and enquire why he was not called as a witness." That the S. C. did not go so far as the late Judicial Commissioner, in thinking that the plaintiff's service, if really rendered, would not have warranted the grant in his favor; nor was it quite correct that the deed alleged *Kieralle* to have no children, for it only declared that he had neither wife nor children, *to assist him in his illness*, that every deed, however, disinheriting the heir at law ought to be proved beyond the possibility of doubt or

suspicion. That the not calling the witness of such deed, without accounting for the omission, by death, or other uncontrollable circumstances, had, in itself, a suspicious appearance, more especially considering that the names of witnesses were often not signed by themselves, but simply introduced into the body of the instrument, with their assent" [vide supra: III. 2. 3.] The omission to call the writer in the first instance having been afterwards satisfactorily accounted for, the original decree in favor of the plaintiff was affirmed No. 8736. Kornegalle 20th Nov. 6th Dec. 1833.

41. In another case in the same court, the plaintiff claimed as heir at law, the defendant claimed by virtue of a deed, by which the plaintiff would have been disinherited, as regarded the land in dispute. The evidence as to the facts, and as the proof of the defendant's deed was conflicting, the assessors considered the plaintiff had not established his right, the Judicial Agent was of a contrary opinion, and that no credit was to be given to the deed of the defendant, on appeal to Kandy, the assessors there agreed with the Judicial Agent, and observed moreover that even if the deed had been completely proved, it would have been of no validity, because it assigned no reason for disinheriting the heir. The Judicial Commissioner again differed from his assessors, and considered that the deed might be maintained. The S. C. on the case being brought before it, decreed that the plaintiff be put in possession of the land claimed, according to the opinion of the late Judicial Agent of Kornegalle, and of the assessors of Kandy, without going so far with the assessors as to say that the deed of disinheritment, filed by the defendant, was necessarily invalid, because no reason was assigned for that act, still the absence of any such reason was one argument against its being genuine, and must necessarily be entitled to weight in a doubtful case No. 7165. Kornegalle 21st November 1833.

42. In another action, also in the Court of Seven Korles, the plaintiff claimed certain land by virtue of a deed of gift from one *Horetella*, in consideration of assistance to be ren-

dered to that person, and of paying his debts. At *Horetella's* death this claim was set up by the plaintiff and was opposed by the defendant, on behalf of one of *Horetella's* daughter's, by virtue of a deed alleged to have been executed in her favor by him a few days before his death. The evidence was of that description, unfortunately but too common in Ceylon, which makes it difficult to say on which side fraud and perjury lie, or whether both parties be not open to the imputation. The nature of the evidence will however appear sufficiently to make the decision intelligible from the respective judgments. The Assessors in the Court of the Seven Korles were of opinion that though the plaintiff had proved the execution of the deed in his favor, yet there was much prevarication in his witnesses, and as it by no means appeared that he had fulfilled his agreement as to assistance, but rather the contrary they did not consider he had established his claim to the land, which they, therefore, were of opinion should be divided between the two daughters of *Horetella*, for one of whom the defendant claimed. The Judicial Agent concurred in this view of the case, and it was so decreed accordingly. On appeal to the S. C. this decree was affirmed in the following terms. "This Court is not surprised at the impression made in the Court below, by the extraordinary manner in which the witnesses swear in this case. But the ground on which the case has been decided, renders the question of fraud or prevarication of little importance. With that ground, this Court fully concurs. The deed in favor of the plaintiff was granted on a specific condition, not *executed*, but *executory*. There can be no doubt, therefore, that a failure in the performance of that condition, must defeat the instrument, it was for the plaintiff to shew a real bona fide performance of that condition: In this, he has certainly failed. It appears indeed that the deceased lived for a time in a house, either belonging to the plaintiff, or over which he exercised a certain degree of control; and that the plaintiff supplied him for a time with rice, but there was no one on the part of the plaintiff to render that personal assistance and at-

*Actual  
evocation*

tendance to the deceased which evidently was in his contemplation when he executed the deed, and which the plaintiff's own witnesses state was rendered to *Horetella* by his daughter. It is also a strong circumstance, that the last offices were rendered to *Horetella*, not by the plaintiff but by the defendant. It is indeed said by the plaintiff's first witness that the deceased was removed from the plaintiff's house by the defendant, but not of his own free will. If however the plaintiff had been executing the stipulated condition, according to the spirit of it, he would have been present and might have prevented any violence being offered, if any such were really offered, to the inclination of the deceased. Nor has the plaintiff proved the payment of any debt for *Horetella*, except in a manner much too loose, to entitle the evidence on that point to any weight. Indeed the circumstance of the plaintiff having requested the creditors to wait for payment would rather lead to a contrary inference it is of great importance that the strict fulfilment of those conditions which appear so frequently to form the consideration for grants of lands in these Districts should be watched with zealous vigilance, in order to prevent designing persons from availing themselves of the weakness of the aged or infirm persons to get possession of their little property, in prejudice of the rightful heirs, and then leaving them to perish in a state of destitution." No. 1622. Kornegalle 25th October 1833.

43. An action was brought on a Notarial deed dated 19th June 1829 for land thereby assigned to the plaintiff by the defendant in consideration of assistance already afforded and to be rendered to the defendant as long as he lived, or, in default of recovering the lands, the plaintiff claimed pecuniary compensation for the assistance rendered by him to the defendant and his wife for the last seven years. The defendant admitted the deed, but alleged that the plaintiff had failed to render the stipulated assistance, whereupon the defendant had assigned the land, by another deed, to his Grand-daughter. The Court of Matelle considered it unnecessary to hear the

evidence, because, the deed being admitted, it was clear that the land was the property of the plaintiff, and it was so decreed accordingly, provided the plaintiff continue to render proper assistance. On Appeal to the Judicial Commissioner's Court it was observed by that Court "That according to Kandyan law, a Donor did not lose the right of transferring his land to a second Donee, if he had cause to be dissatisfied with the assistance of the first, and the case was therefore referred back to Matelle for evidence as to the assistance actually rendered. On the part of the plaintiff, the witnesses stated that the defendant transferred his land to the plaintiff, giving one of his teeth as a token; that the plaintiff had provided every thing necessary for six years, cultivating the land and giving the produce to the defendant who however assigned the land to his Grand-daughter about a year before the action brought, and that the plaintiff came to the defendant and offered to render assistance after the first decision at Matelle, which the defendant, however, rejected. The defendant's witnesses stated that the plaintiff assisted the defendant, before the execution of the deed, but not since, On this evidence the Court of the Judicial Agent was still of opinion that the plaintiff was entitled to Judgment. The case being again carried in Appeal to Kandy, the Assessors who gave credit to the defendant's witnesses were of opinion, "That as the Deed had been granted for further, as well as past assistance, and as the plaintiff had not rendered any assistance since the Deed was passed the grant was forfeited, but that the plaintiff was entitled to compensation for his former assistance." The Judicial Commissioner agreed with his Assessors, except as to the latter part of their opinion, for he considered, that as the plaintiff had forfeited the Deed through neglect, he was not entitled to any compensation; The case being brought before the S. C. the view taken by the Judicial Commissioner was confirmed, and it was decreed as to the Deed granted to the plaintiff by the defendant, "It is necessary," the S. C. observed, that these alienations of land out of the family of the Donor, in consideration of as-

assistance should be strictly watched, with respect to the due performance of the condition, In the present instance, it appears that the plaintiff began to relax in his attentions and assistance, from the time the deed was executed. These instruments it seems are always revocable by the Kandyan law. [vide infra. Par. 46] subject in certain cases to compensation for assistance actually rendered. Now the plaintiff cultivated the defendant's land for six years, and though it is said he gave the produce to the defendant, it is not to be supposed that this did not go towards the defendant's support. If these deeds were to be enforced in the terms of the decree in the original Court, that is, provided he continues to render proper assistance to the defendant, this latter person would be entirely at his mercy, or which is nearly as bad, he would be obliged to have recourse to law in every instance in which the plaintiff failed to render him adequate support" *D. Meck Appoo vrs. Attcohendua*, Matelle 26th November 1833.

44. In another case, closely resembling the foregoing, and which was decided on similar grounds, the plaintiff claimed a garden as having been transferred to him by the defendant's wife on deed in consideration of assistance to her. The defendant proved that the plaintiff had discontinued his assistance for sometime before his wife's death, and that the defendant had been obliged, in consequence to borrow paddy for his wife's support. The Court of Kornegalle, accordingly, decreed for the defendant, and this Decree was affirmed by the Judicial Commissioner's Court and afterwards by the S. C. No. 3,660 Kornegalle, 10th October 1833. In this case, however, some of the Kandyan Assessors were of opinion, that as the deed of transfer had been duly executed, and as the plaintiff had assisted the defendant's wife till a few days before her death, he was entitled to retain the garden.—This opinion is mentioned here, as being at variance with that expressed by the Assessors, also Kandyans, in No. 4,380 Sup. Par. 38 from whom he was to receive assistance, two or three days before his death was a revocation of the grant, even though he left the house, of his

own accord, and without any failure of assistance, as far as appeared.

45. On a claim of land transferred in consideration of assistance, it appeared that the deed of transfer was invalid, under Proclamation of 28th October 1820, from its bearing no mark, as the signature of a witness, but that the granter had lived in the house of the grantee, and had been supported by him for three years, though she afterwards removed to the house of the defendant with whom she resided for eight months till her death, and to whom she made over the land in question a few days before she died. Under these circumstances the Kandyan Assessors were of opinion, that the plaintiff, though the deed could not be supported, was entitled to compensation for the assistance rendered by him, and in this opinion the S. C. concurred, decreeing the land to the defendant, he indemnifying the plaintiff according to the Assessment made of his claim by the Assessors *P. R. Ralle* and *Y. B. P. Mohandiram*. Matelle 17th January 1834 on circuit.

46. The power of revoking or superseding these Gifts or bequests by other subsequent ones is so intimately connected with the original power of disposition, that it will be convenient to insert in this place what is said by Sir John D'Oyley and Mr. Sawers respectively on this subject; To begin then with Sir John D'Oyley; "Transfers, the Donations or bequest of land are revocable at pleasure during the life of the proprietor who alienates it: It is held that any land proprietor, who has even definitively *sold* his land, may resume it, at any time during his life [this position we shall presently see, is disputed by the chiefs consulted by Mr. Sawers] "paying the amount which he received, and the value of any improvement, but his heir is excluded from this liberty. The reason of this custom is, respect and attachment, which belong to ancient family rank, and the importance ascribed to the preservation, as it is called, of name and village; the name by which every person of rank is distinguished and generally known, being that of the village, in which his ancient or principal estates are situated.+ When a land proprietor is become old and infirm,

and has no near relations, or none who look after him, it is a common practice for him to transfer his lands to another, frequently a relation, on condition of receiving support and assistance till death. In this case the latter sends one or more servants to wait upon and administer to him, and supplies provisions and medicines, according to his ability, the condition of the party and the value of the land. If the owner, for so he must still be called, be dissatisfied with the assistance afforded, he can at any time revoke the gift as well by virtue of the rule above stated as because it is conditional, [the latter ground, viz: the conditional nature of the true foundation of the power of revocation"] and may make over his property to another person who thereupon reimburses the first acceptor for the expences incurred by him. This change of possession is not unfrequent, and there have been instances of five or six successive resumptions and new assignments by the same capricious proprietor. It follows that the last bequest or transfer supersedes all which may have preceded." Upon this exposition of Sir John D'Oyley of the very important question of the power of revocation, we find the following notes by Mr. Sawers who appears to have consulted Assessors on the point, and who modifies the proposition laid down by Sir John D'Oyley, as regards absolute sales of land:—a modification which good sense and Justice must lead every one to concur in. "The Assessors unanimously assent to the position that Transfers, Donations, or bequests of land are revocable at pleasure during the life time of the person who alienates the same, but deny that a definitive sale of land is revocable by the seller at his pleasure: For though it was not without precedent for bargains of this land to be broken and annulled, even years after the sale, it was neither justified by law or custom. Unconditional donations of moveable property, such as cattle, goods or money, were not revocable. For it was exceedingly common for old persons,

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having no children (1) to take up their residence in their old age with relations or strangers, in whose favor they, in the first instance executed a deed of gift or bequest, transferring the whole of the Donor's property to the Donor, for the sake of assistance and support, but it frequently happened that the Donor was a person of capricious mind or violent temper, and upon any slight occasion would remove to another House and execute a similar deed ; and thus numerous claims to his property after his death would be made upon deeds of the same import and of apparently equal validity ; in such case the Judge always decided in favor of the person under whose care the deceased had died ; however short the period might have been of his residence at that house ; but any other person who had rendered the deceased assistance and support for any length of time and had been put to expence thereby would have a right to compensation out of the deceased's property ; and even before the death of the person assisted, such compensation would be demanded and recovered. The person rendering the last assistance and support to the deceased would have a preferable right to his property to that of a person holding a deed of bequest, whose house he had quitted or whose service he had rejected, from dissatisfaction with treatment he had received, but it must be clearly proved that it was the intention of the deceased that the person rendering him assistance in his last moments was to be his heir, otherwise, the person rendering the last duties would only be entitled to be rewarded for his or her services out of the deceased's property while the bulk of the property would go to the heirs at law. And even in the case of deceased having died out of the immediate care of a person in whose house he had lived, or from whom he had received assistance

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(1) And in many instances, as the cases shew, where they had children, but who were unable and unwilling to give the requisite assistance ; It would appear from the Text that what is here laid down as the opinion of the Assessors, on the subject of the revocation of Deeds for Assistance, had reference to Moveable property only, but it can scarcely have been intended to be so limited and the numerous Cases on this subject would sufficiently prove that Landed property constantly forms the subject of these Conditional gifts or bequests—This and sundry other passages in the Memoranda of Mr. Sawers have suggested a fear that the Copies of those Memoranda are not always Correct,

and support, even to a period near that of his death, provided his so dying not under the care of this person was accidental and not by his having voluntarily rejected his assistance and support, such Benefactor would still come in for the property before the heir at law; liable, however, to the person under whose care the deceased ultimately died, for his or her trouble or expence."

47. The result of the propositions laid down in Paragraphs 37 & 46 taken in conjunction with the decisions which have been given above (Par. 38 et seq.) would seem to be as follows:—That according to Kandyan law, the owner of Land or other property is not prohibited from disposing of it to any person he pleases, away, from his heirs, that the consent of the heir to such disposition is not necessary to give validity to it, whether the owner's reasons for so disposing of his property must necessarily be expressed seems doubtful, but as it is usual not to state the reason, whether undutiful conduct on the part of the heir, want of support or assistance or any other ground to such omission, must always excite suspicion, and in doubtful cases must weigh very forcibly against the act of alienation, that in all cases Deeds, disinheriting the heir at law require to be strictly and jealously watched, and that if they be not satisfactorily established, the Court will lean against them in favor of the rights of the heir at law, as is the rule of the law of England and of the Civil law. Sup. Par. 190, that in all transfers for assistance to be rendered, the condition must be shewn to have been faithfully and strictly performed, in failure of which the transfer ought not to be enforced: that the Donor has the right of revocation by any subsequent transfer; and even without deed, for the act of his removing to another house, where the transfer was in consideration of assistance, would seem to amount to a revocation; that where his intention is not clearly expressed as to revocation and other disposition, the Court must decide according to the Evidence, whether just ground existed for his dissatisfaction with the first Donee—And that where the subsequent transfer is confirmed

or the former one is revocable, the question arises as to the claim of the former Donee for remuneration, for assistance actually rendered by him—We will now return to Mr. Sawers.

48. "When a man dies Intestate his Widow and Children are his immediate heirs, but, the widow, though she had the chief controul and management of the landed estate of her deceased husband, has only a life interest therein and at her death it is to be divided among the sons, excepting where there is a daughter, or daughters married in Beena; these or rather their children have the same right to a share of their father's lands as they";—but on this subject Mr. Sawers adds under the head "widows" "the widow has no right to dispose of her husband's lands contrary to what the law directs although she has the usufruct of them, unless she be thereto specially authorized by her husband as a means of securing at least the dutiful obedience of his children, this is a common case, but if a widow, being barren, be the husband's paternal aunt's daughter, she inherits the acquired lands, next to full brothers,"—As to the widow's power to mortgage the land, in certain cases; *vide infra*, on the subject of the debts due and mortgage; Par. 146.

49. Soon after the Kandyan districts came under the appellate jurisdiction of S. C., a case was brought up in appeal, in which this limitation of the rights of the widow to a mere life interest came in question: a widow, finding herself excluded altogether from the estate of her late husband, instituted a suit against the representatives, and on their admitting her claim as widow, obtained a decree 11th June 1824 by which certain fields, forming about one-sixth of the estate, were awarded to her in full ownership: And in this decree the heir acquiesced, without appeal. In May 1829, the widow, in consideration of assistance, transferred these fields to one of her children by her deceased husband, to the exclusion of the rest, and on her death in 1833, the present action was brought by the excluded children, contrary to Kandyan law. The Court of the Judicial Agent considered it unnecessary to hear evidence, and decided

the case on the documents produced, viz; the decree of 1824, and the deed of 1829. The first Assessor was of opinion that the widow had obtained an absolute right to the fields and could therefore dispose of them by will. The second Assessor considered that supposing the widow to have obtained an absolute right under the decree, still she ought to have shewn in the deed of transfer some reason for disinheriting her other children, or should at least have expressed her intention so to do. The Judicial Agent was of opinion that the meaning of the decree must have been, that the widow should get no more than a life interest in the fields, which at her death ought to revert to the heirs generally, and that though a distinct share had been assigned to her, it could not have been intended to give her the power of alienation, as her husband had died intestate. It was, therefore, decreed that the Notarial deed should be set aside, and that the land in dispute be held by all the sons in *Talloomaro*, like the rest of the property. The S. C., however, on the case coming before it in appeal referred the case back to the D. C., to receive proof of the Notarial instrument [vide Supra: ~~Page~~: 112.] of 5th May 1829 unless it should be admitted by the Plaintiffs, and also proof of the assistance and support rendered by the Defendant to the mother of the parties, in fulfilment of the conditions of that deed. There is nothing "the judgment observed" in the decree of 1824 to limit the right of the widow to a life interest, unless, therefore, such a decree would have been contrary to law, there is no reason to construe it in that limited sense. The general rule, it is true, is that a widow has only a life interest in the estate of her deceased husband, but then she is supposed to have the chief superintendance and control of the whole estate for her life. Now here she was deprived of these advantages and was obliged to sue her sons for her portion as the means of supporting herself. They admitted the justice of her claims, and accordingly, the Court awarded her, not a life interest in the whole estate, but a part which it appears she had possessed before, and that part was decreed to her without

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restriction or limitation. If the sons had been dissatisfied with this unqualified award they should have appealed against it; —Not having done so, and having admitted the justice of their mother's claim it must be taken as an actual division and separation of the share so allotted, and therefore that she had the right of disposing of it, or at least of directing to which of her children it should go. For it is to be observed that she does not attempt to alienate it from the family of her late husband; The answer to the objections of the second Assessor is, that she *does* give a reason for so disinheriting the other children, or rather for the preference which she gives to the Defendant, by saying, in consideration of support rendered and to be rendered &c. [as to the power of disposing property, away, from the heir at law; see the following Paragraph.] If therefore the Defendant shall appear to have really and bonâfide fulfilled his engagement of supporting his mother, he ought to be considered entitled to retain possession of the land in question in pursuance of the Notarial deed, supposing that instrument to be duly proved. Evidence was accordingly gone into before the D. C., and the Deed and assistance being both established, the S. C., on the proceedings being returned, with the evidence so taken, decreed that the Defendant be confirmed in the possession of the land awarded to him by the deed from his mother, No. 7014, Ratnapoora 26th October 1833 and 23d July 1834.

50. A widow, of a husband dying childless, has the same life interest, and that only, in the husband's landed property, whether hereditary or acquired, as the widow of a husband having issue, but if the widow be a second wife with issue, and there be issue by a former wife, the widow or widows must depend upon the shares of their children and if the share of one of the widows should be insufficient for her and their support, the widow shall have a temporary allowance out of the other share."

51. "A widow loses her right and life interest in her husband's estate, by taking a second husband, contrary to the wish of her first husband's family, or by disgraceful conduct,

such as glaring profligacy or adultery, or by squandering the property of her deceased husband: any one these acts being proved against her by the children would subject the widow to expulsion from the house of her late husband, and deprive her of any benefit from his estate.”

52. The eldest son has no right to a better share of the estate of his parents than his other brothers, and his sisters having Beena husbands.”

53. Daughters while they remain in their Father's house have a temporary joint interest with their brothers in the landed property of their parents, but this they lose, when given out in Deega marriage by their parents, or by their brothers after the death of their parents” [But not, it would seem by half brothers; for in a case in which this question arose, and in which the Judicial Commissioner of Kandy, doubted whether the being married out in Deega would operate to the disherison of the daughters, though he entertained no doubt that such a marriage by the whole brothers would have that effect; Eleven chiefs were consulted and gave their opinion that the daughter did *not* forfeit her right of inheritance by being so disposed of No. 6,754. Ratnapoora 26th October 1833, mentioned *infra*: par: 68, for another point; see also par: 65 as to uncles giving their nieces out in Deega, “It is however, reserved for the daughters in the event of their being divorced from their Deega husbands, or becoming widows destitute of the means of support, that they have a right to return to the house of their parent's estate. But the children, born to a Deega husband, have no right of inheritance in the estate of their mother's parents. [This last position is to be taken as opposed to the rights of sons and of Daughters married in Beena. As regards collaterals and more distant relations, we shall see that the children of Deega married daughters have in many cases a preferable claim—Indeed the exclusion of Deega married daughters themselves would seem only to have reference to sons, and Beena Daughters, themselves would seem only to have reference to sons and Beena daughters of the same bed, for we shall

see presently par: 59 that Deega married daughters being the only issue of that bed have joint, if not an equal right with their half brothers to their father's estate.

54. If, however, a daughter, who has been given out in Deega, should afterwards return to the house of her parents, with the consent of her family, and there marry a Beena Husband, the issue of this connexion will have the same right of inheritance in the estate of their Maternal Grandfather or Grandmother, as the issue of her uterine brothers."

55. On failure of the issue of sons and of daughters, married in Beena, a Deega married daughter would succeed, but if she be dead her father's Brothers succeeded before her children, and again, if the brothers be dead, the Deega daughter's children succeeded before the children of her father's brothers,—on this point Mr. Sawers observes there appears to be a considerable degree of uncertainty, but the chiefs seem pretty unanimously of opinion that where two Brothers have possessed the family estate undividedly the one Brother would succeed to the other in preference to the other daughters married in Deega, but where the family estate has been divided and so possessed by the two Brothers, the children of a Deega married daughter would succeed to their maternal Grandfather before their Grandfather's brothers; [and even in the first instance, that is, where the brother have possessed the estate undividedly] the children of the Deega married daughter, if they become destitute but not otherwise, would have a right to claim support from their Maternal Grandfather's estate, though the Pareveny right to that estate would be in their Grand Uncle [Maternal Grandfather's Brothers.]

56. A daughter having a Beena Husband in the house of her parents, her children have the same right of inheritance to the estate of their mother's parents, as the children of their mother's brothers, but if the children of the daughter having a Beena husband inherit any considerable landed estate from their father, in that case, their share of their Mother's family estate would be proportionably diminished.

57. A daughter married in Beena, quitting her parent's house with her children to go and live in Deega with her husband, before her parent's death, forfeits thereby, for herself and her children, the right to inherit any share of her parent's estate [she having at the time a Brother or a Beena married sister] unless one of the children be left in her parent's house; <sup>Sawers</sup> Four of the chiefs, Mr. Sawers adds, are of opinion that the daughter previously married in Beena (1) may preserve for herself and her Children her own and their claim on her parent's estate, by visiting him frequently and administering to his comfort and especially by being present, nursing and rendering him assistance in his last illness, and this would especially be the case where there were two daughters and no sons, either in re-establishing the right of one to the entire estate against the other daughter married in Deega, or for half of the estate, if the other daughter be married in Beena.—But if there should be a son besides these two daughters under the above circumstances, and he living at Home; in that case the son or his heirs would get half the estate, and the other moiety would be divided between the two daughters or their heirs. (2) But, should the son have been living out in Beena, and the parent have been depending on his daughters and their Husbands for assistance and support, in that case he would only be entitled to one third, and the daughters or their children to one third each.

58. On this branch of the subject the following case from Madewelletenne was decided in 1834. A father dying about 1814 left six pellas of land, and on his deathbed gave a Talpot to his son, the Defendant, telling him to support his mother to whom he gave two other Talpots, and who took the pro-

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(1) And afterwards going to live with her Husband in Deega, "Sawers must have intended these words to be understood, because otherwise, the rights of the Beena married daughter would have remained unimpaired, and would have stood in no need of this special mode of preservation.

(2) Mr. Sawers, it is presumed, means that the other moiety would be divided between the two daughters, provided both had rendered assistance, or if one only assisted, that the other was married in Beena; for if one be married in Deega and render no assistance &c. it seems clear that she could have no claim, and the estate would in such case be divided between the son residing in the house of his parents, and the assisting daughter.

duce of one of the pellas till her death, which happened about 1826: from that time the Defendant, her son, took the produce of this pella as well as of the other five, the present action was brought for a share of the land by a daughter who had been married in Deega, but who it appeared had frequently resided at her father's house, where several of her children were born, it further appeared that she and her Children were in a state of destitution. The Talpots given to the Mother were not to be found;—in his answer, the Defendant stated with great particularity the division made by his father of his lands, alleging all those which he now possessed had been bestowed on him by his father, and that his Sister, the Plaintiff, had forfeited, those which had been given to her for non performance of Government services, but of this he offered no proof: The Assessors in the original Court were of opinion that the Plaintiff, in consideration of his <sup>her</sup> distressed circumstances, was entitled to the Pella which his Mother had enjoyed,—the Judicial Agent, that she was only entitled to support for her life, but on reference to the Court of the Judicial Commissioners [this being before the New Charter came into operation] that Court decreed, that she was not entitled to any thing. On appeal to the S. C., it was decreed that the Plaintiff be put into possession of the Pella possessed by her Mother till her death; The S. C. adopted the opinion of the Assessors in the Court of Madewelletenne for the following reasons: “Independently of the state of destitution in which it appears that the plaintiff now is, and which of itself would entitle her to some assistance from the estate of her deceased parents, it appears that, though she was married in Deega, she always kept up a close connection with her father's house, in which indeed three of her children were born, another reason is, that the defendant, although he undertook to assert in his answer that the plaintiff had received a share of the paternal lands which he even specifically described, yet has not shewn that she did receive any part thereof; again it appears that the father, on his death bed, gave one Talpot to the defendant, and two others

to his wife, what has become of those two latter olas does not appear, but it is not improbable that one of them may have been intended for the plaintiff, more especially considering the frequency of her visits to the paternal residence." No. 590. Madewelletenne 3d May 1834.

59. A daughter being the only child of a man's first or second or third marriage, will have equal rights with her brothers of the half blood, in her father's estate, even if given out in Deega; This rule is qualified by the chiefs who say that where there is an only daughter, or only daughter of one bed, though such daughters would have absolute or *parveny* rights in their shares, they would be entitled to shares inferior to those of their half brothers; commonly, only half as much.

60. Daughters, before marriage or returning from a Deega marriage, have an equal claim for maintenance from the share of all their brothers, although of the whole or half blood, that is to say, from all the shares into which their parent's estate may have been divided.

61. If a daughter bear children in the house of her parents, without having an acknowledged husband, such children would have a doubtful or weak claim to any share of their maternal grand-father's property, and must depend chiefly on the good will of their uncle or uncles for support, and a provision out of the grand-father's estate.

62. A daughter, by conduct which brings disgrace upon her family, would destroy her *parveny* right of inheritance in the estate of her parents, but still she would have a right to support from the estate of her parents and could demand the same at law from the brothers.

63. Daughters must accept the husband chosen for them by their parents, or in the event of the parents being dead by their brothers, and must go out with such husbands in Deega, but in the event of such husband turning out badly, disinheriting her children, and compelling the wife to return to her father's house, the brothers are bound to make provision for their unfortunate sister and her children, out of her father's estate.

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64. Grand children, whether the children of a son or daughter, have the same right of inheritance to their grand-father's estate that their deceased parents would have had, if he or she had survived, that is; they are entitled to his or her shares, and great grand-children in like manner inherit through their deceased parents.

65. The only daughter of a deceased brother or of a sister, having had a Beena husband, is entitled to her parent's share of the family estate, nor does she lose her right to such share by being married in Deega marriage by her grand-father or grand-mother, in which case she would <sup>nevertheless she shall have unless given away</sup> have a right of inheritance, but her being so given away by her uncles would not deprive her of her right of inheritance in her grand-father's or grand-mother's estate, provided she duly perform (or cause to be performed) the Rajecarea: vide Supra: Para: 53 as to the effect of being given out in Deega by brothers or half brothers.

66. If a daughter have unauthorized intercourse with a paramour in her father's house, the children of such intercourse have no right of inheritance in their maternal grand-father or grand-mother's property, but if the father be known, and the children be acknowledged by him, they would have a claim of inheritance on his *parveny* property, provided the paramour were of equal rank and degree with the mother.

67. The same custom regulates the succession to the mother's as to the father's estate, and daughters having brothers have no superior rights of inheritance in their mother's landed property to what they have in their father's estate, with this exception, however, that when the parents have each an independent Estate, the daughters, whether married in Deega or otherwise, have *parveny* rights to equal shares with her brothers in their mother's estate.

68. It appears from Mr. Sawers's notes, to have been a disputed question how the landed property of a person having children by several wives should be divided between the children, many of the chiefs gave their opinion that the property should

be divided into two or more shares according to the number of wives by whom the deceased has left children and that each family should have one share, without reference to the number born of each bed, but the majority of the chiefs who were consulted seemed of opinion that the property should be divided equally among all the children of the different beds, share and share alike,<sup>†</sup> and the two following cases are given by Mr. Sawers as being cited by two of the chiefs in support of the latter opinion “*Meweneewe Mudianse* died intestate in the Kandyan King’s time, leaving two sons by his first wife, and one son by his second wife, both wives being alive, but dwelling in separate *Wallawes*. The case came before the King who decided that the lands should be equally divided among three brothers, share and share alike, the widows having their life interest reserved to them, in their respective children’s shares, the case was renewed under the present Government, in consequence of one of the two sons of the first wife having died without issue, upon which the son of the second wife sued for a fresh division of their late father’s property, or rather that his deceased half brother’s share should be divided between himself and the surviving Brother. But it was decided by the Resident and chiefs, confirmed by the Governor, that no fresh division should take place, and that the share of the deceased Brother should go wholly to his Brother of the whole-blood,”—Again,<sup>†</sup> “*Kolangah pittia Mohotalle* left by his first wife one son, by his second wife two sons, and by his third wife two sons and a daughter, and when the children came to contest about a division of the property, the Lands were divided equally among the four sons, and the daughter was left to be supported out of the share of her two uterine Brothers.” This rule of division [*per capita* rather than *per stirpes*] certainly seems the most consonant to natural Justice and has been acted upon by the S. C;—In one case the deceased had left a son and daughter by his first wife, and one daughter by his second wife, the Court of Ratnapoora adjudged the estate to be divided equally between the three children. The Court of the

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† See manuscript. p. 40. # See S.S. p. 40.

Judicial Commissioner decided that half the estate should be divided between the two children of the first marriage, and that the other half should go to the daughter by the second marriage. The S. C., before which the case was ultimately brought, after adverting to the conflicting opinions entertained by the chiefs on this point, decided in favor of the equal division among all three children, observing that "as far as this Court had been enabled to ascertain, the right of authority, founded both in opinion and precedent, is in favor of division among all the children of different marriages, equally; that this practice would certainly seem to be more consonant with the principles of equitable distribution; that in the present case there was no reason founded on Justice, why the daughter, of the second marriage should enjoy a portion equal to that which was to be divided between her Brothers and Sisters, and that the injustice of such distribution become of course, stronger, when the children of one bed were still more numerous as compared with the other." No. 6754 Ratnapora mentioned supra: par: 53, on another point.

69. Where an estate is enjoyed undividedly by two or three Brothers, having but one wife in common, on the death of one of the Husbands, and the wife, or in the event of the wife being divorced after the death of one of the Husbands, the children, being the issue of the joint connexion, can claim the share of their deceased father, to hold it independently of their surviving father or fathers. If one of the joint Husbands should quit the connexion and take a wife for himself alone, and have issue also by her, and he die Intestate, his share of the family property would be divided between the issue of his first wife which he had in joint-connexion with his brother or brothers, and the issue of his sole wife, a moiety to each.—Nor has the brother who capriciously detaches himself from a joint connexion, after the issue born under it, the power of depriving his first family of the whole of his share of the family estate;—one moiety at least of his share should remain with his first family, begotten under the common connexion of him and his brothers. "Mr. Sawers adds that" there is a difference of opinion

on this point, some of the chiefs say, that the Brother detaching himself from the joint connexion, under any circumstances, can deprive the issue of such connexion of any part of his property, but they admit that a man is liable to support his children begotten under joint marriage, and that if the means of the family be inadequate to their support he cannot deprive them of the whole of his share of the family estate, and quit the joint connexion to form a new one."

70. Where an estate is enjoyed undividedly or otherwise by three Brothers, two of whom are married to one wife, while the third Brother has a separate wife, in the event of one of the family or associated Brothers dying without issue, the other Brother with whom he had the joint wife shall be his sole heir, and the Brother having a separate wife shall have no share of such demised brother's property of any land. *kind.*

71. The acquired property of one associated brother, dying without issue, goes to the other associated brother, but the property which the deceased had received from either of his parents would revert to that parents and associated <sup>husbands</sup> brothers, being cousins or strangers in blood to each other, are reciprocally the heirs of each other, if either die without issue, to the property of all kind which the deceased may have acquired during the association; but not to the property which the deceased may have received from his parents or brothers or sisters, or which he may have inherited in any way from his own family.

72. Should an associated husband die leaving children by a former single marriage, such children would be his heirs, except to the property acquired during the association, which property would go to his associate.

73. The issue of an associated connexion inherit their father's parveny estate equally with the half blood by a former or subsequent marriage of their father, unless the father should, in the first instance, have transferred or settled the whole or any part of such property on his first family, in which case, the second family gets the whole which the father had reserved to himself of his hereditary estate. But the property acquired

under such marriage goes to the issue of such marriage respectively, unless the father should have made a division of his acquired property also, at the time of his separation from his first family, in which case, the last family would get the whole of that share of the acquired property which the father had reserved for himself. \*

74. "Uterine brothers and sisters, though born to several fathers, have all equal rights of inheritance <sup>subject to rule</sup> to their mother's peculiar estate." *See par 67.*

75. "A son, detaching himself from his family and forming a Beena marriage in the house of another, does not lose his right of inheritance to the estate of his parents; but if he neglect to sue for such right in his life time his children will have but a weak and doubtful claim on the estate of their father's parents for their father's share, generally speaking, such claims are considered to be destroyed by the neglect of the father;" Mr. Sawers adds, "the chiefs are generally agreed that in order to maintain the rights of children begotten in a Beena marriage of the father in another's house the children must have been received as heirs presumptive in the house of their grandfather; that is, they must have been in the habit of visiting him, of paying him respect and rendering assistance to him as to their parent."

76. "The same rule above stated applies to a son adopted by an uncle or aunt, or by a stranger, <sup>with a view</sup> to inherit the property of the adopting parents. The son so adopted does not thereby lose his right of inheritance in the estate of his parents who begat him, but a daughter so adopted would, unless she were an only child, lose her right of inheritance in her parent's estate, as much as if she had been given out in Deega." To this position as regards the son, Mr. Sawers adds, "But the chiefs consulted are unanimously of opinion that the son so adopted will lose the right of inheritance in his natural father's estate, in the proportion which the extent of the adopted father's estate bears to what would have been his portion in his own father's estate. And if the estate, which he acquires from his

adopted parents be larger than the son's portion, of his natural father's estates he will only be entitled out of the latter to such a share as would be sufficient to preserve to him the name of his ancestors.

77. A son becoming a Priest thereby loses all right of inheritance in the property of his parents, because to take the Robe is to resign all worldly wealth,—Nor shall he be restored to his right of inheritance by throwing off the Robe after his father's death, unless he shall have done so at the request of his brother, or by the unanimous request of his brothers, as the case may be, in which event, he will have a right to that share of his parent's property which would have fallen to him, had he never taken the Robe.—But should one brother, without the consent of his other brothers, being laymen, induce the brother, a Priest, to throw off the Robe, then that brother shall provide for the *Sewralle* out of his own share of the property solely; and the *Sewralle* shall have no right to demand any portion of the shares of his other laybrothers. But should a Priest be stripped of his Robes for some violation of the rules of his order, or should he throw it off from caprice, he has, in either case, a right to subsistence from the estate of his parents. In a case from Ruanwelle the plaintiff claimed lands in right of his associated fathers, four in number, all of whom were dead; It appeared that after the death of the plaintiff's mother, some of the fathers had married a second wife, the defendant, who had remained in possession of the lands since the death of her last surviving husband,—that the plaintiff had become a Priest in the Maritime Provinces, and had been for some years absent from his own country, during which period the widow had performed the *Rajakarea*; and that he had lately returned, thrown off his Priest's Robes, and instituted this claim. The second and third Assessors were of opinion that the plaintiff was entitled, as heir to his fathers: The D. J. and first Assessor considered that the defendant ought to retain possession for her life, and that at her death, the lands should go to the plaintiff, and it was

so decreed accordingly. And on Appeal to the S. C. this decision was affirmed. No. 2248. Ruanwelle 27th May 1835.

78. The foregoing rules of the Law of inheritance must be understood to apply only in cases where the caste of the parents has been equal, for the children of a wife of inferior caste to that of the husband cannot inherit any part of the *parveny* or hereditary property of the father, that has descended to him from his ancestors, as long as a descendant, or one of the pure blood of those ancestors, however remote, remains to inherit. But the issue of the low caste wife can inherit the lands acquired by their father, whether by purchase or by gift from strangers; and should no provision of this kind exist for the children of a low caste wife, they will, in that case, be entitled to temporary support from their father's hereditary property."

79. "Failing immediate descendants, that is, issue of his own body by a wife of his own or of higher caste, a man's next heir to his landed property [reserving the widows' life interest] is his father, or if the father be dead, the mother, but for a life interest only," [this limitation to a life interest seems, however, to be in contradiction to what will be stated in par. 82 and 85, by which the mother is stated to be absolute heiress at law to her children dying without issue, and to have the power of disposal of the father's *parveny* estate, which she inherits through them] "~~and~~ on the same conditions on which she holds her deceased husband's estate, viz. in trust merely for her children [and this limitation to a trust, or life interest, seems to apply to the father equally as to the mother, in the case of acquired property,] if the father and mother be both dead, the brother or brothers and their sons, and failing brothers and their sons, the sister or sister's sons succeeded."

80. The chiefs are agreed that a sister's son had not a preferable right to the brother's daughter, unless he has been adopted by his uncle, and therefore that failing a brother's son the property should be divided between the sister's son and the brother's daughter. But should the nephew have been neglected while the uncle was instrumental in procuring a Beena

husband for his niece and appearing otherwise to take a paternal solicitude about his niece, in such case she would be her uncle's sole heiress rather than the nephew, being a sister's son.

81. "The husband is heir to his wife's landed property [but see further in this par. this position controverted] which at his death, goes to his heirs; but if the wife leave a son and the father marry again and have issue of the second bed, in such case, on the death of the father, the son of the first bed would inherit the whole of his mother's estate with a moiety of his father's estate, while the children of the second bed would inherit the other moiety of the latter estate, and in the event of the son of the first bed dying without issue, the children of the second bed would only inherit from him the moiety which had descended to him of the father's estate, and his mother's estate would revert to his mother's family." "This, adds Mr.

Sawers, is the opinion of *Doloswelle Dissave* of Saffragani."

But the chiefs of the *Udaratte* are unanimously of opinion that the husband is not the heir to his wife's landed parveny estate which she inherited from her parents, nor to her acquired landed property, that on the contrary the moment the wife dies the husband loses all interest in her estate, which, if she has left no issue, reverts to her parents or their heirs, and that though the wife is entitled to the entire possession of her deceased husband's estate so long as she continues single and remains in his house, yet the husband must quit his wife's estate the moment she dies.

82. The mother is heir to her children even in the parveny property of her deceased husband through them. But if she die intestate, the estate will revert to her husband's family whose parveny property it was, with this exception, that if the mother has children, either by a former or subsequent husband, these children being the ultimate brothers and sisters of the children, through whom she inherited the estate, will inherit the same from her; And children of the same mother by different fathers are reciprocally heirs to each other, after the children of the whole blood have failed. But if the mother has been divorced by any

of her husbands, the children born to other husbands cannot inherit the property of the children whom she had borne to the divorcing husband.

83. If a wife die Intestate, leaving a son who inherits her property, and that son die without issue, the father has only a life interest in the property which the son derived from or inherited through his mother. And at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and, failing them, to the son's nearest heirs in his mother's family.

84. With respect to the father's property, the right of inheritance of the half blood is postponed to that of brothers and sisters of the whole blood; For example, A has by his first wife two sons and a daughter, and by his second wife two sons, and dies: On the death of one of the sons of the first bed without issue no part of his property would go to the children of his second bed, or half blood, But the brother and sister of the whole blood would inherit the whole of the deceased brother's property; On failure, however, of the brothers and sisters of the whole blood and their issue; the brothers and sisters of the half blood are then to inherit.

85. The following is said to be the exposition of *Doloswelle Dissave* of Saffragam "The right of inheritance of the uterine children of the half blood is postponed to that of paternal uncles and aunts and their issue, except in respect to the mother's property. For example, *Lokuralle* marries *Kallu* and has issue *Tikeralle*, *Lokuralle* dies and his widow is taken to wife by *Sirimalhamy* and has issue, *Tikeralle* dies [without issue] and the property which he inherited from his father *Lokuralle* reverts to the brothers and sisters of *Lokuralle*, and does not go to the issue of *Sirimalhamy*, though they are of the half blood with *Tikeralle*, being children of the same mother." This, however, goes on the supposition that *Kallu* the mother is dead, for as the mother is the heir of her children (par: 82.) the property of *Tikeralle*, if his mother *Kallu* had survived him, would have become her absolute property, and entirely at his disposal.

86. The property derived from the father goes to the half brothers on the father's side, in preference to the half brothers on the mother's side, for example: A has a son by his first wife, and another son by his second wife, and dies, and his estate is divided, his widow marries again, bears children to her second husband, and dies, her son by A's children inherits in preference to his mother's children by her second husband, "Mr. Sawers adds that *Dehigame D. Nilleme*, alone, holds the contrary to be law, viz: that uterine children have a preference to the brothers or sisters of the half blood by the father's side, though the property may have originally been the father's parveny."

87. "Two half brothers associated with one wife are heirs reciprocally to each other in preference to brothers of the whole blood: suppose A leaves two sons by his first wife, and two sons by his second wife, at his death, his property is equally divided among the four sons. If a son of the first bed becomes the associated husband of the same wife with a son of the second bed, these two half brothers would inherit from each other, unless the association be entirely dissolved before the death of either of them."

88. "Nephews and nieces of the whole blood succeeded before the brothers of the half blood."

89. "So sisters of the whole blood, though given out in Deega, succeeded in preference to brothers of the half blood."

90. To an estate coming from the mother the maternal cousin will succeed before the paternal cousin, as will appear decided in the following case of *Deyakelenawele Unanse, Vs. Boange Nilleme*. The facts of that case are stated to be as follows: *Watopola Mahatmea*, having a husband in *Beena* had three daughters, among whom her estate was divided; the eldest married *Dehigame Ange mulle Nilleme*, and had a son who succeeded to his mother's property, but becoming a priest he consequently had no issue, the Plaintiff claimed the share of this son on behalf of the Temple, which claim was of course set aside. The Defendant claimed as son of the third daughter,

This case  
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*Dehigame Ange mulle Nilleme* vs. *Boange Nilleme*

*Watopola Mahatmea*; a third claim was set up by a cousin of the last proprietor, the priest, by the Father's side, *Dehigame Angemulle Nilleme*, and the claimant's father having been brothers, and he contested that as the property had been the absolute property of his cousin, the priest, and as he the claimant was the paternal cousin of that person he had a preferable claim to be his heir over the Defendant who was only maternal cousin to the Priest. But the chiefs who sat on the trial, as well as those subsequently consulted, were unanimously of opinion that as the land in dispute had come to the son of *Dehigame Angemulle Nilleme*, through his mother it must revert to the descendants of the first proprietor *Watopola Mahatmea*, viz. to the Defendant, and the issue of the second and third daughter of *Watopola Mahatmea*, Sir John D'Oyly's notes say "if a man die without father or mother land derived from either reverts to their relations respectively within three generations, and in failure of such it goes to the Crown."

91. Nephews of the whole blood, being sons of the several brothers, share alike in the landed estate of an uncle dying childless, without respect to the numbers of each brother's family "Thus, if one brother leave one son, and an other brother three sons, the lands of the third brother dying without issue would be divided into four shares, one to each of his four nephews. But if one of the first mentioned brothers were still alive at the death of the childless brother, such surviving brother would take a moiety of the childless brother's estate, and the other moiety would be divided among the children of the other deceased brother. At the death however of such last surviving brother, if he should not have disposed of his moiety of his deceased childless brother's portion, by sale, gift, or bequest, a fresh division of the childless brother's estate will take place among his nephews or their respective heirs, as if his brother had not survived him, that is, the nephew's side, all share alike in the estate of their deceased childless uncle; Mr. Sawers adds, "It is held that the children of brothers are the nearest of kin to a man after his own children, and that the

children of his sisters are of the same affinity to each other that the children of brothers are to each other; and that they cannot intermarry, being in fact called and considered brothers and sisters; But it is held that there is so little affinity of blood between the children of a brother and those of a sister, their custom makes their intermarriages the most approved connexion. The son of the eldest brother has a sort of vested right to have for his wife his cousin, the eldest daughter of his father's eldest sister, and the connexions of the most respectable families often run in this way, from generation to generation."

92. If a son acquire independent property in his father's life time and die, leaving issue, before his father, his property goes to his widow and children. But his father if destitute, would be entitled to maintenance out of the estate of his deceased son, but would have no deeper interest in it, nor could he object to the widow and children of his deceased son selling the estate, though such sale would destroy the means of maintaining him. If the son leave an only daughter, <sup>if she is given out</sup> the father would have the right to possess the acquired estate of his deceased son, but he could not dispose of it in any way prejudicial to the parvency right of inheritance of the daughter to her father's property.

93. If a wife and children are obliged to quit the husband's house from the means of subsistence failing to be sufficient for the whole family; this does not prejudice the right of inheritance of her or her children to the property of the husband.

94. Sisters have a right of maintenance from their parents' estate in the event of their becoming destitute by the misfortune or bad conduct of their husbands. Nor is this right destroyed by the sale of the parental estate by the brothers, for any person purchasing such an estate, without the concurrence of sisters who may have such claim upon it, would be liable to the sisters of the seller for the same support out of the estate as their brother would have been bound to afford them, in the event of their becoming destitute, and the same obligation would be

upon the holder of the estate, in the event of its passing from the brother's son to his uterine brother by a different father.

95. The chiefs say that if a deformed sister for whom a suitable match cannot be got in Deega, get herself a suitable husband to live with her in Beena; the brothers must give up to her a due portion of her parents' estate according to the number of children; which portion she can dispose of as she thinks fit, but should she die childless and intestate her share reverts to her brothers and does not go to her husband.

96. If a person die childless, but leaving parents, brothers and sisters, the property which the deceased may have received from his or her parents reverts to them respectively [if from the father, to the father, if from the mother to the mother] and his acquired property, whether land, cattle or goods, also goes to his parents, but only the usufruct of it. The parents cannot dispose of such acquired property by sale, gift or bequest, but it must devolve on the brothers and sisters, who however, have only the same degree of interest in their deceased brother's acquired property that they have in their deceased parent's estate, ultimately it is divided equally among the brothers of the whole blood of the deceased, or their sons according to what would have been their father's share; failing brothers' sons, it goes to sisters of the whole blood or their sons, failing them, to the brothers of the half-blood, uterine, and their children, failing them, to the sisters of the half-blood, uterine, and their children, failing both brothers and sisters of the half-blood uterine and their children, to brothers of the half-blood by the father's side and their children, next to sisters of the half-blood, by the father's side and their children, next to the mother's sister's side, that is to say, the mother's sister's children [see the latter part of par. 91] failing them, to the mother's brothers and their children, next to the father's brothers, and their children, and, failing them, to the father's sister's, and their children.

97. The father is not the heir of the property of his children born in Beena marriage, which they have acquired

through their mother; the maternal uncles or next of kin on the mother's side being the heir to such property, but the father will succeed to such children's property otherwise acquired.

98. When a person dies intestate, leaving no nearer relations than first cousins, called brothers and sisters, his or her acquired property goes in equal shares to such cousins by the father's and mother's side, that is to say, to the children of the father's brothers and to the children of the mother's sister or sister, share and share alike.

99. If a man die leaving relations on his mother's side, but none on his father's side, his father's land will pass to his mother's family, his widow, if he left one, having a life interest in the property.

100. Sannasses and title deeds of all descriptions, <sup>weapons,</sup> by the possessors of which lands are held "*Patta-condoes*," by which the family designation or title is preserved, as also all articles received as royal gifts follow the descent of the land, and are considered the common property of the heir.

101. Persons incapable of inheriting are, 1st such as have assaulted and struck or wounded their parents, 2ndly such as have been discarded by their parents for shameful conduct, but mental or bodily infirmities do not disqualify from inheritance."

SEE ALSO, TITLE, LAND.

The following are Mr. Savers's Memoranda of the Kandyan Laws which regulate the succession to moveable property.

102. When a man dies intestate his widow and children are his immediate heirs: the widow having the custody and administration of the property as long as she lives in her husband's house, conducting herself with prudence and circumspection, and doing nothing to cause shame or disgrace to the family, nor squandering the property. Provided the widow thus conducts herself with propriety, her children cannot call for a division of the property till her death, or till she quits her deceased husband's house, but the children of a former marriage of the husband may claim their shares. The widow is entitled

to no more than alike share as one of the children. But she is besides entitled to what was considered her own wearing apparel, jewels and ornaments, commonly worn by herself and given to her by her husband, also to all the property she may have brought with her on her marriage, and what she may have acquired herself in the shape of presents, gifts, or bequests, or what she may have purchased with the produce of her own hands, or gained by trade. Slaves and cattle are considered to belong to that description of moveable property of which she is entitled to an equal share with her children, out of her husband's estate. The following rules, relating to the widow's claim on the personal property, will more conveniently find a place here though given by Mr. Sawers under the head of widow." A widow, whose husband has left no issue, is entitled, at her husband's death, to the whole of his moveable property, including money, grain, goods, slaves and cattle; unless the three last mentioned have been heir looms in her husband's family, that is, what he had inherited or received with the landed estate of his ancestors. But all goods, slaves, or cattle acquired by the husband during the coverture, by purchase, or by gift from others, the widow is entitled to a share of the produce of the slaves or cattle, being of the original stock of the husband's family: On leaving her husband's house, the widow has a right to carry with her all such property as she is entitled to as abovestated: But if her husband's family lands have been burthened with debt, or mortgaged by her husband's ancestors, the widow must give up as much of the moveable property as will amount to half the sum necessary for the disburthening or dismortgaging the landed property of the deceased husband: And if the deceased husband had himself so burthened or mortgaged his family estate then his moveable property is liable to the last article, to be disposed of for the liquidation of the same; in which case, the widow would get nothing, if the debt of the deceased exceeded the value of his moveable property, to which she would otherwise be entitled."

103. "At the death of the widow, the moveable property is to be divided equally among the children, except the daughters who have already received their shares on being given out in marriage.

104. In the event of there being no children, the widow inherits the whole of the household goods, grain in store, and the cattle which have been acquired, together with the increase in the husband's stock of estate, subsequent to the marriage. The property, however, which the husband had inherited from his parents is generally claimed by his nearest kindred, and the widow has no share of it."

105. If a man die intestate, leaving neither widow nor children, his moveable property goes to his parents, failing them, to such of his brothers and sisters as have rendered him assistance and support on his death bed, failing them, to his next of kin or those who have rendered them assistance, except in cases where the property is more than amounts to a fair recompense to the stranger who has rendered the deceased assistance, in which case, the stranger must be satisfied with a compensation out of the deceased's property, and the remainder goes to the next of kin as abovementioned; failing parents and sisters and brothers, the nephews and nieces inherit according to the shares to which their parents would have been entitled and in this respect the children of brothers and sisters have equal rights, and failing sisters and brothers and their children, the moveable property of the deceased will go to the uncle and aunts or their issue, on both fathers and mother's side, that is to say; one half to the kindred on the father's side and one half to the kindred on the mother's side, but these rules apply only to the acquired property of the deceased, since whatever he received through his mother will revert to the mother's family, and what came from or through his father will revert to his father's family.

106. The right of inheritance of children of the half blood is postponed to that of the children of the whole blood *vide supra par. 84 et seq*: as to the relative rights of children of the half blood, as regards landed property.

107. A wife dying, having a husband and children, her peculiar property of all descriptions goes to her children and not to her husband.

108. A wife dying barren or without surviving children all the property which she received from her parents reverts to them or to her brothers and sister, and their issue.—The husband inherits all the property acquired during the coverture, but the property acquired under a former marriage or when single would go to her nearest of kin in her own family, but, failing brothers and sisters and their issue, the husband comes in before the wife's uncles or aunts, and their issue.

109. The property of a deceased person goes to the crown, only when no kindred can be found to inherit *vide supra* par. 90 as the landed property goes to the crown.

110. In the following paragraph the rules of descent by which the acquired property of an unmarried daughter dying intestate is to be distributed are conflicting, nor is it clear to which order of descent Mr. Sawers considers the weight of authority to incline.—The passage itself, as well as the note by which it is qualified will be here given, in order that the difference may be reconciled, or that it may be decided which scale of descent should be adhered to, if indeed that has not already been done “an unmarried daughter acquiring property and dying intestate her property goes as follows: [each successive step supposes of course the previous relation or set of relations to fail.]

1st—The mother.

2ndly—The father.

3rdly—The brothers and sisters of the whole blood in equal shares, if no more than one.

4thly—Brothers and sisters, uterine, of the half blood.

5thly—Brothers and sisters of the half blood father's side.

6thly—Maternal uncle.

7thly—Maternal aunt.

8thly—Maternal grand-mother.

9thly—Maternal grand-father.

10thly—Paternal uncle.

- 11thly—Paternal aunt.
- 12thly—Paternal grand-father,
- 13thly—Paternal grand-mother.
- 14thly—Maternal uncle's sons and daughters or grand-sons  
and grand-daughters.
- 15thly—Maternal aunt's sons and daughters. *or grandsons & granddaughters*
- 16thly—Paternal uncle's sons and daughters. ——— " ———
- 17thly—Paternal aunt's sons and daughters. ——— " ———

Mr. Sawers adds in a note, that "this was the opinion of the first Adigar and some others, but that certain other chiefs, whom he mentions, were of opinion that brothers and sisters of the whole blood would share equally their deceased brother's property, and that the same should be the case with half brothers and sisters' uterine and half brothers and sisters on the father's side; that is, that the sexes related in an equal degree should share equally. And that all the chiefs now concurred in opinion, that the sexes should share equally up to the paternal uncles and aunts. The following table is then subjoined by Mr. Sawers, which, it will be observed, varies from the former one, from the 5th step in the scale.

A child dying intestate, his or her acquired property goes.

- 1st—To the mother,
- 2nd—Father,
- 3rd—Brothers and sisters of the whole blood,
- 4th—Brothers and sisters, uterine, of the half blood,
- 5th—Maternal grand-mother,
- 6th—Maternal grand-father,
- 7th—Maternal uncles and aunts,
- 8th—Paternal grand-mother,
- 9th—Paternal grand-father,
- 10th—Half brothers and sisters, by the father's side,
- 11th—Paternal uncles and aunts,
- 12th—Maternal aunts children,
- 13th—Maternal uncle's children,
- 14th—Paternal uncle's children,
- 15th—Paternal aunt's children.

111. The assessors unanimously state, that the mother is heiress to the acquired property of her children, dying unmarried, and without issue, and that the same is entirely at her disposal: But should she die intestate, the property would go to the brothers and sisters of the whole blood, equally, and, failing them, to the brothers and sisters of the half blood uterine."

112. "The assessors are of opinion, that lands as well as moveable property acquired by an unmarried woman, dying intestate and without issue, would follow the above rules of succession, but parveny property would go to the nearest male relations only, of that side of the family from which she inherited.

113. Property given to a concubine, or acquired by her, if she die intestate and without issue follows the same rule of inheritance as the property of an unmarried woman, but if a concubine or a prostitute leave issue, such issue will inherit their mother's property."

114. "The debts of the deceased must be paid by them who inherit his or her property according to the value of their respective shares. Debts of money, Paddy, or Grain, should be paid by those who inherit the lands: But if the moveable property of the deceased be large, in proportion to the landed property, the heirs of the moveable property must pay a share of the debts, in proportion to the value of such property."

115. "It is a pious duty incumbent on sons, to pay their parent's debts although they may not have inherited any property from them. The sons, and, failing sons, the daughters could be seized as slaves for the debt of parents, after the death of the parents" Mr. Sawers adds that "it was customary in such case, for some near relation or friend to tie a piece of linen rag round his neck with small copper coin in it and to walk about the country till he had collected in charity a sum sufficient to release the unfortunate relative."

116. A child seized and taken as a slave for the debt of a parent could at any period within thirty years emancipate him

or herself, by paying the debt, but not if the child had been given voluntarily by the parent for the debt, with a written deed of transfer. After thirty years the slave could not so emancipate himself, and if a woman, neither she nor her children could be so emancipated."

117. "If a Beena husband contract a debt without the consent or knowledge of his wife, she is not liable to pay it. A Deega wife is liable to pay the debts of her deceased husband, whether she have inherited property from him or not;—The husband is liable to pay such debts of his wife as she has contracted for the purposes of the family; but not such as have been unnecessarily contracted, and without the knowledge of the husband."

118. "When the family of a man or woman has been separated and apportioned off "[that is, it is to be presumed, the estate divided]" and such man or woman has contracted a second marriage, the members of such separated family shall neither have a right to share in the estate of their parent at his or her death, nor shall they be liable for the debts of their parent contracted after the separation: The issue of the second marriage shall inherit the whole estate and be liable for the debts: But the separation must have been complete and indubitable."

119. "A Parent is not liable to pay the debt of a child, unless the debt have been contracted for the benefit of his parent's family: A father could not be seized for his son's debt."

ON GUARDIANSHIP MR. SAWERS OBSERVES:

120. "Children being minors and left orphans, provided they have not been placed specially under the guardianship of any one by their Parents, fall under the guardianship of their maternal grandfather or grandmother, failing them to that of their maternal uncles or aunts, failing them to that of their paternal uncles and aunts, and failing them to that of an adult brother or sister."

121: The guardian is entitled to the administration of his

ward's own estate: But should the ward have no such estate, the guardians, being of the mother's family, cannot call upon the grandfather or grandmother on the father's side, to whom the father's hereditary property shall have reverted at his death, to afford the means of support to their ward, but they must support their ward in such case themselves, or give up the ward to the guardianship of the grandfather or grandmother on the father's side."

122. "The chiefs know of no instance of a guardian having been called to account for the *producé* of his ward's estate: He must account for the original property, whether in land or goods; but the guardian has the usufruct of his ward's estate, during the minority."

123. "The guardian is not necessarily the heir of the ward, but it is very common, when a person leaves minor children to execute a deed expressed literally thus. "I give my land and my child to such a person" by which deed so expressed the guardian becomes the heir of the ward: And this construction as to the right of inheritance has even been put upon deeds of a more ambiguous wording, such as "I give charge of my lands and my child to such a one." In some instances there have even been decisions [declaring it is to be presumed the guardian to be the heir of his ward] given by the *Maha Nadooa* [high Court] and confirmed by the King, upon no other grounds than that of guardianship, but the chiefs say that, in these cases, the child must have been taken charge of in infancy by the guardian who must, therefore, have had more the character of a parent than a guardian."

124. "A widow may appoint a guardian for her child or children, with the right to inherit such children's property, in the event as their dying in minority and without issue, but such guardian, appointed by the mother, will not inherit the property, which the ward inherits through his or her father, which will revert to the father's family."

#### AS REGARDS THE ADOPTION OF CHILDREN.

125. A regularly adopted child, if the adopting parent has

no issue of his or her own body, inherits the whole estate of the person adopting him or her: But if the adopting parent have issue, male, or female, of his or her body, the adopted child will, in that case, have but an inferior portion of the estate, with the issue of the parents. The chiefs are not prepared to say positively, what proportion such share should bear to the share of each of the real issue, but they think it should be one-fourth of such share."

126. "The adopted child must be of the same cast as the adopting parent, otherwise, he or she cannot inherit the hereditary property of the adopting parent."

127. "A regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such children are to be an heir of the adopting parent's estate,"—vide sup: p. 117 where it is observed that the declarations of deceased persons are often very material on questions of adoption.

128. "The fact of a child being reared in a family, even though a near relative is not to be construed into a regular adoption, without its having been openly avowed, and clearly understood that the child was adopted on purpose to inherit the property."

129. On the principle above laid down, that an adoption should be publicly declared: when it was attempted to establish a deed, the proof of which was unsatisfactory, and the only consideration stated for the instrument was the alleged adoption of the person in whose favor it purported to have been executed, of which adoption no evidence was offered, the S. C. observed that the adoption, if it had really taken place, would be a fact of sufficient notoriety to make it capable of very easy proof, and in the absence of such proof concurred with the Court below, in considering the deed not proved:—No. 1220 Ruanwelle, 21st October 1833 the adoption of a child, supposing the fact to be proved.

130. "On the other hand it may be established to form a good and valid consideration for an absolute gift or transfer,

in favor of such adopted child: Thus, a Plaintiff claimed certain land, by virtue of a uterine gift from his uncle P. Ralle, which was proved, but the Defendant claimed under a latter deed from the same person; Witnesses deposed that P. Ralle had first adopted the Plaintiff's younger brother, who died, upon which he asked the mother of the children to be allowed to adopt the Plaintiff, that she at first objected to this second adoption on the ground that she had already parted with one of her children; and then that P. Ralle, executed the deed in favor of the Plaintiff, who lived with his uncle, till his death, and remained in his house till after the funeral. The Court of Kurnegalle considering the deed to the plaintiff to be one of those gifts which, according to Kandyan law are revocable at pleasure [vide supra. par. 46, where the extent of his power of revocation is discussed] considered that the defendant's deed being of the latter date, ought to prevail. The S. C., however, on appeal, took a different view of this part of the case: That Court observed that if the account given by the plaintiff's witnesses, of the adoption of the plaintiff by P. Ralle, and of the circumstances under which the deed in his favor was given were believed, it would appear that it was only in consideration of this grant in favor of the plaintiff, that his mother who objected to the adoption on grounds, so natural to a mother's objection, would give her consent to the removal of the plaintiff from her house to that of P. Ralle, that if these were so, a good and valid consideration had actually been given on behalf of the plaintiff by his mother, and that it would be difficult to imagine any cause which would have justified P. Ralle in revoking his first grant, except undutiful or ungrateful conduct on the part of his adopted son No. 1672. Kurnegalle 31st October 1833.

131. "On the subject of deeds and transfers" under Kandyan law, we have already had occasion to introduce much of what is given both by Sir J. D'Oyley and by Mr. Sawers, when treating of the power of disposing of land and of revoking gifts or bequests of landed property. *Supra. para. 37*

to 47. The following paragraphs relate to the forms of deed and to the ceremonies to be observed in unwritten transfer and bequests of property" as laid down by Sir J. D'Oyley and Mr. Sawers respectively.

132. "Written deeds of any kind," Mr. Sawers observes, "excepting rights to property, were not common before the reign of the King Keertisee, deeds for the transfer or bequest of property in parveny [perpetuity] were considered of inferior validity, if they had not the *imprecation*, by which according to an ancient form and still prevailing, superstition, a judgment or curse is invoked against the person executing the deed his heirs and relations, and also against all other claimants who may disturb the person in whose favor the deed is executed. The same imprecation was necessary to be pronounced on a verbal gift, transfer, or bequest of landed property; and the same when a Ketta or Token was given."

133. "Sir J. D'Oyley says" All deeds executed in the Kandyan country [except occasionally among strangers, who have adopted foreign customs] whether for the alienation of land or moveable property, are not properly vouchers, but mere written records of the transaction; being neither signed by the parties, the writer or the witnesses. In other respects they are in the nature, and bear the tenor, of regular vouchers, reciting the contracting parties, the amount and object, the condition of transfer, and other circumstances, and specifying the names of the witnesses, and sometimes that of the writer and the date.

134. "Deeds are usually *attested* [which we shall see did not necessarily include *signed*,] by five witnesses, and frequently by more, if the property transferred be considerable: But three at the least are deemed requisite, otherwise, the deed, though not at once set aside, is held questionable, and satisfactory explanation is required why more were not called." It is scarcely necessary to observe that the law, as here stated by Sir J. D'Oyley is altered as regards deeds of lands passed subsequently to 1st July 1835, by Ordinance No. 7 of 1834.

135. "As regards the execution of deeds," Mr. Sawers observes, "It never was customary for the witnesses to sign the deed, it was the general practice for the party executing it to make a mark by a mere scratch or by writing one letter on the leaf before it was written upon: This was commonly done before the leaf was delivered to the writer by the person who was to execute the deed: But its being marked or signed by him was not considered essentially necessary to its validity, if it was completed and read over to him before his death: or [Mr. Sawers afterwards adds] if it were proved that it contained the last verbal declaration of the person transferring or bequeathing the property, such instrument would be held to be valid: In short all that was necessary was, to prove the will or intention of the disposer of the property: It was common when a writer could not be procured at the moment, for the person making the bequest or transfer to sign or mark the Talpot or Olah, upon which the deed was ultimately to be written." Sir J. D'Oyley says on this subject, "When a man's last hour approaches, and for want of a writer the time will admit of doing no more, the dying man sometimes writes a single letter, or makes a scratch on a blank Olah, at the same time verbally declaring his will: In such case the deed may be written in his name immediately after his decease; and the names of those who were present at the transaction being subjoined as witnesses, it is held of equal validity."

136. Mr. Sawers continues: "The customary ceremony on such occasions was for the person making the transfer or bequest to deliver the Talpot, Olah, or Ketta, into the hands of the person in whose favor the bequest or transfer was made, who received it with reverence and respect, after which he carried it round to the bystanders, and delivering the deed to each of them, received it back from each in a congratulatory manner."

137. "It was considered sufficient to invalidate a deed, that it was in the hand writing of the person in whose favor it was drawn, and this was certainly a necessary precaution, where deeds were executed in so loose a manner."

138. - It was not necessary that all the witnesses mentioned in the deed should be present, it was only necessary that they should have been informed by the person executing the deed, that he had executed, or intended to execute such a deed, and that its contents expressed his will or intention, declared at the time he marked the leaf." On this point, Sir J. D'Oyley says "The names of witnesses absent at the time of writing are sometimes inserted in the deed, and it is considered sufficient, *provid d* the deed be read to them shortly afterwards, in the presence of the parties, or of him who executes it." We had occasion, under Title "Evidence," supra. 113, to touch upon this practice, and to observe, that it is impossible that the insertion of the names of persons not present at the execution, can give any validity to a deed. Nor is this position inconsistent with what has been just quoted from Sir J. D'Oyley, for the reading over the deed to the witnesses, in the presence of the parties, or of the person executing it, is in fact tantamount to a fresh execution, and delivering of the deed though it would no doubt be better and more satisfactory that each witness should sign the instrument, in order to leave less possibility of doubt as to the identity of it.

139. "When no deed or Ketta was given, on a bequest being made, it was customary for the person making the bequest to lick the right hand of the Donor, and to deliver the bequest in his or her favor. The strict observance of all such ceremonies gave the greater validity to the act and deed." In a case from Matelle, mentioned in paragraph 43. We find the Donor of land giving one of his teeth to the Donee, as a token of his intention.

The following is given by Sir J. D'Oyley, as 'the law and custom of Kandy on the subject of debts and contracts' and incidentally of mortgages.

140. "As trade was unknown to the greater part of the Kandyan nation, their contracts were neither numerous nor varied, and consisted chiefly in the borrowing of money or grain for present necessity, money to pay fees or fines to their chiefs

or by the chiefs to satisfy similar demands from the King, grain for sowing and for subsistence. If the amount borrowed were large, writings were usually executed, with mortgages of lands or moveable property. If small, some article of property was delivered in pawn, with or without writing, except in transactions between Individuals who had such confidence in each other, as to lend without either."

141. "If money be lent on personal security, or if security be afterwards given, when the debtor is pressed for payment, which is a more frequent practice, such security is usually to be answerable for the debt first, in case the debtor die or abscond, within a fixed period, or secondly in case the debtor fail to pay within a fixed period. In the first case, the security has only to produce the body of the debtor and deliver him to the creditor at the expiration of the appointed time."

"In the second case the creditor demands his money of the surety [the time being expired] without having recourse to the original debtor, or distraining his property, and the surety must seek his remedy from the debtor."

142. "Money is usually borrowed on one of the following conditions: First on mortgage of land, with a stipulation that it shall become the absolute property of the creditor, if the money be not paid within a specified period, the land being possessed by the creditor, to enjoy the produce in lieu of interest: Secondly on mortgage, generally, without the stipulation above mentioned; but the creditor possessing the land for interest. Thirdly, on mortgage, possession being given to the creditor, to enjoy not only on account of interest, but on condition, that one or more *Ridies* of the principal sum borrowed shall be discounted [deducted from the debt] every year, till the whole be paid off; the usual rate being one ridie for every pela of land. Fourthly on mortgage, without delivering possession of the land, but only of the title deed, with the stipulation that it shall become the absolute property of the creditor, if the debt be not satisfied within a fixed period: Fifthly on mortgage, without possession, but with a stipulation to pay

portion of the annual produce in lieu of interest. Sixthly without any mortgage, but with a stipulation to pay a certain quantity of paddy annually, in lieu of interest: In the two last cases, it is more frequently a ~~caution~~, that one or more ridies of the principal be also liquidated annually." The following observation by Mr. Sawers on the subject of "Mortgages" will properly find their place here.

143. "In former days, the person in possession of a parveny landed estate, inherited from his ancestors, and having children, might not mortgage such estate without the consent of his wife, if the children were minors, or of the children, if they had arrived at years of discretion: But the consent of more remote heirs was not necessary, to render the mortgage valid against them. This custom has become obsolete and never was universally acted on, but prudent persons take the precaution, both in purchasing land, and in lending money on mortgage, to have the consent of the heirs, and that consent either publicly expressed or entered in the deed."

144. "A mortgage made by a co-heir, of more of the family estate than his own portion only being liable for the debt."

145. "Any person other than the rightful owners holding property, cannot sell, mortgage, or pawn such property, to the prejudice of the rightful owner, that is to say, the rightful owner shall be entitled to recover his property, free from all burthens, which the person who wrongfully hold possession of it may have attempted to impose upon it."

146. "A widow having the administration of her deceased husband's estate may, during the minority of her children, mortgage the landed property, if necessity require it: But this must be clearly to satisfy the necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt, But in all cases, where the children are as much as 14 or 15 years old, their consent is necessary to render such mortgage valid against them and their lands." We now return to Sir J. D'Oyley on "Debts" &c.

147. "If no lands were delivered into the creditor's possession, nor any share of produce assigned to him, payment of interest in money was stipulated, according to one of the following modes. First, an increase took place [usually 100 per cent in Kandy, and 50 per cent, in the country] and if the principal were not paid within the year no interest was charged, and though payment were protracted for any indefinite term beyond the year, the interest did not increase, that is, did not exceed the 100 or 50 per cent, abovementioned; secondly, a certain rate of interest was stipulated to be paid per mensem, or per annum: and whatever amount might accumulate, it admitted no limitation. The rate of interest long sanctioned in Kandy by the example of the Royal Treasury, from which it was frequently lent to traders, was 20 per cent per annum; but as no prohibition existed, the monied men, who were few and consisted chiefly of Malabars and Moormen, often exacted, three, four, six, and latterly even eight pice a month for each P. N. Pagoda. This having been brought to the King's notice, about ten years before the establishment of the British Government, the rate was limited by his order to two pice a month for each P. N. Pagoda, which was then equivalent to *Ten Ridies*: But this regulation is not considered to have affected the interest stipulated to be paid according to the first mode: money was usually borrowed under immediate pressure, and under the latter condition by traders who were almost exclusively of the two classes just mentioned."

148. "A premium or preliminary present was also sometimes given for the favor of the loan, according to the necessity of the borrower and rigour of the lender; It usually consisted of cattle, paddy, cloths, or some gold or silver articles, and sometimes stood in the place of interest, if the money were repaid within a short stipulated period, but not otherwise; This present was called *Atchicareme*, and a similar word in the Maritime Provinces means earnest money paid by a purchaser of property to the seller, to fix his bargain. The exorbitant rate of interest [Sir J. D'Oyley adds] is at once a proof of the scarcity of float-

ing money in the Country, of the Monopoly of trade, and of the oppression and exactions to which the people were subject."

149. "It was a very general practice in the country, to borrow Paddy or other Grain for seed; and for consumption, payable at the next ensuing Harvest. The established rate of interest was 50 per cent, and the creditor often went, or sent his people to the fields to secure payment; If after receiving it on the spot, he re-delivered it to the debtor, on his entreaty, and allowed a respite till the next season, the whole was considered as principal, and 50 per cent charged upon the whole amount next year. This exaction of compound interest was at one time forbidden by the King, as oppressive to the poor, but of course could only be partially prevented in practice. If the debts were suffered to remain outstanding, without such receipt, and re-delivering, no more interest was charged. In the seven Korles and Nuwere-Kalaweya, no interest was charged on Paddy, because it was an abundant article. In Dumbera no interest is payable on money or Grain; but in these Districts, it is often customary to receive a surplus of one or two *Lahas* on every *Pela* of Grain, not on account of interest, but in order to compensate for the diminution of quantity by drying. The case of this exception in Dumbera is not sufficiently explained, but it is said to have been established by a former King's order. For loans of Paddy, also, the borrower was sometimes, but by no means universally, required to give a premium. The common rate was four pice per *Pela*, but in times of scarcity, I understand, has risen to six and even eight pice for seed Paddy. In countries where it was customary to charge interest on Paddy, the premium occasioned no diminution of the interest.

150. "If a debtor died, the principal was recoverable from his heirs, to the extent of the assets of the deceased, but not the interest, whether the loan were of money or Grain."

151. "Where land is delivered into the temporary possession of the creditor, the mortgager still performs King's service, to which the land is liable." Accordingly in cases where it is matter of dispute, whether the land has been sold absolutely

or only mortgaged, we often find each party endeavouring to establish the performance of this duty by himself, as a proof, supposing the service to have been performed by the original owner, that the land had only been mortgaged, or supposing it to have been performed by the occupier, that there had been an absolute sale *supra*: par. 3 *infra*: title Land, par. 25.

152. "The creditor possessed considerable power over his debtor, but rarely exercised it in a severe degree, till after numerous solicitations made in vain for the recovery of his right. For it was customary to make repeated demands to allow further respite and to fix another term, accepting landed or personal security, on one of the above mentioned conditions; and a new loan was often procured upon mortgage, to liquidate former and smaller debts."

153. "Sometimes, on complaint to a chief, for recovery of a debt, the debtor would be summoned, and the claim investigated in regular course, and when after admission or proof of the debt, payment was directed and unreasonably delayed; the chief, on application, would sometimes send officers to seize the debtor's property, and deliver to the creditor a p'ledge, sufficient to satisfy his demand. Public sales of property, under execution for debt, were entirely unknown." It is scarcely necessary to say that any proceeding, such as that which is described in this paragraph, would now be altogether illegal and void. But it is useful to know that such a course for the recovery of debts was formerly recognized; because cases often present themselves in which the rights of the parties may depend on such ancient awards or decisions which at the time they were passed were received as binding.

154. "Suits among creditors in cases of insolvency did not often occur, but it was held that the following simple and equitable rules [as regards the distribution of the property] should be observed: The mortgaged property must answer in preference for the debt due to the mortgager. Property, the possession of which had been fairly obtained, should answer for the debt

(due to the possessor. Any other property must be shared by the creditors in proportion to their respective debts, without preference, on the ground of priority of origin, or of Decree.”

155. “If the debtor had no property, the chief sometimes delivered him to his creditor who was thereupon authorized to confine him in his house; and if he could not obtain satisfaction to employ him as a servant, or rather as his slave, treating him as such, and supplying him with victuals and clothing. In this case an *ola* was frequently written, binding him to serve the creditor, till payment of the debt, or sometimes, but more rarely, one of his children was consigned to the service of the creditor, upon the same condition, but frequently, without any judicial process, especially if the debt were notorious, and payment evaded, the creditor, having obtained leave from his chief or Provincial headman, ploughed the fields of his debtor, or tied his cattle, or took possession of his cocoanut trees, or seized his Paddy on the thrashing floor. Any of which or similar acts, soon compelled him to come forward and make some satisfactory settlement. And if the creditor were a person of comparative power and influence, he often adopted one of those steps, by his own sole authority” [Sir J. D'Oyley does not say what was the course, where the situation of the parties, as regards power and influence was reversed] “This was not held to be strictly legal, but if the demand were admitted, the debtor would rarely complain, and in the event of his complaining, the justice of the claim would be a prominent subject of enquiry, and unless it proved unfounded, the violent seizure would pass unnoticed, or seldom be noticed beyond reproof.

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It is said that, in the distant provinces, powerful creditors have sometimes seized by force a child or other member of his debtor's family. This was considered altogether unjustifiable: but instances were not unfrequent, especially in the Dissavonies, in which the debtor violently resorted to this mode of relief, [as abovestated par. 116] with the intention that the sacrifice should be temporary, but if the debt remained unpaid the

slavery of the consigned person became perpetuated (1) But before he was reduced to this extremity, the distressed debtor frequently found the means of satisfying the demand by obtaining the money from a Wihare for charity, from a *Dewale* on condition of serving it, from the Royal Treasury by favor, from a compassionate chief or from substantial neighbours, by begging." The observation subjoined to para. 153 applies still more forcibly to this. The means of extorting payment, here enumerated, are happily exploded, and if now attempted to be employed, would only render the creditor liable to punishment as a criminal. But as debts or incumbrances, now set up may have been liquidated by one of these processes it is not useless to be acquainted with them, as they formerly existed.

156. For the same reason the two following singular modes, to which creditors could have recourse, deserve [as Sir J. D'Oyley remarks] to be mentioned,

"First.—Whenever the creditor met his debtor in the street or road, he stopped him abruptly, and drawing a circular line round him on the ground with a stick, or sometimes without this ceremony, would sit down beside him, forbidding him, by the King's authority, to move from the spot without paying the debt; the debtor was obliged also to sit down, and, from respect for the King's name, neither could stir, till some other person, approaching and interfering, engaged to be answerable for the debt, or for the person, in the presence of witnesses, or called both parties before the proper chief, to have the case investigated and settled. This was called *Welekene Damanve*, or paying under inhibition.

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(1) Few people would read of this mode of wringing satisfaction from a debtor without shuddering at the inhumanity of it, and exclaiming against the barbarism of a nation by which it could be endured. And yet, the idea of a similar pledge or hostage may be entertained and without any falling of honor in Societies which would be; to the last degree, indignant at finding themselves compared with the Kandyian tribes. At the moment when these notes are in preparation, an action is brought in the tribunal de premiere instance of Paris, to oblige a Hotel keeper to give up the children of a foreigner, which children the Hotel keeper contends he has a right to detain as pledges for the Debt of their father, which the latter had left unsatisfied. The Court, it is true, decrees the restitution of the children, but the mere advancement of such a claim for grave consideration and decision, and this too in the metropolis of a nation claiming to lead the way and set the example in Civilization and liberal refinement, should teach us to be moderate in our reprobation of Kandyian Institutions.

Secondly—Having tried other moderate means in vain, he sent a slave, or servant, or other person, to live at the house of the debtor to make constant demands for the debt and to extort it by importunities; and perhaps abuse; on a sick man, by way of imposing additional trouble of attendance and care. The debtor upon this usually sent back the messenger, with another from himself, bearing an humble entreaty for further time, with assurance of payment, and sometimes obtained a respite; if not, he was obliged to furnish subsistence to the intruder, without charging it against the creditor; and patiently to bear his continual solicitations and insults, till he could appease his creditor, or find means to satisfy his demand. Or sometimes, with the same view of annoyance, the creditor would tie up an old, sickly, or unserviceable bullock, cow, or buffalo in the garden, and deliver it in charge to the debtor, who was obliged to maintain and take care of it, to be responsible for its trespasses, and to give an equivalent, perhaps a better head of cattle or its value, if it were lost or died in his keeping."

As to the attainment of *majority* according to Kandyan law, Mr. Sawers has the following observation:

157. "The age of Puberty is the age of manhood and discretion, and as a youngman is capable of marrying at the age of sixteen, so he is competent to contract debts, and is answerable at law for all deeds executed and contracts entered into by him, after the end of his sixteenth year."

158. "Should a youth sell his land, his cattle, or his goods before the end of his sixteenth year, he can break the bargain and resume possession on refunding the value he may have received for such property."

159. The relation and heirs of a minor may interfere and prevent his selling his property: But if they do not so interfere at the moment, or as soon as it comes to their knowledge, they have no remedy afterwards. If however it was done without their knowledge, they might have their remedy, if their relative died under age."

160. "The chiefs were of opinion that as by their religious

books the age of wisdom was not attained till Forty, a person who had lost his land, cattle, or property by an imprudent sale or transfer, while under age, ought to have the privilege, till he is forty, of reclaiming his property so lost." "It was explained to the chiefs [Mr. Sawers adds] that the Proclamation of 18th September 1819, [establishing terms of prescription in the Kandyan Provinces] admitted of this privilege, so a person disposing of his or her property, would possess the privilege, until he or she should have attained the age of 26 years, assuming sixteen to be the age of majority." And now by the 10th clause of the Ordinance No. 8 of 1834, the periods of prescription laid down by that Ordinance begin to run, as regards Minors, from the time when the minor attains his full age."

161. "The same rule applies to females, being minors, as to males."

162. "A minor at the age of ten years, may dispose of his or her property by will, But to make such will or bequest valid, it must be proved that the minor was fully aware of the import and consequence thereof, and further that there were sufficient grounds for cutting off the inheritance from the heir at law," and *vide in pæ: title minority.*

163. We have now gone through all that appears likely to be of any general use, whether in Sir J. D'Oyley's or Mr. Sawers's Memoranda. It may be well again to remind the reader that the proposition on the different subjects which we have been considering are not given here, nor could they ever have been intended by the compilers of them, as absolute and incontrovertible authorities, even in those instances in which the opinions of the chiefs are not expressly stated to have been at variance with each other; but considered as the best authorities which these two gentlemen, with all their advantages of situation, were able to obtain on the various points of enquiry submitted by them, they may safely be consulted, unless and until they are controverted. It is only by controversy, that erroneous positions will be set right and doubtful points decided, and the

best way to invite controversy on such points is to give the utmost possible publicity to the Notes, which at present form the only ground on which discussion can be maintained.

For points on which Kandyan law is more particularly touched upon, see, titles, Administration Par: 42. Appeal Par: 27 Arbitration (Gangsabe) Par: 33 36, 7; Assessors Par: 38 9 40. Evidence Par: 113. Execution Par: 167, 181. Fraud Par: 199, 203, 4. Judgment 247, 8, Jurisdiction 280, 1, Lands Par: 13, 20, 21, 22.

## LAND.

When neither party shews a right a decree should not give title to either Paragraph 2. Tenant cannot dispute his Landlord's title. Paragraph 3. Action for ground share, defendant denies Plaintiff's title, which is established, Decree for Land itself, as well as ground share 4. Partial rights to Land; Planters, whose share reserved, entitled to enter 5. Heirs contribute to the expenses obtaining possession before receiving their shares 6 Notice to all claimants before adjudication 7. Division of Land between litigants should not be resorted to, as a method of easy decision 8. Resumption of land by government, how effected and proved: abandonment of Cinnamon ground, while cultivation was prohibited no dereliction of future right: proof of Government Proclamation &c. 9. Clause in grant against alienation no impediment to seizure in execution 10. Observation on the right of resumption of land 11. On the right of headmen to hoewandiram 12. On their right to 1-20th of grain collected by them, under Proclamation 21st November 1818 [Kandy] 13. Buddhist priest incapable of possessing land 14. Rajekaria how far evidence of right 15. Government grant not conclusive against all other claims 16. Mortgagee has preference over subsequent purchaser 17. Liability of evicted parties for mesne profits 18. Certain points on the validity of the deeds of land 19. Kandyan Proclamation 14th January 1826 sect: 4, to be construed strictly: parties must be clearly brought within it before held liable to penalties: Two cases to this effect, 20, 21 Restoration of confiscated property cannot operate on land

granted after the confiscation, to other parties: 22. Ordinance against frauds 23.

1. The majority of cases respecting Land, which came before the Court of Ceylon, are contested on the facts only, and the decision of such cases, therefore, though often difficult and perplexing, from the entanglement of titles, and the confused statements of witnesses, affords no instruction to the reader, nor any guide for subsequent Judgments. Those decisions which involved questions of Kandyan inheritance and other matters connected with the laws and customs of that country have already been noticed under title "Kandy," under the present head will be given such other decisions as have been passed by the S. C. relating to lands.

2. In a country where so much land is held without any regular and conclusive written title, cases must necessarily often arise of disputed possession, in which neither party is able to shew a valid right. In such cases the D. C. should be careful to shape their decrees so as not to give a title to one party, merely because the other has failed to establish his right. Thus, a plaintiff claimed part of a garden which she complained the defendant had procured to be surveyed. The defendant denied the plaintiff's right, and at the trial, the evidence was equally unsatisfactory on the one side as on the other. The D. C. gave "Judgment for the defendant, the plaintiff not having proved her right." On appeal, the S. C. referred the proceedings back, in order that some further enquiry might be instituted, by which the respective rights of the parties might be more satisfactorily ascertained, "It is true," the S. C., observed, "that the plaintiff has failed to establish her right, but has the defendant proved his right much better? The defendant may in truth be considered as an *actor* or claimant in this case, as much as the plaintiff; for the act of survey is, in fact, a mode of asserting a claim: And if, by surveying land, a person could thus throw the burthen of proof on all other claimants, assuming to himself a *primâ facie* title by the mere act of survey, he

would be gaining an unfair advantage over all the world by means of his survey, which after all, may be mere usurpation: It would seem from the evidence that each of these parties has had partial possession: It would, therefore, be desirable to refer the matter to arbitration, if the parties would be willing; but as the plaintiff sues as a pauper, care should be taken, in justice to the defendant, to incur as little expense as possible." No. 520 Caltura, 22nd October 1834. The safest course when the plaintiff fails in his proof, and the defendant is also unsuccessful in establishing his claim, is merely to dismiss the plaintiff's suit, without decreeing any thing in favor of the defendant. For though a Judgment positively in the defendant's favor would not be conclusive in point of law, against third parties [see par: 245] still it may give him an advantage which may assist him in defeating those who possess preferable claims to himself, See No. 6284 and 6311. Ratnapoora No. 885. Kurnegalle and 661. Madewalleune, where this course is recommended, so, conversely, a plaintiff ought only to succeed by the strength of his own title, and the want of evidence on the part of the defendant is not sufficient to justify a decree in favor of the plaintiff No. 6284, Ratnapoora, No. 168, Tenmorachy. Where a party is in possession of land, and being conscious of his own right, though he may be without any valid documentary title, is desirous of ascertaining and establishing such right, the proper course for him to pursue is to sue out an edictile citation, as directed by Ordinance No. 7, of 1835, vide supra: p. 100, et seq. where the real object of this proceeding, and the requisites for giving validity to the writ of quiet possession, are shortly discussed.

3. It is a well known rule of law, that a tenant of land [the fact of tenancy being proved or admitted] cannot dispute his landlord's title, for this would be to contradict his own act, by which he has consented to hold of the person letting. In an action by a landlord against his alleged tenant, for rent in arrear, it did not distinctly appear from the defendant's answer, whether he admitted that he was the tenant of the plaintiff; Mr.

*Morgan  
Reports  
art: 4.*

Justice Norris referred the case back to the D. C., "in order that the defendant might be called upon to amend his answer, by admitting or denying, in express terms, the tenancy, as alleged in the libel: If the tenancy were admitted, the landlord's title could not be called in question, if denied, the plaintiff must be allowed to adduce evidence in support of his allegation, and the defendant to the contrary, and the D. C. must thereupon decide." No. 11,924, Colombo 30th April 1834, see also No. 691, Colombo north 30th April 1834.

4. The following case may be considered as one of disputed tenancy. An action was brought for the value of 30 *parraks* of paddy, being the ground share of a field, which the plaintiff alleged he had allowed the defendant to cultivate, on condition of receiving the ground share. The defendant denied the plaintiff's right altogether, or that he had received possession of the field from the plaintiff, but claimed it as his own parveny property. The plaintiff proved his right by virtue of long possession, which was established by the defendant's witnesses as well as by his own; and the D. C. gave judgment for the plaintiff for the ground share, and also for the field itself, as against the defendant. The defendant appealed, on the ground that as the action was not for the field itself, but only for the ground share, the Judgment ought to have been limited to the latter point, and that if the action had been for the field, the defendant could have established his right to it. The S. C. however affirmed the decree, observing that though the claim was not originally made for the field itself, but for the ground share, still as the defendant by his answer had challenged the plaintiff's right to the soil and had asserted his own, it became incumbent on the plaintiff to shew his right, and that having done so, the D. C. was perfectly right in so wording its decree as to prevent future litigation between these parties: No. 241, Ratnapoora, 22d December 1834.

5. The partial right to land which so frequently exists in Ceylon among several parties, is necessarily productive of fre-

quent litigation: A person had obtained Judgment in a former P. C., for a garden, but reserving the right of the defendant as planters, which Judgment was affirmed by the S. C. in November 1833. In November 1834 the plaintiff applied for a writ to eject the defendant from the garden, on the strength of the former decree. But the D. C. decided that as the defendants were, by the terms of that decree, joint owners, they had a right to protect their shares, as planters, by their presence, and rejected the application. The plaintiff appealed, and urged that if he were allowed to go into evidence, he could have shewn that there was a necessity for ejecting the defendants, and that he should have been ready to buy up the planter's share at a valuation. But the S. C. held that the plaintiff must stand or fall by the decree, in which, so far, from any right of ejectment being given, the right of the defendants was expressly reserved. Nor could the plaintiff insist on buying the planter's share, if the defendants were unwilling to part with it, for this would be carrying the decree further than the terms of it warranted. No. 2692, Galle, 14th May 1835.

6. When an heir was sued by co-heirs for their shares of land, and Judgment was obtained against him, it appeared that the defendant had recovered the lands in question from a person who had got unlawful possession of them, at his own expense, to which the plaintiff had contributed nothing. On the case coming before the S. C. It was ordered that the decree should not be carried into execution, till the plaintiffs had repaid to the defendant their proportion of the expenses which the latter had incurred in prosecuting and defending the suits relating to the land in question; No. 7826 Negombo 8th October 1833.

7. One of the most frequent difficulties in deciding land cases in Ceylon arises out of the almost infinite claims which exist, in many instances, to the same piece of land by different parties, without any division having taken place. In order to come to a satisfactory decision on questions affecting lands so situated, it is evident that all the share holders or claimants should be

before the Court, or should, at least, have notice of what is going on, in order that they may come in and defend their individual rights. If they neglect so to do, after public notice given, the Court must proceed without them. And where a D. C. dismissed a suit for a garden, on the ground that it would not be safe to decide the case in the absence of other part-owners, the S. C. ordered the case to be restored to the list, and notice to be published to all who might be interested to appear, without putting the plaintiff to the expense of a fresh action. No. 7728. Amblangodde, 23d July 1834. L B. 20th 27th November 1834.

8. Where the evidence is conflicting, and nearly equally balanced, so that the Court is at a loss to know to which side the weight inclines, a strong temptation arises to solve the difficulty by dividing the land in dispute between the parties. This is a course which is not to be encouraged, and above all it ought not to be resorted to, as an expedient to save time, or the trouble of investigation. Instances will sometimes occur in which, after exhausting the evidence, and after taking the opinion of the assessors, the mind of the Court will find itself so unable to declare in favor of either side, in preference to the other, that a division seems the only mode left of deciding the case. Thus, in one case which ultimately came before the S. C., the evidence was equally strong on both sides; the assessors in the Court of Alipoot voted for a division, those in the Court of Kandy and the Revenue Commissioner, for the plaintiff, while the Judicial Commissioner leaned in favor of the defendant. Under these circumstances, the S. C. considered that a division of land would be the safest mode of deciding, and it was so decreed accordingly. No. 7. Alipoot, 12th October 1833. And so in one or two other cases similarly situated.

9. The following case may be of use, as bearing on several points connected with the right to land: 1st As to the mode in which resumption of land by Government, on non-performance of the conditions, should be effected, and proved.

2dly. Whether the abandonment of Cinnamon grounds, at the time when the cultivation or destruction of that plant was prohibited, operates as a dereliction of all future right to the land.

3rdly. What proof is necessary of Government Advertisements and Proclamations, to give effect to them. A claim was made against the Government for a garden forming part of the Cinnamon garden near Colombo, It appeared in evidence before the D. C., that the whole of the garden in dispute was formerly, in the time of Dutch Government, the property of Manuel De Almaeda, from whom the plaintiff claimed to be descended;—that Cinnamon grew in the larger part of the garden, at first, spontaneously, afterwards by cultivation;—that certain fruit trees growing in that part were cut down by order of the Dutch Government, for which trees Manuel was remunerated by the Government;—that when Cinnamon was cut there, he received the usual allowance, then made for each pingo load,—that after the trees had been cut down, and the house in which Manuel lived had fallen to decay, that person left the garden, giving permission to a certain Vidahn Aratchy to live in the smaller part, the soil of which was not adapted to Cinnamon,—that the Vidahn Aratchy resided there till his death, and his widow afterward—that in 1804 Peter De Almaeda, father of the plaintiff's wife, brought an action against the Aratchy's widow to recover possession of the smaller part of the garden, which suit was dismissed in 1805, on the ground of long possession by the widow and her deceased husband;—that in 1815 the plaintiff purchased that part from the Aratchy's representatives, and had resided there ever since—that from the time of the British taking possession of the Maritime Provinces, the larger part had been constantly cultivated by Government, as Cinnamon garden, and that in 1833 the Ordinance was passed; abolishing the right of exclusive cultivation of Cinnamon

in the Government. The garden being advertized for sale, by order of Government, the plaintiffs put forward their claim, contending that their right from their ancestor Manuel had never been divested out of them, though their possession had, by force of the circumstances above-stated, been for a long time interrupted: The D. C. decided in favor of the plaintiffs. On appeal to the S. C. several objections were made on the part of the Crown to this claim, one of these objections, namely, that the children of Manuel De Almaeda were stated in the Thombo to have been born out of wedlock has already been mentioned. See para. 216-7 as not having been allowed by the S. C. The other objections will appear from the following substance of the judgment, by which they were overruled.

“ It is admitted that the title of Manuel De Almaeda cannot be disputed, but it has been asked on the part of the Government, why it is to be presumed that the Crown has not resumed possession on ground of neglect to cultivate, especially seeing that, from the Thombo, it would appear that the Company's share has never been paid? To these questions it may be answered that any such assignment by Manuel, or resumption by Government had determined on resuming possession, on the ground of noncompliance with the conditions of the original grant, such resumption should have been made in a public authentic shape, and should have been recorded in the Court by which it had been adjudicated. The right of re-entry, on the ground of non-cultivation, can only be enforced by a Court of Justice, and on proof of such neglect. But it is useless to talk of non-cultivation by the owner of the soil, when such cultivation was rendered impossible by the growth of Cinnamon, in which the owner, according to the law as it then existed, could not have been permitted to engage; So with respect to the alleged non-payment of the “Company's share.” If that had been the ground of resumption, it ought to have formed the subject of regular Judicial proceedings. The payment by the Dutch Government of

the price of the first trees which were felled, and of the accustomed fee on each load of Cinnamon peeled, furnishes the strongest evidence that Manuel De Almaeda was considered by the Government at that time to be the owner of the soil, and there is no proof of him or his descendants having ever been divested of that ownership except the fact of his having ceased to occupy the garden, after the first trees had been cut down. The purchase of the smaller part by the plaintiffs is satisfactorily accounted for by the Judgment in 1815, and therefore raises no inference against them, as regards the rest of the garden. The only question, therefore, on which any doubt could be entertained in this case is whether the abandonment of the larger part by Manuel and his family, amounted to that total dereliction of their rights which precludes them from ever reasserting them. Now upon this part of the subject it is to be observed that the abandonment could scarcely be said to be voluntary. Manuel could neither cultivate Cinnamon, nor destroy what had already been brought into cultivation, without infraction of the law. When, therefore, the first trees were cut down, he had no longer any object in remaining in the garden. Nothing was left, on which he could exercise rights of ownership, except a few trees on the limits of the garden the fruits of which, it would appear, he did occasionally gather. Nor could he possibly have foreseen, nor was there any thing to make him suppose, that the exclusive right to cultivate Cinnamon would be abolished, or, consequently that he could hope to derive any beneficial interest from the garden in future. And it is in this point of view that the question may become material, as regards other land similarly situated. In deciding the present case, however, this Court abstains from laying down any universal or general rule. Each case must be decided on its own merits. It has been said in arguments before this Court, that certain advertisements and proclamations have, from time to time, been published, calling on parties having claims upon land, possessed or cultivated by Government, to come forward and establish them. What the effect of such publications would have been, supposing any such to have been

proved, or offered in evidence, would depend on the terms of them, on the degree of publicity given them, and on the effect they might have produced on the public in general. It is sufficient on this occasion to say that no such documents were offered in evidence on the trial. But it is now urged that the Government was not in possession of them, or did not know of their existence, at the time when the case was heard, and it is asked that the case may be remanded for this evidence to be now added. But following the rule, generally observed, in allowing fresh evidence to be adduced, there seems no reason for the indulgence, because if the existence of such documents can be supposed to be known in any quarter, that knowledge would most naturally be found in the officers of Government. Another ground which has been insisted upon for the Crown is a title by prescription; and that the exceptions to the law of prescription arise from personal disabilities only, and cannot be raised from the nature of the property [see Ordinance No. 8 of 1834 sect. 10 *infra*, tit. Prescription.] It might be sufficient to say that nothing was pleaded or argued in the Court below as to prescription. But even if prescription had been regularly pleaded there is the peculiarity attending this class of cases; that as soon as the ground becomes planted with Cinnamon, the Crown had the right to take the cultivation of it into its own hands exclusively, and that the owner of the soil, as he could in no way interfere with or impede that cultivation, might, at length, as in the present instance, cease to derive any advantage whatever from the naked right of possession. An occupancy by the Crown, under such circumstances, would be far from that species of possession which the law of prescription contemplates, and which presumes a voluntary acquiescence on the part of all claimed. Unless, therefore, it had been shewn that public notice had been given, for the original owners to put forth their claim, and that they had neglected so to do, this Court is of opinion that this involuntary abandonment of land ought not to preclude the proprietor from ascertaining his right, nor

that the change in the cinnamon laws has made the ground available to him in any mode of cultivation which he may chuse to adopt "The decree of the D. C. in favour of the Plaintiffs was accordingly affirmed" No. 6715 Colombo 6th July 1835.

10. We have seen that a clause in a Government grant of land, restraining the alienation or assignment of it without permission of Government, is no obstacle to the seizure and sale of such land in execution: *supra*: 163, 4.

11. The following case involves the right of pre-emption of land, as claimed in the Northern Districts, by owners of land contiguous to that which is offered for sale, and though the final decision cannot be here given, it may be well to mention the proceedings, as far as they go, as leading the way to further inquiry on the subject. The plaintiff complained that the first defendant had sold to the second, one-sixth of a piece of land, of which the plaintiff, as owner of the adjoining land, claimed the right of pre-emption. It appeared from the evidence of the *Odear*, that the plaintiff offered to buy the piece of ground in question, but that the second defendant offered a higher price which the first defendant accepted. The D. C. gave judgment for plaintiff. On appeal to the S. C., the case was referred back, in order that further inquiry might be made with respect to the price offered by the plaintiff to the *Odear*, and the price actually paid by the second defendant, also whether the plaintiff offered to pay whatever might be offered by the second defendant, or by any other bidder, and further at what period, with reference to the publication by tom-tom, the offer was made by the plaintiff. Inquiry was also directed to be made, from those best qualified in the district to give information, as to the law or custom in the northern districts of this right of pre-emption. The S. C. observed "that from the *Thesavalame*, as appended to Van Leewen's Commentaries: p: 763; 4. it would seem that the right only existed, where the party claiming it held a mortgage, or some other claim upon the land; but that, at all

events, it seemed 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. That as the right was founded on the contiguity of the land about to be sold to that already possessed by the person seeking to exercise the privilege of pre-emption, the land must be presumed to be more valuable to him than to the generality of others, and he ought, consequently, to pay the best price which could be got for it—that if it were true, as stated by the *Odear*, that the land was sold to the second defendant, because he offered a better price for it than the plaintiff, the latter might have offered one-twentieth (1-20) of the real value, and still, according to the decision of the D. C. would have been entitled to insist on a transfer to himself” No. 210 Tenmorachy 5th December 1834. The proceedings were directed to be returned to the S. C. at Jaffna on the next circuit; and the writer of these notes is unable to say what was the result of the further inquiry.

12. In the following case, the right of headmen to exact the due called *Hoewandiram* in the Southern districts came in question: And though from the circumstances under which the case presented itself, the S. C. was not called upon to decide upon that right, as a general question, it may be useful to state the view taken of the subject as it stood. The plaintiff sued the defendants, who were headmen, for the value of certain paddy received by them as headmen, in September 1831 and May 1832 under the designation of *Hoewandiram*, no such due being reserved in the deeds by which the plaintiff held his lands; it appeared from the pleadings that the plaintiff had at first refused to pay this demand, on which the defendant complained to the Collector, Mr. Mooyaart, who ordered the plaintiff to pay. And the plaintiff stated in his replication that he considered the order illegal, and that he might have persisted in his refusal, but that he had paid it as a matter of courtesy, knowing he could recover it back. It was proved in evidence that the *Hoewandiram* was paid on some of the

lands in the districts, and not on others. And, Mr. Mooyart, who in the meanwhile had been promoted to another office, stated in evidence that he considered the demand decidedly just. On this evidence, the D. C. gave judgment for the Defendants. The S. C., on appeal, affirmed this judgment, but with the following observations, "In recording this affirmation the S. C. is anxious to have it understood that the right of Headmen to levy the duty or tax called hoewandiram, is, on the one hand, neither established, sanctioned, or recognized, nor on the other hand, in any way affected thereby. This right may possibly exist, but if the claim of these Defendants, to retain the amount paid to them by the Plaintiff, had rested solely on their right to exact it, this Court would certainly have required fuller and more satisfactory evidence of the customs or law on which such right was founded, and of the consideration which, it must be presumed, is received in some shape or other, by those who pay the tax. The present decision goes entirely on the principle that when a man pays money voluntarily, and it is impossible, on the evidence now before the Court, to say that the Plaintiff did it by compulsion—he cannot recover it back, merely on the ground that the parties receiving it could not have enforced their claim in a Court of Law: No. 58 Hambantotte 22d December 1834.

13. The following case in which another right claimed by headmen [in the Kandyan Districts] came in question, may properly find a place here. An action was brought by Government against a Koralle for £62, the amount of a deficiency in his accounts with the Cutcherry of Kurnégalle, and for which he had given his land. The only question was, whether the Defendant was entitled to set off against this debt, the one-twentieth share of grain collected by him and which he claimed under the 29th clause of the Proclamation of 21st November 1818. The Court of Kurnégalle was of opinion that he was not entitled to make this set off, because all the grain had not yet been collected, and till it was, it would be impossible to say how much should be awarded to the Defendant. The

Judicial Commissioner and the Assessors at Kandy considered that as this was a final settlement of accounts, the set off, ought to be allowed. The case being brought before the S. C., the following judgment was pronounced : " By the evidence which had been transmitted by the D. C. of Kurnegalle, it appears that until the whole tax of each year is collected, the Government Agent does not consider himself at liberty to pay the percentage, nor even then, till he receives the authority of Government [The words of the 29th clause of the Proclamation are *in such portion as the Beard of Commissioners shall regulate.*] It also appears that the claim which has been made by Government, and for which the Defendant gave his Bond, does not include the outstanding grain, which is, therefore, perfectly independent of the present claim. On these grounds, this Court considers that the Government was fully justified in resisting the claim of the Defendant, as things stand at present. The 29th clause of the Proclamation no doubt gives the inferior chiefs an absolute right to this twentieth, as compensation for their services. But this right, like every other claim for remuneration, can only be supported by first shewing that the services for which it is given have been duly and faithfully performed ; and that such performance has been complete, not partial or imperfect. In the present instance it is admitted by the Defendant, that a considerable portion of the grain is still outstanding. It may be that this deficiency in the grain has arisen without any fault or negligence on his part. But on the other hand it certainly is possible, as is suggested by the Agent of Government, that the deficiency may be owing to the want of due vigilance on the part of the Defendant, or, which is still possible, though by no means to be presumed that, the Defendant has received the outstanding grain or part of it and neglected to account for it. All these doubts, the Government [in other words, the public, whose servant the Defendant is] has a right to expect shall be cleared up, before he can claim his remuneration. The proclamation of Government, though the more solemn way of assuring to public servants a due remuneration

neration for their services, when performed, does not place a headman in a more favorable situation than any other servants, public or private. The percentage in this case, like the wages of a private clerk or servant, can only be claimed on proof of performance of every part of the contract into which the claimant has entered. If a clerk or domestic servant apply to his master for his year's salary or wages, such master has an undoubted right to call upon the clerk to settle his accounts, or the servant to produce the property which may have been committed to his charge. And if, in either case, the clerk or servant were to refuse, or were unable to comply with such requisition, he would apply in vain to a Court of law for payment of services so imperfectly performed. This Court cannot distinguish such a case from the present one. Let the Defendant shew performance of his part of the contract, and his right to the one-twentieth, or at least to that portion of it to which he may be individually entitled would be at once established. But if the present claim were admitted, it would be difficult to deny the right of any headmen to deduct one-twentieth from every parrah of Paddy which he paid into the treasury. But there is another ground, on which the Court considers that the Government is not only justified in resisting, but would scarcely have been justified in acceding to the present claim, or, at least would do so, at the risk of having to pay a portion of it over again to other parties. It is known to every one conversant with those collections, that the *Korale* is not himself entitled to the whole of the twentieth share, but that part of that share goes to certain headmen, in such proportions as may be directed by government. In ordinary cases, no doubt, the whole twentieth is paid, in the first instance, to the *Korale*, in confidence that he will pay over to the subordinate headmen their respective shares. But without casting any reflection on the Defendant, it is impossible not to see that if the Government were to intrust to him, in the doubtful situation in which he now stands, as a public servant, the whole of the percentage awarded by the Proclama-

tion to the headmen generally, it would, by that act of indiscretion, render itself liable, at least in an equitable point of view, for any shares of the other headmen which they might fail in recovering from the Defendant. This judgement was not given till after a very full consideration of the case, and it is pronounced with the concurrence of all the judges of the Court, and of the assessors." The decree of the Court of Kurnegalle, by which the defendant's claim of set off was rejected, was accordingly affirmed. No. 1386 Kurnegalle 30th November 1833.

14. Buddhist Priests cannot legally possess land, except in trust for some Temples, still less can they bequeath land entrusted to them for the benefit of a temple, to any other person, whether Priest or lay man. And this whether the Proclamation of 18th September 1819 [Kandy] be taken into consideration, or not, No. 5980 Ratnapoora 3rd February 1834 see also No. 7090 Ratnapoora 21st December 1833.

15. The performance of *Rajekarea* or Government service, as long as that was exacted, is often one of the points relied upon, to shew that the party performing it had not relinquished his ultimate right to the land, though he may have parted temporarily with the possession, by mortgage or otherwise; supra: title, Kandy, paragraph 3 and 151. And considerable weight is usually attached to this fact by the Courts, especially if such performance of duty has continued uninterruptedly for a length of time: One solitary act of performance would, of itself, go but little way towards establishing a right. On the same principle, the S. C. has decided that the mere voluntary payment of the commutation tax, by a person, though it may be the means of getting the land registered in his name, will not give him a title. No. 1515. Alipoot 21st October 1833.

16. The question was put to the S. C. by a D. J., whether a grant by Government to one or two parties, in an action for land, which the other party acknowledged to be genuine, but denied to be conclusive against him, would supersede all other claims, and thus render it unnecessary to go into evidence accord-

ing to the 4th paragraph of the circular letter to the D. J. of 15th April 1835. To this question, which may be considered as partaking partly of law and partly of practice; the S. C. returned for answer "that claims on land, founded on grants by Government, were not, necessarily and without further enquiry to supersede all other claims; that, for instance, a party might acknowledge the Government grant to have been regularly executed, but might allege that Government had been deceived by the person obtaining it, and had in truth no right to dispose of it;—that if such allegation were proved to be well founded steps would be taken to get the grant cancelled as having issued improvidently or under deception, L: B: 20, 23, November 1835. And the S. C. then recommended the examination of the party, in order to ascertain the grounds on which he intended to contest the efficacy of the grant, as to which, vide supra: 152, 3.

17. Attempts are frequently made by persons, who have borrowed money on mortgage of their land, to defeat the mortgages by sales, real or pretended, to third parties. A plaintiff sued on a mortgage bond, by which the first Defendant and another person, not a party to this suit, acknowledged to owe the plaintiff £7 10 0 for arrack delivered to them, and promised jointly, to pay within three months without interest. And the first defendant went on to agree, that if the above sum were not so paid, he would deliver up in mortgage a certain garden to be held in lieu of interest until payment. The garden had accordingly been delivered to the plaintiff, who had possessed it till interrupted in his possession by the second defendant who claimed under a bill of sale executed to him by the first defendant, but of subsequent date to the mortgage to the plaintiff. The D. C. dismissed the action, on the ground that the other debtor ought to have been included in the action: But the S. C. directed the case to be remanded, on the grounds which will be stated under title "Pleadings" par. 3. On the trial, the deeds, both of mortgage and sale, were proved to have been regularly executed; and the D. C., considering that

the latter instrument ought to be held valid, decreed for the defendants. On appeal, however, this decree was set aside, and the following judgment was pronounced; "Both the instruments, on which the plaintiff and second defendant respectively rely, have been established: But of these there can be no doubt that the bond, by which the first defendant binds himself to give the plaintiff possession of the land, in default of payment, must have the preference, as being of prior date. The sale to the second defendant must be considered subject to previous incumbrances, as to which it was the duty of that person to make enquiry. Indeed it is difficult to believe that he could have been ignorant of the possession and enjoyment of the profits by the plaintiff: And if he was aware of it, he must either have entered into collusion with the first defendant, to defeat the plaintiff of his just claim, or he must have been guilty of the grossest negligence, the consequences of which ought to fall upon him and not upon the plaintiff. If the second defendant has been defrauded by the first, he must seek his remedy against the person who has deceived him, and whom he trusted, and not against the plaintiff, who was no party to nor consulted about the sale, [vide supra: p. 82.] The plaintiff is, therefore, entitled to retain possession of the land till payment, and he is also entitled to the value of the fruits taken by the second defendant, and further, to costs against both defendants, for both are wrong-doers as regards him." No. 3149 Amblangodde, 3rd September 1834.

18. In the foregoing case, the second defendant, it will be observed, was declared liable to the plaintiff for the fruits taken by him. And this part of the judgment proceeded on the ground that the second defendant had been guilty either of collusion or gross negligence. The subject of the liability of evicted parties for produce taken by them, during their usurpation, was afterwards brought to the notice of S. C. by the D. J. of Ruanwella in a case in which a share of a garden had been finally decreed to the plaintiff in November 1833 and the question arose in 1836 as to the plaintiff's right to compensation

for profits. The following question, whether the plaintiff be entitled to compensation for the profits, accrued since the final decision of the case, ought to depend on the exertions used by him to obtain possession of the share allotted to him, and on the resistance offered by the defendant to the execution of the Decree. As a general principle, the S. C. inclines to the opinion that compensation for past produce, for intermediate or Mesne profits, (as they are technically called by the English law,) should not be granted in a case of merely disputed right, which in Ceylon is so lamentably frequent; but only in those cases in which the land has been obtained by force, or been held over without any colour of right. In the present instance, the plaintiff's claim could, at most, be only made from the decree of the S. C., in November 1833. As soon as that decree was made known to the plaintiff, it was his duty to apply for the execution of it, by allotting him his share of one-eighth. Whether he duly exerted himself in this respect, and whether, on the other hand, the defendant resisted or defeated such attempt, which is the principal point raised by the pleadings, must depend upon the evidence. The amount and value of the produce can only become a material question, after the previous and more important point is decided. Whether the defendant be answerable at all for that produce?" L. B. 17th February 1836.

19. We have already taken occasion to notice, somewhat in detail, what evidence should be adduced to establish a deed or other written instrument, whether relating to land, or to any other subject; and whether notarial or not, supra: title Evidence, p. 111. 2. 3. A case has also been stated, sup: 205. 6., in which the question was considered, what writing and signature are sufficient to give validity to a sale of land, under the Regulation or Ordinance against frauds. In that case, and on another occasion, supra: 48. 9. the S. C. recommended that the payment of the purchase money and the execution of the deed of transfer, should be contemporaneous acts. It has also been mentioned, but only as the individual opinion of the

Chief Justice, that a deed &c. relating to land is not necessarily vitiated from the circumstance of the execution of it, by the parties and witnesses, not having taken place at the same time, supra: 183. 4. see also p. 207. 8. to shew that a conveyance of a mere butique, not including the land on which it stands, requires no stamp. Another case will be found under title "Fraud," supra: 200, in which the S. C., set a-side a bill of sale of land on the ground of fraud and want of consideration.

20. The two following cases arose out of the Proclamation of 14th January 1826 [Kandy] the 4th clause of which enacts, "That from 1st May 1826 if any person or persons shall be concerned in any fictitious transfer of land to any chief or headman, for the purpose of evading the payment of any tax or duty upon such land, such person shall be guilty of a misdemeanour, and upon conviction thereof before any competent jurisdiction, the land belonging to such person, so fictitiously transferred shall be confiscated for the use of His Majesty, and the chief or headman so convicted of being concerned in taking such land upon such fictitious transfer, shall be liable to a fine" &c. In an action for certain lands in the district of Madewaltenne, the right of the plaintiff, as against the other parties to the suit, was proved to the satisfaction of the Court below, but it appeared that while the land was in the possession of the plaintiff and his mother, since deceased, the latter was prevailed upon by a headman, *Gabonneralle*, under circumstances which will appear from the judgment of the S. C., to give up the title deeds to him, in order to get the lands registered in his name, and thus exempted from the tax. On this ground, the Court considered that the lands were forfeited by the terms of the proclamation, and it was so decreed accordingly. And on appeal to the Judicial Commissioner's Court at Kandy, this decree was affirmed. On appeal to the S. C., however, this decree of confiscation was set aside in the following terms, "this is a penal proclamation, and must receive the strict construction

by which all penal laws must be interpreted. Before, therefore, this decree of confiscation could be allowed to operate against the plaintiff, it must appear, beyond all doubt, that he himself had been personally concerned in a fictitious transfer of the land, for the purpose of evading the tax or duty. In the first place, it by no means appears certain that the false registration took place after 1st May 1826. The possession and cultivation by *Gabonneralle* are said to have commenced six or seven years before the action was brought; and he is never known to have cultivated it till after the land was commuted: It is just as possible, therefore, that the collusive transfer took place before 1st May 1826 [in which case it would not be an offence within the words of this proclamation] as afterwards. In the next place, there is no evidence whatever to bring the offence home to the plaintiff himself. That part of the plaintiff's statement, which seems to have been considered as an admission on his part, only affects his mother. And even if it could be taken against himself, the whole admission must be taken together; and then it would appear that the fraudulent part of the transaction took place before the 1st May 1826 and, therefore, would be out of the reach of the proclamation. Again, the witnesses all fail to establish that positive proof of collusion with *Gabonneralle*, which alone would justify the enforcement of this severe penalty, whether against the plaintiff or against his mother: The utmost that any of the witnesses state on this subject is that they *understood* that *Gabonneralle* had registered the land in his name, in order to exempt them from duty. This mere *understanding*, or general rumour, is much too loose to warrant a conviction [which this in fact is] of a criminal offence. But according to the expressions used by the generality of the witnesses, it by no means appears certain, that even this general rumour attributed any participation in the fraud to the plaintiff or his mother. It is not impossible that this headman, as the plaintiff states, prevailed on the plaintiff's mother to give up the deed, in order to procure an exemption from the tax without that woman being at all

aware of this illegality of the transaction, or of the means by which the exemption was to be effected. But even supposing the fraud to be brought home to the mother, that fraud must not be visited upon her son, unless it can be shewn that he participated therein. And even if the decree of confiscation had been made in the life time of the mother, it could not have been supported, unless such a participation on the part of the son had been established, for the land in question never appears to have been the property of the mother at all, and therefore, could not have been confiscated under this proclamation, for her fraud alone. On these grounds, and as this Court agrees with the Court below, that the plaintiff has established his right, as between himself and the other parties, the lands are adjudged to the plaintiffs” No. 552 Madawellette 30th November 1833. It might have been sufficient, in this case, to say, that the confiscation could only legally take place “upon conviction” for which purpose a regular prosecution would have been necessary. For a conviction of an offence cannot take place thus incidentally, and without the party accused having an opportunity of making a regular defence. But it was thought better to enter into a view of the circumstances, for the same reason that the case is here given at length, in order that the decision of the S. C. might serve as a guide in other cases bearing a similar aspect.

21. In the other case, arising out of this proclamation, certain land was sought to be confiscated. The defendant being in possession was charged, as headman, with having falsely registered the land, while in office, with intent to evade the payment of the tax. Mr. Serjt. Rough, before whom this case was heard in appeal, held “that the penalty of confiscation could in no view of the proceedings, be sustained: supposing the charge to be founded on the latter branch of the 4th clause confiscation would be altogether inapplicable, for the parties were distinctly marked out by the terms of the Proclamation, and the persons and penalties could not be taken interchangeably. The former part of the clause contemplated a

person [or headman] being concerned in the illegal transfer to the headman; in the present case, the defendant was the headman himself, nor could a prosecution have been sustained on the second part of this clause, without first shewing distinctly, that the land belonged to some other person, and that the defendant, as headman, was concerned in taking the land upon the fictitious transfer. Whatever suspicion of fraudulent dealing might attach to the defendant, before he could be convicted under this Proclamation he must [as in all cases of penal law] be clearly or unequivocally brought within the very terms of it." No. Matura 3d May 1834.

22. In cases relating to land in the Kandyan Districts, questions not unfrequently arise out of sentences of confiscation passed by the late King of Kandy for high treason. In an action for the value of a house, estimated at several thousand Dollars, the plaintiff claimed, as widow of *Ratwalte Dissawe* who was executed by sentence of the late King, his property being confiscated; but his property had been restored, in general terms, to his family, by the British Government, It appeared, however; that the house in question had been granted by the King after the confiscation to *Nelema*, under whom, and by virtue of possession, the defendant claimed; The Court of the Judicial Commissioner of Kandy considered that, as many of the late King's verbal grants had been annulled, there was no reason why the plaintiff should not have a similar indulgence, and a Decree was accordingly passed in her favor. But on appeal to the S. C., this Decree was reversed on the following grounds. "When the British Government restored the estate of the deceased *Dissawe* to his family, that act of restoration could only operate on property which still belonged to the Crown, as successor to the rights of the Kandyan King. But the house in question was no longer at the disposal of the late King, which grant, it is not disputed, was perfectly good and valid. The late King had, therefore, divested himself, and consequently the British Government [which succeeded only to his right] of all power over it. So that even if the Governor, as represen-

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tative of his Sovereign, had made a specific grant of this house to the heirs of the *Dissawe*, it would have been null and void, inasmuch as he would have been giving away that which belonged to another. But on referring to the Speech of Sir Robert Brownrigg of 20th May 1816, which is alluded to in the proceedings, it appears that His Excellency gave distinct notice, that grants made by the late Government, subsequent to confiscation, and perfected by possession on the part of the new proprietors, ought to be considered as being, in almost every instance, a species of impediment, fatal to revival of antecedent titles, so that, even if this speech can be considered as law, or as binding on Courts of Justice, it would be fatal to the present claim." No. 3544, Kandy 12th October 1833.

23. As to what writing and signature shall be sufficient on a sale of land, to satisfy the Ordinance against Fraud and Perjuries, vide supra. p. 205 to 208.

#### LAW.

Different kinds of, in Ceylon: Common, or unwritten par. 1. Written viz: Statutes, Regulations &c. Rules of construction: remedial, liberally, penal, strictly: General words: The whole to be made effective, if possible: Latter supersedes former repealed, when revives: Declaratory and introductory par. 2. R: Dutch Law in Maritime Districts, except as to Native customs, 3. Criminal Law 4. Royal prerogative, 5. Admiralty 6. Ignorance cannot be pleaded 7. Law and practice distinguished 8. Construction of 47th Rule, 9.

This title, which in its general and unlimited sense would comprehend, all that has been decided, or written on every subject of Jurisprudence, is only mentioned here for the purpose of enumerating, with a few observations, the different sources from which are derived the Laws now in force in Ceylon, and which may be classed under the six following heads.

1. The Common Law, or *unwritten* as distinguished from the written Law, which latter forms the subject of positive enactments. The *unwritten* Law consists of custom, handed down from one generation to another, either by oral tradition, confirmed

by constant and immemorial usage, or embodied in any code or other collection which, in practice, may have acquired the weight of authority. For the word "*unwritten*," as, applied to this branch of the Law, is not to be taken as necessarily implying that it never has been committed, wholly or in part, to writing: It only means that such Law has not been written and sent forth to the world by legislative authority, but that it hath sprung from ancient usage confirmed by time and the tacit approbation of the Legislature,—a customary Law being only so long in force, as it remains unrevoked or qualified by the Supreme Legislative power. Thus, the Laws or customs of the Kandyan districts have been reduced to writing, as regards their leading principles, by the industry and experience of gentlemen who have been at the head of the Judicial establishments at Kandy, as we have seen under the foregoing title. But still they form the common or unwritten Law of those Districts, that is, they have never been reduced to writing or promulgated by Legislative authority. The Common or *unwritten* Law of England consists partly of *general* customs, those, namely, which are in force, generally throughout the Kingdom, and partly of *particular* customs, or those which prevail in certain parts only.—In Ceylon, the Common Law may be said to consist nearly, if not entirely, of the latter description of custom, since, owing to the various divisions, as well of the Island itself as of its Inhabitants, there can exist but few customs common to all districts and to all classes, throughout Ceylon. Thus the distinction between Maritime and Kandyan Districts, and between Northern and Southern Districts, as regards local division—the absolute separation again of Cingalese from Malabars, and of both those classes from the Moors, as regards distinction of race,—must leave it scarcely possible that any customary Law, on any one subject, can govern the whole public in common; On all questions, therefore, arising between nations on matters of property, inheritance, marriage, legitimacy, or any other civil rights; if there be no express Legislative enactments on the point in dispute, the Court must decide according to the customary Law, and for that pur-

pose, must inquire into the custom not only of the Districts, but of the class to which the litigants belong,—For as different classes inhabit the same district, as for instance, Moors and Cingalesé or Moors and Malabars, it would often be not sufficient to ascertain the general local Law, without seeing that it is also applicable to the litigants personally. Many of these native customs must, no doubt, appear strange, and even absurd to European understandings, though, before coming to that conclusion, the state of Society and the circumstances which may have led to the usage in question ought, in fairness, to be well understood. The customs of Natives, whom we are accustomed to look down upon as semi-barbarous, are more frequently founded on rational and even wise grounds than superficial observers would give them credit for, and often, indeed, will be found to be the result of necessity rather than choice. But however this may be, and whatever may be the apparent absurdity of a custom in the eyes of strangers, if it be proved to exist, and have not been abolished by Legislative enactment, it is still the Law of the Island, which every one has a right to invoke in his favor, as much as if it bore the stamp and sanction of the written Law. If this were otherwise, if a custom could be declared to be no longer binding as Law, because a Court of Justice considered it absurd or inconvenient, the common or customary Law would at once cease to exist, except at the will and by the permission of the Courts. In other words, each Judge would at once make the Law and pronounce it, according to his own individual view of the subject, which view and the Law pronounced upon it to day, might be overturned to morrow by his successor in office,—the very worst mode of Legislation and of administering Justice which can be devised. If a custom be bad, or no longer suited to the condition of those who may be subject to it the proper remedy lies through the Legislature. In the case mentioned *supra*. 222, 3, the S. C. yielded to the force of custom, on which the D. C. had decided, though it was a custom which, on the face of it, had nothing in the shape of Justice or equity to recommend it. But if the S. C. had persisted in the view

which it took of the case in the first instance, and had reversed the decree of the D. C. on the ground that, as a question of abstract Justice, Dowry property ought to be held liable for the husband's debts, it would have been doing violence to what was proved to be the customary law of the Malabar race, and substituting what is familiarly called Judge made law in its place.

The writer of these notes has dwelt the longer on this point, because he knows, by experience, how strong the temptation is to a Judge to deviate from law, founded only on custom, where the application of it seems likely to operate as a hardship upon one of the parties. He is by no means certain that he may never himself have yielded to the temptation, but he is quite sure that if he has done so, such decision cannot have rested on a sound foundation. We have seen indeed, *supra*. part 36 that no custom can be used as a cloak to cover fraud; but this is no more than may be said of every law, written or unwritten; for as it is one of the first maxims of every law, that no fraud can be legal, we may be pretty certain that whenever an attempt appears to make the law subservient to fraud, it is, not by an application, but by perversion and distortion of the law, that the proposed object is to be effected.

2. The *written* or enacted law, as distinguished from the common or *unwritten* law above alluded to. This branch of the law consists, in Ceylon, of such acts of the Imperial Parliament as are applicable to and in force in the Island, and of the local laws, whether under the denomination of Proclamations, Regulations or Ordinances, which have been duly passed and published by the Legislative Authority of Ceylon, for the time being, whether for the Maritime or Kandyan districts, or both, and which have not been repealed by subsequent enactments. As regards acts of the Imperial Parliament, it may be observed, as a general rule, that no such statute applies to a colony, unless there be express words in it to shew that all the colonies collectively, or the particular colony in question, are included. At present, it is believed, every Act of

Parliament affecting Ceylon is promulgated, as soon as received, in the Government Gazette. With respect to the local laws in Ceylon, these have lately been printed and consolidated as much as possible, so as to simplify this little code to a great degree, an object which ought to be one of the foremost in the consideration of every legislature. It may be of use to insert here some of the leading rules which have been laid down for the construction of acts of Parliament, and which may with equal propriety be observed in construing all enactments, whether emanating from the Imperial or Colonial Legislature. It should be borne in mind, however, that rules of construction imply that the instrument to be construed is involved in some degree of doubt: When the expressions are plain and unequivocal, no rule of construction can be necessary, since to construe them otherwise than according to their plain import would be to do violence to the declared intention of the Legislature. It is one of the most frequently occurring questions of construction, whether doubtful words are to be taken in a liberal and more enlarged sense or in the strict and more limited application of them. This depends upon whether the law in question be a *remedial* or a *penal* one, the principal distinction which it is necessary to mention with reference to our Ordinances, or other written laws. A *remedial* law is that which amends something wrong, or supplies something defective, in the law previously existing, but without imposing any specific punishment for the breach of it, such for instance, were the former Regulations of Prescription, and such is the present Ordinance No. 8 of 1834 on the same subject. A *penal* law is one which enforces its provisions by certain punishment or penalties, to be awarded against persons infringing it. Of this nature is the Arrack Ordinance, No. 5 of 1834 and such indeed must be most laws for the protection of the Revenue and such also we have seen is the 4th clause of the Proclamation of 14th January 1826 *supra*: title Land par: 20 21—The rule, then, as laid down by English authorities, is, that a remedial law is to be construed liberally; that is, if the expressions used be doubtful, a Court

endeavours so to interpret them, that the mischief may be cured and the remedy be applied: A *penal* law is to be construed strictly, that is, the persons on whom the punishment or penalty is to be imposed must be shewn to be clearly within the very words of the law, and if these words be doubtful, the Court is bound to decide against the infliction of the penalty; title "Laud" par. 20 21. We shall probably have occasion to mention one or more instances of the application of this rule of construction under title "Prosecution." Some enactments are partly remedial; partly penal in their nature. To such laws, the above rule of construction applies in one or other of its bearings, according as the provision of the law, which the court is called upon to enforce, is directed towards the correction or annulment of the act unlawfully done, or towards the punishment of the person charged with doing it. Thus the 21st clause of the Colombo Police Ordinance makes a person liable to punishment who receives valuable property without shewing it to the constable &c. and it also enacts that the person delivering such property shall not be entitled to recover it back, unless the delivery be witnessed as therein directed. As regards the latter of these provisions, the Ordinance is to be considered remedial and construed liberally. As regards the former it should be considered penal, and construed strictly. Another rule is that where a law speaks of things or persons of a particular degree no general words will extend the law to things or persons of a higher degree. Thus the words "Bills of Exchange, Promissory notes, or *other written securities*" would not comprehend *Bonds*, because, these are of superior rank or degree to the sureties specified. A third rule is that each part of a law should if possible, be so construed, that the whole may be effective; it is said to be the duty of courts, to put such a sense upon the words of a law as is agreeable to equity and reason: and that the best way of expounding is to consider what answer the makers of the law would probably give, if the question which has arisen were proposed to them. A further general rule is that a latter law annuls all former ones which are in opposition to it, whether the

former law exist in the shape of custom, or of written law. And we have already observed, par: 1 when speaking of native laws and customs, that these are only in force so long as they remain unrevoked and unqualified by the Legislature. Where a custom is abrogated in express terms by Legislative authority, as for instance, that of carrying into effect sentences of death against women in the Kandyan districts, by drowning, which was abolished by Proclamation of 23rd March 1826, no doubt or difficulty can arise on the subject. But it sometimes happens that a local law is passed, which is found to be at variance with some custom, unknown or not adverted to at the time of passing the law, and which, therefore, is not mentioned therein. In such case, if the variance be so great that the two cannot exist and have operation together, the custom or common law must give way to the Ordinance &c. On the same principle the S. C. had occasion to observe that when the new rules of practice [which may be called the laws of procedure] conflicted with former ones, the last mentioned practice must give way: supra: 39. The last general rule which seems likely to be of use to the readers of these notes, is that if one law be repealed by another, which is afterwards itself repealed, the former law revives, unless such revival be expressly guarded against in repeal of the second law. A declaratory law is one which only declares for the removal of all doubts, what the law on a particular subject already is, in contradiction to an *introductory* or enacting law, which introduces some improvement, or alteration in the existing law.

3. The Roman Dutch law or the laws and institutions that subsisted under the ancient Government of the United Provinces "subject to deviations and alterations made therein by lawful authority, were declared by Proclamation of 23d September 1799, to be those by which Justice should be thenceforward administered in the settlements and territories in the Island of Ceylon, *then* under His Majesty's dominion. It is obvious, therefore, that the Roman Dutch Law is confined to the Maritime Districts, and has never been in force in the

Kandyan Provinces, which have only lately been annexed to the Crown of England. And even as regards the Maritime Districts, the Native inhabitants are so far to be excepted from the operation of the Roman Dutch Law, that on questions of inheritance, marriage and other subjects connected with national usages, if that law be at variance with their own customs, of which we have spoken under the first head, it is those customs, and not the law of Holland, which ought to prevail. The proclamation, it is true, contains no reservation to this effect, though the Charter of 1801 sect : 32, did provide that Cingalese and Mussulman parties should be governed in their litigation, by their respective laws and usages, or by those of the Defendant, if the parties were not both of the same race,—This clause was, however, only applicable to the few cases between Natives, which were cognizable by the S. C., under that Charter ; and that instrument was repealed by the present Charter; the proviso in question became of course wholly inoperative. But no doubt, it is believed, has ever been entertained, that the Native inhabitants of the Maritime Provinces were entitled to be governed and have always been governed in that class of questions above referred to by their respective usages and customs, except where these have been abrogated or altered by positive law, vide title “Nantissement” par : 5 where the question to what extent the Roman Dutch law was introduced into the Maritime Provinces is incidentally touched upon, though without reference to the exception of Native usages here mentioned.

4. Of the Criminal law of Ceylon very little presents itself in the way of observation. With the exception, indeed, of those few instances, in which particular punishments or penalties are awarded by Regulation or Ordinance against particular offences, no law, properly so called, exists, by which the punishment of offenders in Ceylon is regulated, vide supra 268 note. The course of proceeding is marked out by the Charter and rules of practice, but the degree of punishment on conviction is left entirely to the discretion of the Judge. The D. C. being limited, as we have seen. p : 266 by the 25th

clause of the Charter, to certain degrees of punishment. Murder is the only crime which is ever punished by death: but this practice rests only on the concurring opinion of expediency taken by successive Judges, and not on any positive law, written or unwritten.

5. Another very important branch of the law in force in Ceylon, though it less frequently becomes matter of Judicial discussion than other branches, is that which consists of the rights and powers of the Crown, comprised in the general term Royal Prerogative. One of the most prominent of these powers is that of legislating for all conquered or ceded Colonies; the exercise of which in Ceylon is exemplified by the Charters of Justice by virtue of which the present and former Courts held their existence. But the prerogative is not limited to that which is inherent in the Crown of Great Britain, it comprizes all those powers which were lawfully exercised by the Supreme Government, existing at the time of cession, and which by that act of cession devolved on the new Sovereign. Thus the King succeeded, on the cession of the Maritime Provinces, to all those powers and prerogatives which had been legally exercised over these Provinces by the Dutch Government, and in like manner, on the annexation of the Kandyan Provinces, all the rights of the Kandyan Kings devolved on the Crown of England as far as the same could legally be exercised on British subjects. The Order in Council of his late Majesty dated 12th April 1832 recognizes the principle that the right to exact service from the holders of land devolved from the Kandyan Crown to that of Great Britain, while it exercises the right of Legislation by abolishing the system of forced labor altogether.

6. The last branch of law which it seems necessary to mention as being in force in Ceylon, and which indeed has reference chiefly to the Court by which it is administered, is that of the Admiralty, by which offences committed; and actions arising on the high seas are cognizable.

7. To one or other of these different sources all laws, it is believed, in force in Ceylon, may be referred. It is a maxim

which must be familiar to all who have frequented Courts of Justice, that no one, of competent age and understanding can be allowed to plead ignorance of the existing law, from whatever source derived, as a justification of the breach of it. This maxim is not confined to English jurisprudence, it is one which must necessarily be implied by all laws which it is seriously intended to enforce. For though the plea of ignorance is one which it would be impossible for the accuser, in most instances, to repel, it might, if admitted at all, be urged for nearly every offence known to the law. On the other hand, this necessity of obliging every one, at his peril, to take notice what the law is, makes it the more imperative on the executive Government to give publicity to every new law, and to every alteration in the existing law by all the means in its power. The want of such publicity, in a way which would enable all ranks and descriptions of persons to inform themselves of every such change in the law, has long been complained of in England.

8. It frequently becomes necessary to distinguish between the law itself to be enforced. This distinction has already been alluded to more than once p. 181 and will be found more fully discussed under title "Nantissement" in the judgment on the case of Clark vs. M. Lebbe. The law can only be altered by Legislative authority, the province of all judges being proverbially to declare what the law is, but not to make the law. Whereas in matters of mere *practice*, the judges are authorized to make rules and to alter them, as they may think expedient; a power which in Ceylon is conferred on the Judges of the S. C. by the 51st clause of the Charter, in the most general and extensive terms, as regards the *practice* both of that Court, and of the D. C. And this distinction in the mode of legislating on matters of *law*, and on matters of *practice* is still more pointedly marked out by the 48th clause of the Charter which directs that any contradictory or inconsistent decisions on matters of *law* or *evidence* [evidence being a subdivision of law] shall be set right by a declaratory law, to be laid before the Legislative Council, whereas any such contradictions in matters

of *pleading* or *practice* are to be rectified by general rules or orders of court. It may here be observed that the Charter now in force, important as the effects of that instrument have been, makes no alteration in the law of Ceylon; but only appoints the courts by which the laws already existing shall be administered and prescribes the outline of procedure [to be filled up by the rules of practice] by which that administration of the laws shall be carried on.

9. The 47th rule of the first section of the rules of practice, by which D. J. are recommended to apply to the S. C. for instructions, in cases of doubt or difficulty, is limited by the terms of it to questions of *practice*. And though it will be observed from the letter book of the S. C., that the D. J. have, in many instances, submitted questions not of mere *practice* but of *law*, an instance of which will be seen under title "Notary" it must not be supposed that the Judges of the S. C. are pledged by the 47th rule to answer such questions. The late Mr. Serjt. Rough, indeed, objected, on more than one occasion, to questions of law being proposed to the S. C. except by way of regular appeal—certainly not from any disinclination on the part of that learned person to afford the D. C. every proper assistance, but because he considered it irregular. The writer of these notes has sometimes, oftener perhaps than he ought to have done, given his opinion on questions purely legal, when proposed to him, and the opinion of Mr. Justice Norris was on one occasion declared in favor of the practice, as being "in strict accordance with the ancient Civil Law" supra 177. And it is believed that the views of Mr. Commissioner Cameron were quite in accordance with this more extended liberty of enquiry. Where indeed a civil case had been already decided, and the D. J. applied to the S. C. for its opinion as to the correctness of that decision, the Judges declined offering that opinion, without a regular appeal, for the reasons given above p. 21. It does certainly appear less objectionable to advise a D. J. on a point of law, still undecided in the Court below, than to pronounce an opinion on a case decided, and unappealed from. In the former in-

stance the opinion may prevent not only a false step about to be made, but many subsequent ones, which would have been retraced on the final reversal, at increased expense and loss of time. Nor could the party to whom such opinion or direction might be unfavorable, complain, with any show of Justice, of having lost an advantage which he could only have owed to an error on the part of the D. C. Whereas a decision, once pronounced and recorded, becomes the property of either party to whom it may appear advantageous, unless appealed against: and if not appealed against any expression of dissent on the part of the S. C. would only embarrass the D. J. as to the mode of rectifying his error, unless that error were such as the D. C. would be justified in correcting by amendment of the Judgment, as to which see p. 173. et seq: and p. 249.

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### LEGITIMACY.

See titles Husband and Wife p. 214. 5. 6. 7. Evidence p. 120.

### LIBEL, DEFAMATION.

What conditions; verbal, written or otherwise, par. 1. Remedy for by action or prosecution, in actions, the Civil Law, in prosecutions, English Law: but evidence of the truth admitted and on what grounds, par. 2 and 3. Legal proceedings not Libels 4. But petition to the Governor falsely accusing of fraud, not privileged 5. A fortiori, if communicated to a third person, 6. Tests to decide whether accusation be libellous: as to the limits of accusation or censure, 7. Actions for Libel not to be dismissed as trivial 8. Nor for malicious prosecutions: Case on this subject: Requisites to support this action, 9. 10. 11. Amount of injury, with reference to profession or calling, 12. Palanodia or Recantation, instead of pecuniary amends, 13. Refusal to sit at Table with another, 13 and 14. Costs, sometimes, sufficient expiation, 15.

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1. By the word Libel, taken in this sense, is intended any malicious defamation, whether of the Government, a Magistrate, or a private person. And this word is more properly used

when the defamatory matter is printed, or written or expressed by pictures, or any other similarly permanent shape: Where the injury is conveyed by word of mouth, it is generally called Defamation or verbal slander. The offence may be committed not only against the reputation of the living, but also against the memory of the dead: And the Civil Law agrees with the Law of England on this point, Voet: Lib: 47. Tit. 10 par. 5.

According to Blackstone, indeed, Libels, in their most extensive sense, are taken to signify any writings &c. of an immoral or illegal tendency.

2. The remedy for Slander, whether verbal or written, is either by action at the suit of the party aggrieved, or by prosecution at the suit of the Crown. In the Civil actions which were brought before the former S. C. on this subject the Roman Dutch Law was adhered to, and if the writer of these notes be not mistaken, some cases will be found on record decided by former Judges of the S. C., in which much learning will be found collected, but which he regrets is not in his power to refer to more particularly in this place: In Criminal prosecutions, the Law of England, as that was amended in 1792, is so far adhered to, that it is left to the Jury to decide on the tendency of the alleged Libel, as well as on the fact of publication: But the S. C. has been moreover very much inclined to the admission of evidence to prove the truth of the publication in Criminal prosecutions as well as in Civil actions, at least as reasons for mitigating the punishment. And it has adopted this view, partly in conformity with the Civil Law, and partly from analogy to the practice of the Court of Queen's Bench, which requires the party applying for an information, (and it will be recollected that all prosecutions in Ceylon are on Information) to swear to the falsehood of the Libel. Another reason was that almost all Libels which have been prosecuted before the S. C. (at least up to a recent period) have been published against Magistrates, accusing them of corruption in Office: And the Court has felt very forcibly the inexpediency

(if such a reason may be allowed in Judicial proceedings) of appearing to stifle any inquiry into the conduct of persons connected with the administration of Justice, more especially considering how important it is to confirm the native, and indeed all descriptions of persons in the confidence and good opinion, which it is hoped and believed, they entertain in the Judicial establishments, and how difficult it would be to make them understand the wisdom of the rules which declares truth to be no justification of a Libel when prosecuted as a crime.

3. Every day's experience, indeed, tends to strengthen one's opinion, that the distinction in the Law of England on this point rests on subtle refinement rather than on reason and justice: as was observed on a late trial on an information against the "Times" Newspaper for a Libel on Sir J. Conroy. "The first essential of justice is the discovery of the truth, and no one can feel sure that justice has been done by a mode of preventing cognizance of the truth from the province of the Jury." The learned Chief Justice of the Queen's Bench is reported to have said on another occasion. "That when a person engages in the perilous trade of Libeller, he ought to be prepared at once, and at the earliest moment to justify the statements he has ventured to make." But if he be not permitted to shew the truth of his statements to the Jury, such preparation is not only useless as regards his own defence, but the party complaining of the Libel receives but a very imperfect and unsubstantial vindication of his character at the hands of the Jury, even if he succeeds in obtaining a verdict: for the libeller may still insinuate, and generally indeed takes good care to do so, that he could have proved the truth of all his assertions if the law would have allowed of his so doing.

4. The following points have been decided by the S. C. since the Charter, first, as regards alleged Libels, uttered in the course of proceedings or which may be supposed to be preliminary to lawful investigation: An action cannot be sustained for libellous matter contained in the written pleadings in a case. No. 743. *Amblangodde* 11th September 1835, [on Circuit] In

this case the language of the petition is very strong. "The plaintiff is a Proctor, skilled in acts of frauds and stratagem, and endeavouring to steal the Government *Ratmahore* lands." Nor for words made use of in *vivâ voce* pleading; No. 1704. Tenmorachy, 8th July 1834, [on Circuit.] Where the defendant had said in the late Sitting Magistrate's Court, that the plaintiff was a rogue. In all these cases, the S. C. held that as the allegations had been introduced into the proceedings in the regular course of justice, they could not be considered "Libellous" in the legal sense of the word. It is the duty of the Court, in which scandalous matter is irrelevantly introduced into the pleadings to expunge it, and to animadvert upon it, if wantonly introduced, or even to commit a party for contempt, if he persisted in using abusive or indecent language in his oral pleading. But if the allegations are permitted by the Court to remain, it must be presumed that the Court considers them admissible, as tending to support the case of the party using them, and it would be unjust and absurd to treat them as libels.

5 But where a person presented a petition to the Governor accusing an officer in the Custom House of fraud and Malversation, which petition the Government directed to be communicated to the party accused, it was held that an action was sustainable. The defendants pleaded first, that this was a privileged communication, secondly that the accusations were warranted by general reports. This latter ground of defence wholly failed, and circumstances of great aggravation appearing in evidence, such as the declared animosity of the defendants against the plaintiff, and their having tampered with some of the witnesses, the D. C. awarded the whole of the damages asked for, £100, and the S. C. refused to reduce them. With respect to the first plea, the S. C. considered that as it did not appear that the accusation was true, or that the defendants could have believed them true, or that any ground existed even in the shape of rumours, to justify such belief, it could not be said to be a privileged communication, and, therefore, entitled

to indemnity; that, moreover, when a man accused another to the Government, he ought to be prepared to prove his charge, and not to take it for granted that his accusation was to be held confidential, and to remain confined to the breast of the Governor. No. 12,210, Colombo, 23d September 1834. It is scarcely necessary to observe that there is nothing in this decision of the S. C. inconsistent with the refusal stated at length under title "Jurisdiction," supra: 282. to call on the King's Advocate to produce a letter which he had received accusing one of the District Judges of partiality. That refusal was no decision as to the libellous tendency of the letter, which letter, indeed, was never before the Court, it proceeded on the grounds, first, that the S. C. would have had a very doubtful right to enforce the production of the letter; and secondly, that even if it were produced, the S. C. could not regularly take any proceedings upon it. In the case just mentioned, the libellous instrument was given up by the authority to which it was addressed.

6. In another case, in which libellous matter was stated in a petition to the Governor, and the defendant delivered the petition, not to the Governor, but to a third person, the D. C. awarded damages, and the S. C. affirmed the Judgment. No. 9,522. Negombo 5th October 1833. In this case all pretence of the communication being privileged was rebutted by the circumstance of the petition being given by the defendant himself to a person other than the authority to whom it was addressed.

7. It can rarely be a difficult task, it may be presumed, for the good sense of a Court or Jury to decide whether a charge or accusation, be it in the shape of a petition or under any other form, be brought from a sincere and conscientious desire to discharge a duty, or from a wanton or malicious wish to injure the person reflected upon, under colour of doing or obtaining justice. If the situation of the accuser, with reference to the party accused, or simply as a member of society, be such as to call upon him to prefer the charge or

to justify him in so doing, if the charge turn out to be well-founded, or though not absolutely proved to be true, if there appear to have been a probable cause for it, and if, in bringing forward and pursuing his charge, the accuser neither has recourse to improper means of crimination, not by exaggeration, or needless publicity wantonly aggravates the evil which he professes an anxiety to cure; the fair and natural presumption, since it is impossible to look into men's hearts, so as to discover with absolute certainty their real motives, is that he was actuated by a sense of duty, and not by base or malignant motives. As regards the latter part of the principle above laid down, the keeping within the bounds of fair and dispassionate statement it is observed by the authority so often quoted in these notes. "A man may be guilty of slander, not only, when it occurs in a transaction altogether unlawful, but even when he is engaged in a legal act or in the performance of a positive duty, if he wantonly exceeds the limits prescribed to that duty and makes use of his authority to bring others into contempt. It is open to the Judge or Magistrate, in the administration of the law and for the maintenance of his dignity, to reprimand and keep in order Suitors, Advocates, Proctors and others similarly situated, if any thing be done amiss by them. But if such Judge or Magistrate should heap words of obloquy upon them, if he should censure without cause or beyond what the occasion requires, not for the purpose of vindicating public authority or of administering and correcting the offender, but in order to expose the party to hatred and disgrace [though this is not to be highly presumed] he may be held liable to an action for Slander," Voet lib: 47. tit: 10. par. 2. vide supra p: 242. 3. as to the terms of censure in commenting from the bench on the conduct of parties.

8. Secondly as regards libellous matter uttered, not in the course, or under colour of Judicial or other lawful investigation: In several instances, where actions have been brought for Slander, D. Cs. have dismissed them, as being of too trifling a nature to justify occupying the time of the Court with the investiga-

tion, when such dismissal, have been appealed from, however, if the words alleged to have been uttered have appeared to be clearly slanderous and actionable, the S. C. has referred the case back for regular inquiry; observing "that every complaint for which the law assigns a remedy ought to be inquired into, however trivial it may appear; and that a plaintiff who complains of an injury done to his character, has as much right to the time of the Court as one who seeks to recover property, or redress for any other species of injury." No. 7,403: Kandy 30th September 1835. No. 7,506 Kandy, 11, November 1835. supra 242.

9. 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 to recover damages for a malicious prosecution, in which the defendant had sworn that the plaintiff, a salt Storekeeper 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 had 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 parrabs 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 1818, 14, or whether theft was in the 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 the 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 situation in life of the person attacked. Now this plaintiff described as "Store-keeper" which it is presumed means, Government Salt Store-keeper, in which character an accusation of a mere infraction of the Government Regulation for the protection of salt revenue assumes a very serious complexion, both as affecting the plaintiff's character for integrity, and the propriety of allowing him to continue in his office."

10. It may assist the D. C. in the prosecution of this inquiry to state what are the requisites to enable a man to support an action for a malicious prosecution. *First* the charge must have been false—that it was the case in the present instance, is clear from the evidence attempted to be adduced in support of it. *Secondly*—there must have been want of probable cause to justify the informant in making the accusation. As far as appears as yet, this ingredient is also to be found in the present

case. If the defendant should be able to shew that he had good ground for making the charge he will have an opportunity of doing so in his defence. *Third'y*, there must have been malice on the part of the informant. But on this point the S. C. is again compelled to differ from the D. J. in the proposition that "Nothing like a malicious design to wrong the plaintiff is fairly to be inferred from the proceeding." The law *implies* malice, when no probable cause is shewn for the accusation. And this is no more than common reason would imply; for what, except malice, could induce a man to prefer a charge against another, for which he is conscious that no real ground exists? This question must, therefore, depend on the want or existence of probable cause, as that may appear at the trial. With this additional observation that the plaintiff should be allowed to adduce evidence, of express malice, if he be able so to do. *Fourthly*, the damage which the plaintiff may have sustained by the false accusation is to be considered, whether suffered in person, reputation, or by pecuniary loss. In the present instance, the damage is alleged by the libel to have been sustained in the reputation of the plaintiff. The amount of that damage will be properly for the consideration of the D. C. if the other requisites be established, or rather if what already appears from the proceedings in the criminal prosecution be not contradicted by the defendant's evidence. It is only necessary to say on that subject, that where a person has actually been brought to trial for any offence, the conviction of which would be injurious to his character, whether as a member of society, or with reference to his profession, occupation or office, it has never been considered sufficient reparation for that attack on his character, that the want of evidence, in other words, the want of probable cause, has rendered it unsuccessful.

11. With respect to the consequences which may ensue to the revenue, by actions of this nature being encouraged, by giving the plaintiffs in them any advantage over other suitors; but on the other hand, they cannot be prohibited, if the

law permits the injured party to seek his remedy by means of this action, whatever may be the consequence to the revenue. The protection of the revenue against fraud is surely not more important than that of individuals against false and malicious prosecutions. And there is a wide distinction between a prosecutor barely failing to adduce exclusive evidence, so as to convict the accused, and being unsupported and even contradicted by the whole of his witnesses. For it is remarkable that each of the three persons whom the informant cites as witnesses of the fact, severally denies that he saw any such removal, or that he ever gave such information to the prosecutor, the present defendant.—F. G. Boets plaintiff vrs.—Chilaw and Putlam 11th November 1835. The result of the trial of this action had not been made known to the S. C. before the writer of these notes left Ceylon.

12. It was observed in the foregoing case that the effect of an unfounded prosecution, or of a libel, or any other mode of defamation on a man's character, must often be considered with reference to the situation in life of the person attacked: this proposition is so obvious, as scarcely to require illustration. If a man says or writes of a Proctor that he is ignorant of law, or of a Physician that he is ignorant of medicine, such assertions have a direct tendency to injure the Proctor or Physician in their respective professions; and are indeed indirect attacks on the moral honesty of these functionaries, since it is dishonest to attempt to practice an art or science, without being duly qualified so to do. But the same imputations of ignorance of law or physic, made against a person who is not engaged in the profession to which the imputation refers, inflicts no injury upon him, because it is not his duty to be learned in that particular science. Thus an action was brought by a certain Buddhist priest against the High priest, for defamation, but was dismissed by the D. C. on the ground that the words used did not convey any imputation on his moral character, and that the plaintiff must seek for any redress to which he might be entitled by Ecclesiastical means. On the

case coming before the S. C., on circuit at Galle, the assessors observed that the expressions used conveyed an imputation of the absence of religious feeling: one of the words employed meaning "irreligious." On this statement being made the Chief Justice referred the case back for inquiry, considering that whatever might have been the effect of such an imputation on a layman, it was impossible to accuse a priest, whatever might be his sect, of irreligion, without materially injuring his priestly character. No. 949 Amblangodde, 11th September 1835.

13. One of the remedies pointed out by the Civil Law for merely verbal injury is the *Palinodia* or recantation of offensive expressions by the person who made use of them. Indeed the action to obtain this description of satisfaction is quite distinct according to the Civil Law from that in which pecuniary damages are sought to be recovered. Voet. Lib. 47 : tit : 10 par : 17. And this author considers "the recantation to carry with it a sufficiently heavy penalty, since, as observed by Seneca, no punishment can be more acutely felt than that inflicted by forced repentance," some cases, it is believed, have occurred in Ceylon, in which, though the action had not been expressly directed towards obtaining this species of reparation, the S. C. has either directed a recantation to be made, or, where it has been voluntarily offered by the defendant, has considered that these honorable amends have taken away any claim for pecuniary ones, supposing always that no *special* damage or loss has been sustained. And the following decision proceeded on that principle. The plaintiff complained that the Defendant had asked him to a marriage feast, and had afterwards refused to associate or sit with him at that ceremony. The Defendant answered that he had no intention of affronting the Plaintiff, that his only object was to prevent the Plaintiff as well as others from going to the feast, and thereby swelling the expenses. The D. C. considered, from the evidence, that there had been no intention on the part of the Defendant to insult the Plaintiff, and therefore dismissed the

action. And the S. C. on appeal affirmed that decision, observing "that there appeared from the evidence no wish or intention to wound the plaintiff's feelings, but that even if such an intention was perceptible the defendant's answer amounted to a *Palinodia*, with which the plaintiff, if his object had only been to vindicate his character, ought to have been perfectly satisfied;—and that after so satisfactory an answer, it would have been scarcely possible to award damages even if the offence had been established.—No. 1126 Caltura 8th July 1835. It is proper to add, however, that the Assessors expressed their dissent from this judgment, considering that damages ought to have been awarded. The refusal to sit with another at table, supposing the object had been proved to be offensive, is considered by the Natives, as by more refined societies, to be one of the bitterest insults that can be offered by a man to his equal.

14. Accordingly in another case, where the defendant had refused to sit at a marriage feast with the plaintiff, and had risen and broken up the party, declaring that he would not associate with him, and in his answer justified his conduct on grounds of alleged disgrace attaching to the plaintiff's family, which, however, he failed to establish, the D. C. awarded Ten (10) Rixdollars damages, and on appeal by the defendant the S. C. affirmed the Decree. In this case it will be observed the defence set up, but not proved, was an aggravation of the original offence, It also appeared that the plaintiff had not only been disgraced in the opinion of the witnesses, but one of them stated that he had refused to give the plaintiff his sister in marriage, in consequence of the affront.—No. 2,592, Colombo North, 29th October 1834.

15. Cases sometimes occur, especially when the slander complained of is verbal, in which the Court, after hearing the evidence, considers the injury to be so trifling as not to call for damages, but in which the intemperate or thoughtless conduct of the defendant may properly subject him to the payment of the costs. Thus an action was brought for calling the

plaintiff's father, since deceased, "a whore's son." It appeared that the Defendant held a bond of the deceased, and being angry that he could not obtain payment, exclaimed, tearing the bond, "I cannot get the money from this "whore's son." The D. C. considering that these words were uttered thoughtlessly in a fit of vexation, and without any intention of seriously imputing base birth to the plaintiff, dismissed the action with costs. The plaintiff appealed to the S. C., which decided that the Defendant ought at least to pay his own costs and modified the decree accordingly.—No. 767 Cultura, —th April 1835. Perhaps it would have been no more than just, if the defendant had been decreed to pay the costs on both sides; but in such case it is more regular to award nominal damages, *vide supra* p. 72. In an action for similar words of abuse, which the D. C. dismissed, owing to doubts of the truth of the evidence, the S. C. affirmed the dismissal with costs.—No. 994, Cultura 22nd April 1835. Another action was brought for defamation, in calling the plaintiff and family his slaves. The defendant by his answer justified his words as true. It appeared clearly from the evidence, that the plaintiffs family were not slaves. The D. C. considering that no loss or injury had been sustained by the plaintiff, awarded no damages, but in as much as the assertion of the defendant had turned out to be untrue, decreed that he should pay the costs on both sides. The plaintiff's object appeared to be only to establish his right to freedom, and he did not appeal for damages. The defendant appealed from the judgment of costs, to which he contended he was not liable, since no damages were awarded. But the S. C. affirmed the decree, observing "that if a man took upon himself to call another his slave, he did so at his own risk, and if he could not prove his assertion, the least that the person whose freedom was questioned, had a right to expect, was that he should be indemnified for the expense of publicly contradicting the assertion.—No. 788 Matelle 25th July 1835. These three causes ought to have been mentioned under title "Costs."

## LUNATIC.

Regulation No. 2 of 1829 and 3rd section of Rules, Par. 1, Relations cannot sue for Lunatic, till duly appointed Guardian Par. 2. Bare assertion insufficient to establish Lunacy Par. 3. Plea of insanity by a father, to a debt incurred by his son rejected, 4.—Opinion of insanity should be supported and explained by facts 5. \*

1.—The course of proceeding, for inquiry into, and deciding upon the state of mind of a supposed Idiot or Lunatic for appointing guardians over the person and property, allowance for maintenance and other purposes, is prescribed by Regulation No. 2 of 1829 to which the D. Cs. are referred, for their guidance by the third section of the rules and orders of practice: the only provision added by that section is, the requiring every guardian of the estate of such Idiot or Lunatic, to file half yearly accounts of his administration.

2. The question was submitted to the S. C. by a District Judge, whether the children of a person who was stated to be insane were entitled to recover on a bond executed in favor of the alleged Lunatic. An action had been instituted on the bond, and at the trial the witnesses swore to the unsound state of mind of the obligee. The District Judge expressed his conviction that this person was of unsound mind, and incapable of managing his affairs. The S. C. returned for answer "that the best course to be adopted would be, in the first instance, to have the supposed lunatic brought, if possible, before the District Court, when from his personal examination, if able to attend, and from the evidence of witnesses, as well those already examined, as any others competent to give an opinion on the subject, the Court would be enabled to decide whether he were really of unsound mind or not: and if the result were unfavorable, a guardian must be appointed, as directed by the regulation: That the relations of the alleged Lunatic were not legally entitled to sue on his behalf without being clothed

with the authority of his legal guardian; for this would be to decide the question of Lunacy, without any inquiry specially directed to that object, and without fixing on any one the responsibility, so necessary to be vested somewhere, of due attention to the care of the Lunatic's person and of his interests. That it would, therefore, be proper to suspend the decision of the case till the necessary inquiry should have been instituted, and consequent steps taken on the question of Lunacy. L. B. 24th June, 4th July 1835.

3. Another District Judge applied for instructions how to proceed with respect to a person, reported by his brother and Police Vidahn to be deranged, so as to render it necessary to confine him in the stocks, to prevent his doing mischief. He was stated to be worth no property, but his mother was in possession of land to the amount of Rds. 400 or 500 and the D. J. wished to know whether, on the affidavit of the brother and the Vidahn, the supposed lunatic could be committed to gaol till restored to his proper senses. The D. J. was informed in answer. "That in all cases of alleged derangement of intellect, the provisions of the Regulation No. 2 of 1829 should be adhered to, as nearly as the circumstances of each case would admit, and his attention was particularly called to the mode in which the inquiry ought to be conducted, namely before the D. J., if circumstances would admit of it, otherwise before Commissioners, to be appointed as directed by the 5th clause. That if the latter course were adopted, the witnesses should appear before the D. C. according to the present exclusive system, as regards the power of administering oaths, and be sworn to their respective depositions, but that it would be highly dangerous to allow a man to be declared insane, on the mere assertion of a relative, supported only by the evidence of the Police Vidahn, that the supposed Lunatic had been put in confinement. That if ultimately the D. C. should feel satisfied that the person in question was out of his mind, and that the violence of his conduct might endanger the public peace, and if none of his relations were able and willing to take charge of his person, the D. J. would have

no alternative, it was feared, but to commit him to the gaol of the district,—there being no other place for the reception of Lunatics. And that, under the circumstance of poverty in which this person was described to be, any proceedings which might be necessary to enable the D. C. to come to a conclusion, as to the state of his mind, ought to be conducted in *Formâ pauperis*.”—L. B. 12th 22nd February 1836.

4. An action was brought to recover the sum of one Pound lent to the first defendant, the son of the second defendant. The second defendant pleaded that his son was both a minor and insane, at the time he borrowed the money. After hearing the evidence, the substance of which will appear from the Judgment of the S. C. the D. C. decreed for the plaintiff, and this decree was affirmed on appeal. The S. C. observed “of the two grounds of defence, set up by the second defendant, that of minority has been left wholly without proof: The D. J. records that the first defendant appears about 20, but the circumstance of his having been accustomed to carry on dealings in trade, of which there appears little doubt, would take away all colour of defence on this ground. With respect to his alleged insanity, the evidence is much too loose and vague, as to time, to justify the conclusion that he was not in his right senses when he received this money from the plaintiff. But even supposing that he had been out of his mind about that time, it was the duty of his father, the second defendant, and it is still his duty, to take those steps which the law justifies and calls upon him to take; for placing his son under that restraint which would prevent the youngman from improvidently disposing of his property, on the one hand, or on the other hand, from obtaining money from others, who may not be aware of the state of his intellect.” No. 1194 Walligammo, 13th June 1835.

5. We have seen it observed, *supra* 200, I. that as the question of insanity, except in very decided cases, is a matter of a mere opinion, the *naked expression* of such opinion is not entitled to any great weight unless it be followed by an explanation of the facts or circumstances on which it is founded.

## MALICIOUS PROSECUTION.

See title Libel, paragraphs, 9. 10. and 11. and Prosecution.

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## MARRIAGE.

See "Husband and Wife;" and as to *Beena* and *Deega* marriages see title "Kandy."

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### Marriage, breach of promise of,—

Though this is a wrong which more frequently forms a subject of complaint on the part of the woman, there still is nothing to prevent the man from bringing an action for this injury, if he considers that he has sustained one, by a breach of the engagement entered into with him. An action of this description was brought against the first defendant, for refusing to fulfil her promise of marriage, and against the second defendant, mother of the first, for inciting her daughter to retract the publication of the banns, and the assent of both mother and daughter were proved, and there was no defence to the action, except a disgraceful one attempted by the mother and which turned out to be false. The D. C. endeavoured to prevail on the first defendant to return to her engagement, but in vain, and at length considering that the plaintiff had sustained no damage, dismissed the action, but directed the second defendant to pay the costs incurred by herself and her daughter. The S. C., on appeal, concurred with the Court below in thinking that the plaintiff had not shewn any pecuniary loss, which would entitle him to damages to any amount; but considering that the contract had been undoubtedly entered into, and had as undoubtedly been broken, at the instigation, or by the connivance of the second defendant, considering also the false and disgraceful defence which that person attempted to set up, it was but just that all the costs of the action should fall upon her: and as there would have been an inconsistency in awarding costs to the plaintiff, with a decree dismissing his claim, it was ordered that Judgment be entered for the plaintiff for one shilling, and that the second defendant should pay the costs, as well of the plaintiff

as of herself and her daughter, the first defendant. No. 1472, Caltura 28th October 1835 mentioned supra 72.

Publication of banns, both parties being present and assenting, evidence of a promise, supra 216.

See also No. 1134 Caltura, supra 71 as to costs. "Merits of a case." Explanation of the term p. 82. Note.

## MINORITY.

Age of majority in Ceylon. Paragraph 1. Privileges of minors, immunity from punishment depends on understanding, rather than age, so admissibility as witness—par. 2.—contracts by minors void except for necessities or unless ratified after majority—3.—Minority how proved 4—When it ceases, before the usual age. *Venia Œtatis*, marriage, trading 5—case of alleged minority referred back to D. C. for inquiry as to trading 6.

1. The age at which a person ceases to be a minor must vary in Ceylon according to the law of the nation to which the minor belongs. By the Roman Dutch Law, which it must always be remembered, is only in force in the Maritime Provinces, a person does not attain his majority till he has completed his twenty-fifth year, a very mature age in Ceylon when the effect of climate upon the human frame is taken into consideration. As regards Natives the age of majority would be found, even in the Maritime Provinces, it is apprehended, by the law of their own respective tribes, vide supra, title law p: 1 and 3.—In the Kandyan districts we have seen that a man may contract debts, and is answerable for his contracts, after he has completed his sixteenth year. Supra. title "Kandy" par. 157 to 162 where a few points on the subject of minority will be found, as given by Mr. Sawers. By the Law of England, where the full age of majority is twenty-one years, there are several intermediate periods, on obtaining which the minor becomes competent to do certain acts. Thus at 12, he may take the oath of allegiance, at fourteen, may agree to marriage, choose his guardian, and make his will of *personal* property, at seventeen,

may be executor, and at twenty-one acquires full power of disposition of himself and his property. And a similar qualified attainment of majority for many purposes may be recognized in Ceylon, though the diversity of Laws and customs would make it difficult to state the periods with any precision. And a very valuable treatise on the Roman Dutch Law of minority is to be found in "Voet: lib: tit: 4 De Minoritate 25 annis."

2. By the law of all countries, minors are much favored and have many privileges, chiefly as regards their civil rights and liabilities. For with respect to immunity from punishment, for offences committed by them, this ought to be decided, not so much with reference to the precise age of the offender, as to the state of his understanding, and the power of his mind to discriminate between good and evil. For this capacity differs so much in different understandings, that it is much safer and more satisfactory to decide, from the circumstances under which the offence was committed, and from the general character and habits of the child, whether he or she were aware of the nature and consequences of the act, than to lay down any exact age at which children shall become responsible for their actions. For the same reason no precise age can be fixed within which a child shall be admitted to give evidence. The admission or exclusion must depend, in each case, on the understanding of the child as that shall appear to the Court on examination, and of its capacity to distinguish between truth and falsehood, and to understand the consequences of uttering what is not true. *Supra*. 135.

3. As regards civil immunities, the general rule is that contracts made by minors are void as against them: that is, the minor may refuse to ratify them, and may be relieved against the effect of them on application to a Court. This is the general principle both of the English and the Civil Law. But it is not without exceptions. The reason of the rule is that the minor is supposed to be deficient in the understanding and experience necessary to enable him to take care of his own interests. When, therefore, the reason ceases, the rule

ceases also. Accordingly a minor is liable to pay for food, clothing, medicine, schooling, and other necessaries of life which may be furnished to him; and this whether he has entered into an express contract to pay, or whether the creditor trusts to the implied promise which the Law raises on such occasions [infra title "Obligation."] As regards those objects which come under the description of "Necessaries" it cannot be said that the purchase of them requires experience or sagacity, since they are essential to the minor's existence. If the minor be living with his parents, and under their authority, they, and not the minor, are answerable even for necessaries. What things are to be considered necessities, must depend on the sex, age, and station in life of the minor. A claim was made in one of the Southern districts which sounds oddly to European ears. The plaintiff sued on a contract, by which the defendant had agreed to pay 30 Rixdollars, if he did not return within one month a certain *comb* which the plaintiff had lent him. The defendant alleged that being in great want of a *comb*, to appear at some ceremony, he had entered into this improvident contract, that he was a minor at the time, that he had lost the *comb*, but was willing to pay 10 Rixdollars as the value of it. The D. C. being satisfied of the defendant's minority, dismissed the action. The S. C., however, on the case coming before it on circuit, and on the assessors giving it, as their opinion, that the *comb* was to be considered a necessary appendage to a Cingalese in the defendant's station, directed Judgment for the plaintiff for ten Rixdollars. No. 552 Amblangodde, 7th March 1835. And whatever be the nature of the debt contracted during minority, if the minor after coming of age, promise to pay it, such promise will be binding upon him.

4. Minority is proved by inspection of the alleged minor himself by the Court, by the evidence of witnesses, register of birth, or any other documents which may safely and legally be relied upon. The mere appearance of the person, unless it be so directed one way or the other as to leave no doubt,

in the mind of the Court, ought not to be taken as conclusive: And where a D. C. decided that a defendant was not liable, as being *apparently* a minor “the S. C. considered this to be not sufficiently certain, and directed evidence to be gone into as to that fact. No. 655, Amblangodde, 5th March 1835. [circuit.]”

5. Minority ceases in some instances, as regards the civil disabilities of the minor, before he attains the age of minority. By the Roman Dutch Law, the *Venia Œtatis*, or permission to be considered of age, may be obtained, for which purpose the applicant must prove himself, by sufficient evidence, to be of good character and of those sober, prudent, and industrious habits which permit the management of his affairs to be entrusted to him without danger. Voet. lib. 4 tit: 4 par: 3. By the more modern Law of Holland, marriage has the effect of conferring on a minor the rights of majority, unless the Court, for special causes, should see fit to continue the restraint of nonage to the usual period. Ibid: par: 6. Another mode by which the effect of minority, screening the minor from his liability on contracts, may be destroyed, is his having been engaged in trade at the time of contracting; the law considering, with great reason, that if a man has understanding and experience enough for commerce, he may safely be left to his own protection in the ordinary concerns and dealings of life. Or, as Voet observes, par: 51. “The claim to relief from contracts, founded on inexperience in business, appears utterly inconsistent with following commerce as a vocation.”

6. In an action brought against the defendant for opposing a sale in execution, which the plaintiff had obtained against one Sauda [a moorman] the defendant justified the opposition, as Sauda’s father, on the ground that his son was under age, to which the plaintiff replied that Sauda was engaged in trade at the time of the debt being incurred. The D. C. decided that Sauda was under age, being about twenty, and dismissed the suit. The S. C., however, referred the case back to the D. C., in order that a full enquiry might be made into the

circumstances under which the debt was originally incurred. "If it could be proved that Sauda was openly engaged in trade, his minority would be no justification of the opposition by his father: Or, if the debt was contracted for necessaries, either himself or his father would be liable for the amount. The law very properly protects minors against those who would attempt to take advantage of their inexperience, but the plea of minority is a defence which, on the other hand, should be admitted with some caution, lest it should be made the means of defeating a creditor of a just debt, incurred by the alleged minor under circumstances which ought, in justice, to preclude his sheltering under a supposed incapacity to contract. Another question is, what is the age at which Moormen became liable for debts. Among the Moors, as far as this Court has been able to observe, very many are engaged in commerce before the age of twenty." No. 584. Negombo, 7th February 1835. See also No. 1194. Walligammo, *supra* tit. "Lunacy" par. 4.

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#### MORTGAGE.

See titles, "Kandy." Paragraph 140 et seq:—"Land" paragraph 17:

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#### MOTION.

By a supplementary rule of practice of 9th October 1834, the following direction is given "with respect to applications and motions:" The word "application" having been used in the table of Court fees, and nothing having been said of "motions," it has been supposed, in some of the D. Cs. either that every motion must be in the form of a written application, or that it must be preceded by an application in writing. A distinction, however, must be made with reference to such motions as, from their nature, necessarily require to be reduced to writing, in which cases stamps are necessary; all other motions may be made *vivâ voce*: and no Proctors shall be allowed to charge for drawing an application, unless when it is necessary to be reduced to writing. Certain charges for draw-

ing applications for documents, having, in pursuance of this rule, been disallowed by the Registrar in taxing Bills of Costs, transmitted from a D. C., the D. J. applied to the S. C. for instructions, whether the practice of filing applications in writing for documents was to be discontinued. He observed that the practice had been long standing; and appeared necessary, as tending to check unnecessary, and frivolous applications for documents, the searching for which often consumed a considerable portion of the time of the Officers of the Court, besides which, it was usual to file the application in the place of the document, as proof of the delivery of the Document. The S. C., in answer, referred the D. J. to the Rule of 9th October 1834 and then observed, "That since that Rule was passed, the practice in the D. Cs. at Colombo, [and it was necessary that the practice in all the D. Cs. should be as nearly as possible the same,] had been, not to make applications in writing nor to require them, except in some few special cases; that the S. C. could not by any means concur in the necessity of written applications on all occasions, however ancient the practice might be;—that no longer time would be consumed in searching for Documents, because required by *vivâ voce* motion than if sought by written application, and that it might be doubted whether the requisition would be less frequent, because the latter mode was insisted on;—and that with respect to filing the application in the room of the Document required, and as proof of the delivery of it to the applicant, a much better and more regular proof of the applications and delivery would be the entry by the D. J. in the proceedings, of the motion made, and of its being granted or refused, which entry ought to be made of all applications, whether written or verbal." L. B. 24th April 1835.

#### NANTISSEMENT.

Meaning of the term: When granted, and on what Documents according to Voet; paragraph 1. Three cases on this subject deciding. 1st. That *Nantissement* was introduced into

the Maritime Provinces with the Roman Dutch Law; 2ndly. That it is matter of *Law*, rather than practice, 3rdly. That it is not absolute, 4thly. Nor superseded or affected by the Charter of 1801, 5thly. Nor by present right of arrest and sequestration; 6thly. That it tends to shorten, rather than lengthen, the ultimate issue, 7thly. That a Merchant's Book is ground for it, and may be produced unstamped, 8thly. That it may now be supported by declaration, instead of oath. 9thly. That the defendant's admission of liability is not indispensable, 10thly. That his bare allegation of fraud is no bar, 11thly. That it may be granted in progress of the suit, even after appeal, and though refused before, if new ground shewn; And 12thly. That being of an interlocutory nature, it should have preaudience of trials on the general merits: Paragraph 2 to 10. Opinion as to granting or refusing it, mutual examination of parties would assist the decision par. 11.

1. Before entering into the cases which have been decided by the S. C. on this subject, it may be useful to those readers who are not versed in Roman Dutch Law, and may serve to facilitate the comprehension and application of those cases, to offer a translation of Voet's exposition of this proceeding, which he treats of as follows. "Of interlocutory sentences, that which is in most frequent use is the decree of provisional payment, or *Nantissement*, which the plaintiff demands shall be made to him pending the main action, if he holds in his favor an admitted signature, or his Merchant's Books, or an acknowledgement by the defendant, or some plain proof of the debt of a like nature: And a brief summary of the requisites, both here in Holland, and in neighbouring states, for this proceeding, which is not mentioned in the Roman Law, though it has been introduced into practice, will not be out of place here. It is necessary then that the debt be unconditional and reduced to certainty; and that this should appear, either by the admission of the opposite party, or by some instrument, public or private, acknowledged by him, or by the Merchant's Book, or by other Documents of a like nature, to which a somewhat greater

authority attaches, than to mere private accounts, and which should be confirmed by the oath, or death of the party. And thus the defendant, after a first citation, may be decreed to make provisional payment, unless indeed he appear and shew good and sufficient ground for resisting plaintiff's application: As if the defendant deny altogether the delivery or sale of the goods, giving some probable reasons for the denial." Voet Lib. 42. tit. 1. par. 6. The rest of this paragraph lays down certain rules, as to the number of citations and delays necessary, which points, with us, would be regulated by the practice of the D. Cs. But it is well to mention that a copy of the instrument, on which the plaintiff relies, ought to accompany the citation: The above extract will give an idea of the nature of this precautionary proceeding, sufficient to render the following cases intelligible, even to those who were not previously acquainted with the term *Nantissement*: The subject is treated of more in detail in the ten paragraphs of Voet, following that from which we have just quoted.

2. Two Cases present themselves to the writer of these notes, in which the subject of *Nantissement*, came under discussion. The first of them occurred before the former S. C. in 1830 when the writer was sitting alone in that Court, he is however, tempted to insert it here, as having been cited in the subsequent case, which was argued before the S. C. sitting under the new Charter. The Judgment in each case states the facts, sufficiently to make the decision intelligible. In the case, first about to be mentioned, another point, foreign to the subject of *Nantissement*, arose, viz: What proof shall be sufficient of a person's authority to certify a fact, referred to under title "Evidence," supra. 150.

3. "This action is brought by the Attornies of E. J. Scott who is the Executor of John Scott to recover the sum of £840 being the arrears for 28 years of an Annuity of £30, granted by the defendant to John Scott by deed dated 20th April 1810 and executed in England. The defendant having quitted England, as the plaintiffs allege in their Libel, in 1803 from which pe-

riod no payment of the Annuity has been made. The defendant, by his answer, avers 1st. That no memorial of the Annuity deed was enrolled in Chancery within the 20 days from the execution thereof, as required by statute G. III. ch. 26. 2ndly that the deed was obtained by fraud; that the Grantee and others falsely represented to the defendant that he should receive the full consideration money of £180, whereas the defendant was induced, by fraud, to return a great part of that sum, whereby the deed became void. With respect to the first ground of defence, I am compelled, though with some reluctance, to say that the opinion which I entertained when the case was first brought before S. C., and which I then intimated to the bar, remains, in substance, unaltered. The statute already adverted to, which is the act that must govern this case, required that a Memorial of every annuity deed of a nature similar to that in question should be enrolled within 20 days after its execution, on pain of nullity. The defendant avers that no Memorial has been enrolled in due time, to wit, on the 9th May 1801. It is for the plaintiffs, therefore, to prove the affirmative which they have taken, and necessarily taken upon themselves to make. Has then that affirmative been proved? The only evidence of such enrolment is the following endorsement on the deed. "A Memorial of this deed was enrolled in His Majesty's high Court of Chancery the 9th day of May in the year of our Lord 1801 D. Drew." Who this D. Drew is, or was, by whom this Memorandum purports to have been made; whether he was a person duly authorized to make such endorsement, or whether this be really his signature, there is no evidence whatever to shew. If indeed, it had been proved that he was the clerk of the enrolments on 9th May 1801 and that it was his duty to make this endorsement on the deed, or even if the certificate purported to have been signed by him in that character, the Court would probably have felt justified, under the authority which has been cited of "*Kinnersly vs. Orpe*:" Douglas, 56, to declare this certificate sufficiently authentic. But giving the fullest effect to that decision, and to the analogy which Mr.

Justice Buller draws from Statute 27. Hen: 8 ch: 16 it must be recollected that the opinions both of Mr. Justice Buller and Mr. Justice Willes were founded on the fact that "the Memorandum was the certificate of the proper officer, and not of a private person, as had been contended at the bar. The signature itself in that case was "P. Fury, Auditor." And this principle is fully recognized by Mr. Phillipps in his treatise on evidence, (P. 310 3d edition)—provided the instrument offered in evidence be authenticated by a person appointed for that purpose;"—Whereas here, there is nothing but bare and gratuitous presumption to lead the Court to suppose that "D. Drew" was more than a private unauthorized person. This defect in the plaintiff's proof can only, it seems, be remedied by a commission to examine witnesses in England, and of that commission the defendant, on whom it is scarcely necessary to say lies the burthen of establishing the second ground of his defence, can avail himself.

The necessity of such a commission having become apparent, the plaintiff's counsel has moved that the defendant may be compelled, either to pay into Court the amount claimed, or, at least, to give security for the payment of it, if it should be ultimately decreed to the plaintiffs. The defendant's proctor resists this application on four grounds: 1st that the practice of demanding *Nantissement*, or provisional payment is antiquated and obsolete;—2dly that it has been superseded by the 38th clause of the Charter of 1801 which provides another mode of security, by arrest of the person of the debtor, 3dly, that *Nantissement* can only be demanded when the debtor admits his liability; and 4thly that; at all events, it cannot be decreed where fraud is alleged against the claimant, as in the present instance. With respect to the first and more general ground, I certainly see no reason for considering the practice as obsolete. It is treated of by all the Civil law writers whom I have been able to consult:—Vanderlinden, who published his Institutes so late as 1806, speaks of it as a custom frequently in use, and, considering the very brief and elementary nature of the work, lays

down very clear and distinct rules for deciding in what cases it should be granted. The necessity for affording, such provisional security to creditors, suing at this distance from the scene of the original transaction, applies with peculiar force; and it would be easy to mention cases in which a refusal to grant such precautionary relief would amount to a total denial of justice.

Nor, secondly, do I consider that the 38th Section of the Charter of 1801, has superseded, or in any way affected, this mode of proceeding. That clause declares in what cases a Warrant of Arrest may issue against a defendant, and prescribes the course of proceeding on such Warrant,—but it does not make that process substitutionary of those which exist by the Common law of the Island, and which remain untouched by the Charter. There are other reasons besides those which the Charter specifies as grounds for obtaining a Warrant of Arrest, which may often make some measure of precaution necessary to secure a debt during the long interval which must elapse before evidence can be procured from Europe: I need only give as an example the possibility of the death of a defendant. It is true, as has been urged, that the Charter of 1801, as it now stands, allows of the arrest of any defendant, whether suspected of an intention to quit the Jurisdiction, or not, on a debt which is sworn to exceed 100 Rds: but I can never admit that this extensive and extraordinary power of arrest is given, to the exclusion of the milder course of proceeding, prescribed by the ordinary rules of the Civil law. And here the passage which has been cited on the part of the plaintiffs, from Voet, Lib: 42. tit: 1, par: 12, is in point, to shew that this application may be made in the progress of the suit, if the plaintiff has reason to apprehend a longer delay than at first appeared probable. Whereas the Charter of 1801, literally adhered to, would seem to contemplate only an arrest, issued in the first instance, in lieu of the common Citation. In answer to the third ground of objection, it would be sufficient to say that, in the present instance, the defendant admitted in Court that he

believed the signature to the Deed, and to the Receipt endorsed upon it, to be his. But I am very far from agreeing that such admission would be indispensable to the success of applications like the present. According to Voet, par: 7, even if the defendant positively denies his signature in open Court, the decree of provisional payment is only to be *postponed* until the plaintiff shall prove the defendant's signature. If, therefore, that fact be proved, in the first instance, by other evidence, the admission or denial of the defendant would be of no importance. The fourth, and last objection proceeds on the fallacy of supposing, that a bare allegation of fraud is sufficient to bar the plaintiff of his claim to this relief. On this branch of the subject, Vanderliuden, Book 3. par: 1. sect. 12, seq: "On the part of the defendant, to prevent provision or *Nantissement* being decreed against him in such cases, he must produce such counterproofs as appear to the Judge to render it probable that the plaintiff will not succeed on the merits." Indeed, if this were otherwise, and a naked averment of fraud were deemed a sufficient answer to the application, no European creditor could ever hope to avail himself of it, unless the debtor here consented to it. There is a passage in Voet, par: 9, which appears to me to bear closely on this objection: "Nor will the exception, that the sum mentioned in the instrument has not been paid, avail the defendant, if, by a renunciation of that exception"—and I cannot but think that, in the present case, the defendant's own signature to the Receipt of the consideration in six bank notes, the number and value of each of which are specified, is fully tantamount to the renunciation required by the Civil law—"or by the lapse of two years, if no renunciation have been made, the burthen of proof should be thrown, not on the plaintiff, but on the defendant who pleads the exception &c." The Court is of opinion that the plaintiffs are entitled to the security for which they have applied: And it is, therefore, ordered that the defendant do either pay the sum of £840 into Court, to abide the result of this suit; or else, that he give security for such sum as

may ultimately be directed to be decreed to be due, if any should be so decreed." Gibson and another vs. Rodney, Colombo, 12th Nov. 1830.

4. The second case on this subject arose in 1835, and though brought before the S. C. in appeal from the D. C. of Colombo, was argued, if the writer of these notes be not mistaken, before the three Judges, all of whom concurred in the following Judgment pronounced by the C. J.

5. "The plaintiffs in this action seek to recover the value of certain cloths which they allege have been sold and delivered by them to the defendant, the plaintiff being British merchants, the defendant a Native merchant. The defendant, by his answer, admits the agreement to purchase the goods in question, but denies that they have ever been delivered to him. In this stage of the case, the plaintiffs apply to the D. C. for the security of *Nantissement*, or provisional payment,—and they ground this application on the following entries in the sales book of the house:

Colombo, 23th January 1835.

30th

S. M. L. Mahamado Lebbe Markair at 2 equal monthly instalments.

□ 100 pieces checked lappets..... 6s. 7½d.—£83 2 6

Received Mahamado Lebbe.

∠ 80 pieces Book Muslin..... 7s. 9d.—£31 0 0

Received Mahamado Lebbe.

On these entries being shewn to the defendant he admits his signature to each of them, but still denies the delivery. After considerable discussion in the Court below, and due consideration of the arguments adduced on both sides the D. C. pronounces its opinion that the defendant's signature, without other corroborative proof, is insufficient to warrant a compliance with the plaintiff's application; more especially as the defendant denies the delivery of the goods, and as the Rules of Practice are silent upon this point. Against this decision the defendant has appealed; and indeed the District Judge has recorded his wish,

that a matter of so much importance should be brought to the notice of the S. C. The right of the plaintiffs to demand this security has been contested before this Court on three distinct grounds: First, it is contended that the law or practice of *Nantissement* never has formed part of the law of Ceylon, even of the Maritime Provinces. Secondly, that if it did exist as law here, as a general rule, still this would not be a case to which it would be applicable. Thirdly, that even if both the first points should be decided in favor of the plaintiffs, still the sales book, on which the plaintiffs rest their application, is inadmissible in evidence, under the 9th clause of the Stamp Regulation, No. 4 of 1827. With respect to the first and more extensive ground of objection the question was brought before the late S. C. in the year 1830, in the foregoing case of *Gibson vs. Rodney*, when it was decided that the right to demand this provisional security did form part of the Roman Dutch Law, as administered in the Maritime Provinces of Ceylon. Without repeating the grounds on which that decision was formed, it is sufficient, as regards that case, to observe that the Court, now sitting, coincides in the view then taken of the subject: and the only anxiety felt by the C. J., by whom that Judgment was pronounced, when sitting alone, has been that the question should be considered entirely an open one. The present case has accordingly been argued as unreservedly as if the question were now agitated for the first time; though the line of argument has differed considerably from that taken in the former occasion. It has been contended, on the authority of the Proclamations of the 23d of Sept. 1799, and the 22d January 1801, and of the first Charter of 1801, that the Law of Holland was only intended to remain the law of the Maritime Provinces partially, as a temporary measure, and subject to any alterations to be subsequently made. This Court can only assent to the latter part of the proposition. The Roman Dutch Law was, no doubt, introduced from the first, subject to any alterations which might legally be made in it by Legislative authority; and accordingly, various alterations

and modifications have, from time to time, been made in it. But, subject to these changes, there can be as little doubt that the body of laws and institutions "which subsisted under the ancient government of the United Provinces," continued, by virtue of the Proclamation of 1799, to be the code by which the administration of justice was to be governed, and so continues up to this day, except in so far as it has been altered, by legal authority—(vide supra, "Law," par: 3.) Then with respect to this particular right of *Nantissement* it has been contended that as this was itself a comparatively modern innovation on the Law of Holland, having been introduced into the United Provinces from France, it did not necessarily follow the general mass of Dutch Law into these settlements; and this position is attempted to be strengthened by an argument, taken up at a later stage of the discussion, that this is a right wholly unfitted for the state of commerce at present existing in this Island, and ought, therefore, to be rejected, as one of those deviations, evidently beneficial and desirable, which could seem to be contemplated by the Proclamations. Leaving, for the present, the latter part of this argument, it is sufficient to observe here, that it certainly formed part of the Law of Holland at the time of the cession of these Settlements, and, therefore that, at whatever time it may have been engrafted on the Dutch Law, it was transplanted hither, together with the stock of which it had become a part. Of the various authorities which have been cited, the only two which at all bear upon this point (for there does not appear to be a single author who expresses any doubt of *Nantissement*, in general, forming a part of the Law of Holland) are "The Dutch Consultations" and "Lybrecht on the duties of Notaries." The first of these authorities speaks of "this provision as having been introduced, not only against the practice, but also against the Common Law." This position is controverted by some of the most eminent writers on Dutch Law, and among others by Van Leeuwen in the *Censura Forensis*, where he shews that it rather runs with, than counter to the Common Law. But even supposing it to be in contravention

of the Common Law, the same thing may be said of the English Statute of Limitations, or of any other Law which is not merely declaratory or explanatory, but by which the general Law, as it existed before its introduction, is altered and controlled. The very circumstance of its introduction shews the opinion entertained of its utility, and that the Legislature considered that the pre-existing Law required the alteration.

6. "The argument, however, which has been chiefly insisted upon, as shewing that this provision of *Nantissement* does not form part of the Law of Ceylon, is that it is not a matter of Law, but of mere practice: and that, as neither the Proclamation of the 22d January 1801, regulating the practice of the P. Cs., nor the Rules of practice promulgated in 1833, for the present D. Cs., take any notice of this provision, it must be considered as tacitly extinguished. It has been urged, in support of this argument, that Voet, (Lib: 42 tit. 1) who treats so largely on this subject, only cites books of practice in the course of his discussion of it; that the exceptions to this right shew that it is matter of practice rather than of Law; that the same conclusion may be drawn from the discretionary power vested in the Court to grant or refuse it;—and it has been asked how *Nantissement* differs, in respect to its nature as Law or practice from Arrest or Sequestration?—The answer to this question will draw the attention at once to the true distinction between Law and Practice. *Nantissement* differs in no way, quoad the question whether it is to be deemed matter of Law or of Practice, from Arrest or Sequestration, except that it is not noticed in the Rules of Practice, whereas the two other subjects are, and the course of proceeding therein is laid down. But a matter is not necessarily a matter of practice because it is treated of in books of practice, or because it is tied down and limited by certain Rules of Practice. The fallacy in this part of the argument has arisen from confounding "Law" with the course of proceeding (which is synonymous with "Practice") by which that Law is to be enforced. Suitors, possess certain rights which form part of the Law: the Rules,

as to the enforcement of those rights, from the practice. Thus, Arrest and Sequestration are rights to which plaintiffs are entitled; in other words they are the Law; certain Rules define the cases *in* which, and prescribe the mode *by* which those rights, shall be exercised: these Rules are properly termed practice. (See further as to the distinction between Law and practice under title "Practice." Nor are these rights less part of the Law, because liable to certain exceptions, or because the Courts have certain discretionary powers as to the exercise of them. Then, with respect to there being no mention made of this provision in the Proclamation of 1801, or in the present Rules of Practice:—the same observation may be made with respect to Set-off or Reconvention, Edictile Citation, Parate Execution, Payment of money into Court, Security for Costs and many other subjects probably. These are all rights to which suitors are entitled,—These are, therefore, the law of the land. And yet no mention of any of these subjects is to be found in the Rules of Practice. The truth is that those rules were never intended to do more than provide for the every day practice of the courts; leaving subjects of rarer occurrence to be either provided for by future orders, if it should become necessary so to do, or to be dealt with as directed by the law authorities in which they are treated of, as has always been done in respect to Set-off, Parate Execution and others. But even if the law of *Nantissement* had been brought to the notice of those who framed the present Rules of Practice, there would have been an impropriety in giving it a place in rules by which all the D. Cs. of the Island were to be guided, since it may be doubted whether this law does exist in the law of the Kandyan Provinces. It has indeed been urged as a reason why this provision cannot be granted that uniformity is to be enforced in the Courts of the Island: but the uniformity required is in the practice, as far as possible, and not in the law; for the law does and must vary in different districts and among different tribes. To give any force to this argument, therefore, the right of *Nantissement* must be shewn to be matter of mere practice, whereas this

Court is unanimously of opinion that it is law. Another argument has been that the use of this provision will render two issues necessary, and will, therefore, make the proceedings more circuitous and prolix: but it is difficult to imagine any issue or fact, decided in this preliminary stage of the proceedings, which would not tend to shorten and simplify the points ultimately to be decided. The enquiry to be entered into, as to granting or refusing this security, will not diverge from the route by which the merits must finally be tried: it will pursue the same direction, though it will not always reach the final conclusion.—Again, this proceeding, it has been said, is unnecessary, inasmuch as every possible remedy is already given by the right of arrest and sequestration. But the first of those remedies is against the debtor absconding, the second against the fraudulent alienation of his property; whereas the security of provisional payment is directed against a third kind of evil or injustice,—that occasioned by delay. It is also said that with the exception of the case of Gibson vs. Rodney, not a single instance has occurred in which this provision has been demanded in any court of justice, since the cession of the Island to the British. This is very possible; but if the right exists, it is not the less law, because hitherto suitors may not have known of its existence, or may not have thought it expedient to exercise it.

7. “The second objection to this application is that, even admitting *Nantissement* to be the law of the Maritime Provinces, generally, this is not a case which falls within the general rule. It is admitted that a merchant’s Day-book is one of those documents on which provisional payment may be demanded, but then it is urged that as the Dutch Law requires that document to be supported by the oath, or strengthened by the death of the merchant, (Voet, ut supra, par: 6) but in the present instance the merchant is still living, and as by the new system of practice no oath can be administered to a party in a suit, therefore the grounds of the application remains incomplete, and the right to *Nantissement* cannot be enforced.—But though the oath is abolished the Rules of Practice have substituted the examination of

the party, under penalty if he should practice deception; and this Court is of opinion that the declaration, thus substituted, would be fully equivalent to the oath, for the purpose now before the Court. As a mode of finally deciding a case by reference to the oath of the opposite party, the mere declaration would not be received instead of the decisory oath, unless, indeed, the adverse party were to say he would be content to leave the point at issue to the declaration, in open court, of his opponent. But on a question like the present, where the object is merely to satisfy the mind of the court, a preliminary step, whether the goods were delivered or not, it is difficult to imagine a case in which the examination, not merely of the plaintiff but of the defendant, and not merely by the court but by each other, would be more likely to promote the discovery of the truth. And here the court cannot but observe that this right of *Nantissement*, so far from being unfitted for the state of commerce, or the mode of administering justice in these districts, seems to go hand in hand with the main objects which the new system of judicature proposes to itself, speedy decision, namely, and the extracting, as much as possible, of the facts, from the lips of the parties themselves.—(Vide supra par. 153 where this part of the Judgment has already been cited.)

8. “ Lastly, it is contended that this book is inadmissible in evidence at all, under the 9th clause of the Stamp Regulation, No. 4 of 1827. The first part of that clause, as far as relates to the present question, enacts. “ That all contracts and “ agreements for the future purchase or sale of goods; and all “ bills of parcels or other memorandum whatever of any bargain or sale already concluded concerning any goods or other “ property already purchased or sold, which shall contain any “ recital of the terms of such bargain or sale, or any mention “ or stipulation concerning the time or mode of paying the “ amount due, or for the payment of any interest on the “ amount due for the same (whenever it is intended that “ such bill of parcels or other memorandum shall be binding on and be signed by the parties thereto, or any or

“ either of them ”) shall bear a certain stamp duty. The latter part of the same clause provides, “ That nothing in this “ or any other Regulation contained shall be construed to “ prevent the admission of Account Books &c., not containing “ such stipulations or agreements as are hereinbefore required “ to bear a stamp.” Now the entry in the present case certainly does contain “ mention concerning the time of payment,” and the Court has felt some difficulty, and has entertained some doubts, as to the true construction of this clause; and, as to its applicability to the case under discussion. But after mature consideration, the Court is of opinion that there is nothing in the 9th clause to prevent the production of the Account Book, for the purpose for which alone its production was intended. The latter part of the clause must be taken with reference to the beginning, and cannot be carried beyond the fair import of that part. Now the import of the first part, divested of its technical garb, and put into familiar language, is that Bills of parcels &c. which stipulate for the time, or mode of payment, or for interest, if intended to be binding on the parties with respect to such stipulations must be stamped; in other words that these memoranda shall not be used as cloakes to cover agreements which, if couched in the usual form, could require stamps. It has not been said, nor is there any thing to shew, that the mention of the time of payment in the present instance was intended to be binding on the defendant nor was the book produced with any such view. This part of the entry may have been made merely as an aid to the plaintiff’s memory. The 16th clause of the Regulation has also been cited to shew that any person producing in Court, whether in evidence or for any other purpose whatsoever, any deed or other instrument required to bear a stamp, and not duly stamped, shall be fined; and all Courts are required to enforce the penalty. But this is not “ a Deed or other Instrument requiring a stamp,” because, as the mention of the time of payment does not appear to have been intended to be binding on the parties, the Account Book cannot be said to contain “ a stipulation:

“ or agreement hereinbefore required to bear a stamp,” and does not, therefore, fall within the exception introduced into the concluding proviso of the 9th clause. For the mere purpose, therefore, of shewing that such a sale took place on such a day, but not for the purpose of shewing a promise to pay at a certain time, the Court is of opinion that the Account Book was admissible evidence. And the Court has arrived at that conclusion, not merely on principle, applied to the circumstances of this case, but on the authority of certain decisions in England, from which it appears that unstamped instruments may often be admitted for collateral purposes. Thus, an unstamped agreement has been received as evidence of an acknowledgment contained in it; that is, it was abandoned as a direct proof of agreement, and only resorted to for the collateral purpose of shewing some acknowledgment or admission of the party. (*Wheldon vrs. Matthews*, 2. *Chitty's Rep*: 345.) So an account of goods and cash furnished to the defendant, and signed by him as received, was refused as evidence of the actual receipt, because not stamped; but the Court of K: B: allowed it to be produced in Court to refresh the memory of the witness who was also permitted to state, from the account, that each item was called over to the defendant, and that the defendant admitted that he had received the same. (*Jacob vrs. Lindsay*, 1 *Eart.* 440 and see also title “*Debtor and Creditor*” p. 33, and “*Stamp*” par: 9 and 10.)

9. “It is, therefore, ordered that the plaintiff be called upon to declare whether the goods were really delivered to the defendant; that the defendant, or his Proctor, be allowed, as usual, to examine the plaintiff on this point, and, in case of such examination, that the defendant have notice to appear, to undergo examination as to this point by the plaintiff and that if the plaintiff shall declare that the goods were delivered, and if after the mutual examination of the parties, supposing such mutual examination to take place, the D. C. shall see no reason to doubt the truth of such declaration, provisional payment be required,” (*Clark & Co. vrs. Mahamado Lebbe*, Colombo, November 1835.

10. In another case, which was an action on a bill of exchange to which the defendant admitted his signature, but pleaded want of consideration, the plaintiff, on the 25th February 1835, moved for provisional payment, upon which the D. C., on the 9th March, decided that the defendant ought to have an opportunity of establishing any exception which he might have to this motion, whether by the examination of the plaintiff or by other proofs. The case accordingly proceeded, and after one or more stages, the plaintiff, on 20th May, moved for an early day of hearing, or provisional payment. But the D. C. saw no reason for taking the case out of its regular course, and, as to the provisional payment, considered the point as already decided. Against this last refusal the plaintiff appealed: but it then appeared that the defendant was on the continent of India, and considering how important it was that he should be present on the decision of this application, the S. C. doubted whether it was fair towards him to acquiesce in the refusal, while he was in the Island, and then to press for conditional payment when he was absent. On the assurance, however, of the defendant's Proctor, that the defendant was daily expected to return, it was ordered, with the consent of both parties, that as soon as the defendant arrived, the earliest day, consistently with the convenience of the D. C. should be appointed for hearing the case: The plaintiff's right to provisional payment, if circumstances should justify its being granted, not to be affected by the delay. No. 6,309 Colombo, South, 27th May 1835. Upon this case it may be well to observe, *first* that the application for *Nantissement* may undoubtedly be made at any stage of the suit, even after appeal. Voet ubi supra: par: 12: Gibson vs. Rodney, supra: nor would a refusal by the Court to decree it in an early stage, even though acquiesced in or affirmed, debar the party from repeating his application at a subsequent period, if circumstances should have so changed as to give him a better right to demand it. Secondly, that the D. C. scarcely appears to have adverted sufficiently to the nature of the inquiry, in the case just mentioned, when it refused to

appoint an early day for it. The only point necessary to be ascertained, in order to decide the question of *Nantissement*, was that which the defendant had raised viz: Whether consideration had been given for the bill. This, as in most questions of an interlocutory nature, ought to have had precedence of ordinary trials on the general merits.

11. The following suggestions may perhaps be of use to some of the District Judges, though it must be remembered that they were only founded on the individual opinion of the writer of these notes. A D. J. applied to the Chief Justice in December 1833 for instructions, whether he ought to comply with a motion to compel a defendant to pay money into Court before decision. The action was on promissory notes which were over due. There was a strong *prima facie* case against the defendant and some suspicions as to his fairness,—After observing that the rule of the civil law which gives this precautionary remedy might be considered as still in force (as to which see the preceding cases) the Chief Justice observed that the motion under consideration was rather to be favored, provided the plaintiff had established a good ground for it in the first instance, and the defendant did not show sufficient reason against it, in the second. As to the first point the promissory notes are produced, the defendant's signature to them is proved and the day of payment had elapsed. The second question whether the defendant had any sufficient ground of objection to urge against the application still remained for inquiry. And here the District Judge must exercise his discretionary powers. The true test would be, whether the defendant could show to the satisfaction of the Court, that the plaintiff in all probability, would not ultimately succeed in establishing his claim. But this must not be allowed to rest on mere suggestion. As on the one hand, the Court would not be justified in listening to the plaintiff's motion, on the bare assertion of the plaintiff, without the production of the promissory notes, and proof of the signatures; so on the other hand some *prima facie* evidence should be required, either in the shape of

Documents or the oath of a third person, or the like; that the defendant had a real *bonâ fide* defence: As for instance, that value had not been received, or, in any other way; that the plaintiffs had not fulfilled their part of the contract. For this purpose, the new rule, allowing the examination of parties, both by each other and by the Court, would be found of great service. The defendant should be called upon at once to state his grounds for resisting the plaintiff's claim, and to show in what way he proposed to support those grounds. If he refused to assign any, or if, when assigned, they appeared insufficient the Court might order the money to be paid in without hesitation. The defendant should also be at liberty to put any questions, relevant to the subject, to the plaintiff, as directed by the 29th Rule, and any admission of the plaintiff would of course have as much weight with the Court, as if the facts had been proved. This mode of proceeding, if cautiously acted upon, would go a great way towards checking unfounded defences, made merely for time. But each case must be decided according to the discretion of the Court, as applied to the question, whether Justice would be best served, by granting or withholding the motion. The S. C. would give any further assistance in the way of instruction to the Judge; or either party could have an immediate appeal and decision against the interlocutory order of the D. C., L. B. 23d 24th December 1833.

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#### NONSUIT.

See title Judgment, p: 245 and Practice, paragraph 2 to 10

#### NOTARY.

Responsibility of, strictly enforced: Drawing instrument on an insufficient stamp, liable to his employer, independently of the Stamp Regulation. Authority of Voet, as to the general liability of Notaries.

1. The responsibility of these Officers of the public, who have so much in their power, and in whom such extensive confidence is necessarily reposed, ought to be generally understood and vigilantly and scrupulously enforced, whenever by negligence

or misconduct, they render themselves liable for injury or loss to their employers. On this subject only one case occurs to the writer in which the S. C. has been called upon to give an opinion. A person brought an action in a D. C. on a Notarial instrument which appeared, when produced in Court, to be insufficiently stamped, and was therefore inadmissible in evidence under the 15th clause of the Stamp Regulation No. 4 of 1827. The plaintiff, in consequence, not only failed in his action, but was fined under the 13th or 16th clause, and being unable to pay the fine, was committed to prison. And he brought the present action against the Notary on the Regulation to recover compensation for the various Damages which he had thus sustained, in consequence, as he alleged, of the Notary's negligence. The Notary had also been fined under the 13th clause, but the fine had been remitted by an Act of Grace. The D. J. doubted whether the plaintiff had any right of action against the Notary on this ground; first, because he himself had been found guilty of fraud on the revenue, and therefore could not sustain an action against the partner of his fraud; and secondly, because the Regulation does not expressly provide for such remedy: For though the 13th clause directs that "any Notary who shall be convicted of having written or attested the execution of any such deed or instrument [unstamped or insufficiently stamped] shall incur a fine of £20 *in addition to any Civil responsibility to which he may be liable*" the D. J. considered that these words had reference to ordinary negligence on the part of the Notary, and not to negligence or fraud as regarded the Stamp. Not feeling satisfaction on the subject, the D. J. applied to the S. C. under the 47th rule for instructions; and was informed in answer, that although the question was one of law rather than of practice, to which latter subject the 47th rule was applicable, still as no decision had been made, he would readily be assisted by an opinion, by which expense and delay might be saved to the parties. It was accordingly suggested. "That the Libel of the plaintiff ought not to be rejected, as affording, if true, no ground of

action; that the plaintiff had made a mistake in resting his action on the Regulation, because his right against the Notary, if that person had acted either fraudulently, negligently or even unskilfully, existed independently of any positive law, or Regulation. That the Regulation, it was true, enforced the penalty on any party executing the unstamped instrument, which was necessary, it must be presumed, for the protection of the Revenue; But that unless the plaintiff could be shewn to have done this knowingly, and with the deliberate intention of defrauding the Revenue, this enactment by no means fixed upon him the brand of fraud which would incapacitate him from suing the person whose peculiar duty it undoubtedly was, to see that all instruments prepared by him were on sufficient Stamp; that the expression "in addition to any Civil responsibility to which he may be liable" could only point at responsibility incurred by the Notary towards his employer, for a breach of the Regulation itself; and must be supposed to have been inserted, in order to prevent the Notary from pleading the penalty, to which he had subjected himself criminally at the suit of the Crown, to any Civil action which his employer might bring against him for damages, that it would have been superfluous and irrelevant to have thus maintained his responsibility for ordinary negligence and unskilfulness because as such liability could in no way be affected by the Regulation the provision would in that point of view have been useless; that on this ground, therefore the Notary ought to be called upon to answer, and the parties to go into evidence; but that another reason, why the plaintiff should have this opportunity of showing with whom the fault really lay was, that if it should clearly and distinctly appear that the fraud or even negligence rested wholly with the Notary, it would be a good ground for applying to Government for a remission of the fine imposed upon the plaintiff, and it was possible that the plaintiff might be able to prove that he had actually advanced the money to the Notary for the purchase of the requisite Stamp." L. B. 12. 17. December 1833.

2. As regards the liability of Notaries, as adverted to in

the foregoing case. Voet tells us that "if any of the formalities, which the law or custom require, be omitted and on that account the instrument, more especially a Will, becomes inoperative, the Notary is liable to make good the damage sustained by the injured party, since the fault lay with him, for professing an art in which he was not skilled, or for exercising his calling negligently." Lib. 22. tit. par. 3.

4. In Ceylon it is safer that all the Witnesses to a deed should be examined, even though the instrument be Notarial: Supra 112.

And see title, "Land" and Sequestration."

Vide *infra*, title Obligation par. 4. Where an instrument, though invalid as a mortgage, because not executed before a Notary, was still held good as a simple bond.

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## NUISANCE.

How to decide whether acts be nuisances, or not: public—private remedy, by prosecution, or Civil action. Reasons against abatement by act of the party.

1. A nuisance is defined to be "any annoyance which occasions hurt, inconvenience. or damage." But what shall be such hurt, inconvenience, or damage, as gives the public or a private individual a right to complain, must be decided by law, and not be left to the fanciful or fastidious temper of the complainant. Public or *common* nuisances, as they are called by the English law, consist in doing a thing to the annoyance of H. M. subjects generally, or in neglecting to do a thing which the common good requires," Hawkins P. C. Ch: S. 1. Thus, annoyance on public roads, bridges, or rivers, by rendering them inconvenient or dangerous, either positively by actual obstruction, or negatively by want of reparation, when it is the duty of any particular persons to keep them in repair, are public nuisances, so offensive trades, manufactures, or practices, which are detrimental to the public health, or the peace of the neighbourhood; but with respect to this class of Nuisances, reference must be had to the custom of the place, and the length of time which the object complained of may have already existed. Gaming houses

[supra 209.] Brothels and all other disorderly houses are public nuisances, *eaves droppers*; who occupy themselves with picking up or hunting for tales of scandal and slander, for the purpose of dissemination and mischief, and *common scolds*, which latter species is supposed to belong only to the softer sex, are also held to be public nuisances by the Law of England, and indeed there can be no doubt of their being properly so classed in ordinary language. But as Slander is punishable or actionable in itself, and scolding is also an offence, when carried beyond ordinary domestic limits, so as to threaten breach of the peace, it is scarcely necessary to consider them under the denomination of nuisances.

2. Private nuisances consist in acts or neglect of acts by which, though the community at large cannot be said to be affected by them, an individual is interrupted in the legal enjoyment of his dwelling or Land. As regards annoyances to the person, these would more properly be classed among other specific offences. Nuisances to the dwelling, according to the Law of England, are by constructing another building so near as to over-hang it, and to throw the water from the new roof on the more ancient one, or so that the windows of the latter, provided they have been enjoyed for any length of time, are obstructed, or by corrupting the air with noisome or unwholesome smells. The suffering a house to go to decay to the damage or danger of the next house is also a nuisance. But the depriving a man of a mere matter of pleasure, as of a fine prospect; by building a wall or the like, is held not to be a nuisance, in the legal sense of the word, because it takes away nothing absolutely necessary, or convenient. Nuisances to Land consist in any act, tending to the injury of the cattle, trees, crops, or other produce, as by erecting a manufacture, the vapour and smoke of which have that effect, or if a man neglect to clean a ditch which he ought to do, by which his neighbour's land is overflowed, or if he stop or divert the water which ought to irrigate his neighbour's Land, or cause it to run in too great quantities: This class of nuisances must frequently

give rise to complaints in Ceylon, where artificial irrigation is so indispensable; and the rights of the respective parties often require long investigation and great patience, before they can be satisfactorily adjusted. A case was long and keenly contested in the D. C. of Hambantotte, No. 39, as to the custom, by which the water necessary for Lands lying on different levels ought to be regulated. Much evidence was gone into on both sides, but the result was not sufficiently certain, to furnish any general rule or principle for the regulation of this highly important branch of rural economy. The stopping a private right of way, which belongs to a man's lands, is a private nuisance, as a similar obstruction to a general right of way is a public one.

3. The foregoing enumeration of nuisances, as given by the English Law, will be found not inapplicable to Ceylon, nor does the Civil law, it is believed, vary much from the principles above laid down. It must be remembered that the injuries which have been particularized are given as examples of those which most frequently occur; not as including every possible case of nuisance. Other annoyances, falling under the same principle, must be viewed in the same light and remedied in the same manner.

4. And as regards the remedy: Public nuisances must be prosecuted criminally, for it would be unreasonable to subject the author of the nuisance to a separate action by every member of the community. But if a person can show any special damage, sustained by himself individually, he may bring his action, even though the nuisance be a public one. With respect to the "abatement" of nuisances, as it is called by English law, that is the quietly removing them by any one who feels the inconvenience; it is earnestly recommended that, in Ceylon, this remedy be never adopted, unless in cases of the most urgent necessity: Relief can always be obtained from the D. Cs. at so small an expense of time, or from the S. C. under the 49, Clause of the Charter, in certain cases [*supra* title Injunction, p: 229.] that it is infinitely better for the party aggrieved

to have recourse at once to the authority of the Law, than, by taking the law into his own hands, to run the risk of personal contest. Very many of the riots and disturbances which come before the Courts of Ceylon arise out of attempts by parties to vindicate, by their own authority, and with their own means, their violated rights, or those which they imagine to be such. And the result of such attempts frequently is that the party who complains of injury to his property is sentenced to punishment, for violence done by him to his neighbour's person. The course recommended to the D. Cs. to be pursued upon conviction of a nuisance, when no actual mischief appears to have been intended, is to order the Defendant, to remove the obstruction or other nuisance; and in default of compliance, or if he should afterwards repeat it, then to award fine or imprisonment against him: And where a D. C. in a case of that nature, imposed a fine in the first instance, the S. C. referred the case back for reconsideration; suggesting that if the D. C. should be of opinion that the order of removal would produce the desired effect, the Judgment might be so modified. No. 151. Amblangodde [criminal] 2nd December 1835. And on another occasion, where the Defendant appealed against a fine imposed by the D. C. after an order to remove the nuisance had been issued and disregarded, the S. C. observed. "That as the forbearance of the D. C. in the first instance appeared to have had no effect on the Defendant, it had become necessary to impose something more than a mere nominal fine; and that the Defendant must expect that the amount would be increased on every future occasion in which he should be proved to have caused a similar obstruction." No. 158. Amblangodde [criminal] 9th December 1835." The writer is unable to say whether the obstruction was to a road or to a water course; but there would be no difference between the two in point of principle. It must be recollected that if it should appear that the obstruction, or whatever may be the act complained of, was done with a malicious intention of injuring a particular person or set of persons, such act would assume a much graver character, and would

come under the denomination of malicious mischief. With respect to encroachments &c. under the Colombo Police Ordinances, see title "Police."

5. The remedy for private nuisances is by action against the parties occasioning them; by which action the Plaintiff may either seek to recover damages for any injury he may prove he has sustained, or to obtain an order for the removal of the nuisance. By the law of England this latter remedy cannot be obtained by ordinary action, except indeed by means of damages, which would probably be increased on every fresh action, till the Defendant should give up the contest; every continuance of a nuisance being a fresh ground of action.

There is nothing however, to prevent the District Courts in Ceylon from ordering a defendant to remove the nuisance, if that should be the remedy prayed for by the plaintiff.

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### OATH.

Must be in the form prescribed by law, and by due authority. By parties to a suit abolished, declaration, in some cases, substituted:—Fees to priests for administering.

1. It is laid down by some of the highest authorities on English law, and it is a position highly proper to be observed in Ceylon, 1st that all oaths must be such as are directed or allowed to be administered by the law; and 2ndly that "if they are administered by any person not duly authorized so to do, they are not only void, but the person administering them are guilty of a high contempt, and punishable by fine and imprisonment" As regards the first branch of this position, we have seen under title "Evidence," par: 141 and seq: that the oath to witnesses must be administered in the ordinary and prescribed form: though the ceremony to be used in administering it must depend on the religion, and sometimes on the caste, of the witness. With respect to the 2nd part of the proposition we have also had occasion to observe, title "Inquest" paragraph, 233, that no one but the D. J. [the higher authority of the S. C. of course excepted] is legally authorized to

administer an oath : And the supplementary rule No. 14th October 1833 by which the service of process may be certified by the declaration of the serving officer, instead of his oath, was passed, in order to obviate the inconvenience of making the officer travel to the D. C. from a distance for the purpose of being sworn. The concluding part of the position above laid down follows as a matter of course, for any usurpation of Judicial authority, by a person having no colourable title to exercise it, must tend to bring regularly constituted tribunals into contempt, besides misleading the parties to such unlawful swearing, and tempting them probably to the commission of illegal acts.

2. Oaths by parties to a suit are now wholly abolished, and the most extensive examination of each other and of both or either of them by the Court, has been substituted in their place: supra 151. For some purposes the declaration of the party is now considered equivalent to his oath under the former system ; as on application for *Nantissement*, supra 153 and title "*Nantissement*" paragraph 7. And a plaintiff, a foreigner, being unable to give security for costs, when called on so to do, was directed by the S. C. to enter into his own bond for payment, instead of swearing that he would satisfy them, according to the civil law practice, supra 77 8. The oath of the applicant for edictile citation can now also be no longer received ; supra 103. As regards fees to be paid to priests for administering oaths, the S. C. has recommended, where no priest was regularly attached to the D. C. for that purpose, that the fee which had heretofore been paid to him for each oath, so administered, should continue to be paid till a priest should be appointed L. B. 2d September 3d October 1835. It is to be observed, however, that such fees ought to be charged to Government, and not be borne by the parties, because the Court fees prescribed by the table of 1st October 1833 are supposed to include all charges, and the Government impliedly undertakes in consideration of receiving those fees, to furnish all Court Officers who may be necessary for the administration of Justice.

## OBLIGATION.

Meaning of the word more extensive in the civil, than the English law, paragraph 1. Consideration essential, by whom consideration, or the want of it, must be proved, par. 2. When demand of performance necessary par. 3. Instrument may be good for some purposes, though invalid for others 4 and 5. Must judgment on bond be limited to the penalty? 6 Ordinance against frauds 7. Master and servant 8. Obligations express or implied: If former be proved party cannot rest on the latter, 9. Case to that effect, 10. But express contracts must be proved, and are not to be presumed; case on that point 11. Obligations arising from crimes 12.

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1. In the law of England, the word, obligation is generally used to signify a bond, conditioned for the payment of money, or performance of other acts, under a specified penalty. By the civil law a much more extensive meaning is given to this word; and every right which one man possesses to call upon another to do, or abstain from doing, any act, whether such right originate in mere natural justice or from agreement, expressed or implied, [as to which distinction a few observations will occur presently] written or verbal, or from the commission of any crime or offence, by which another is injured, form the foundation of an obligation. All those contracts which in the English law are called *assumpsits* by which one takes upon himself or engages to pay, do or not to do a stipulated thing, fall within the civil law term "obligation," The subject is too extensive to admit of its being discussed, however briefly or generally, in these Notes: A discussion too, which the numerous treatises on the subject, render the less necessary. All therefore, that it is proposed to do here is, to notice such decisions as have been made by the S. C. since the establishment of the new Charter, on the subject of obligations.

2. Every obligation, whatever be its foundation, and whether the performance of it be secured by written contract or rest on legal implication for the enforcement of it, must have an ade-

quate consideration, otherwise no obligation can be said to exist. Accordingly, the want of consideration is one of the most frequent defences to actions on contracts; and even on money bonds, the defendant often alleges that the consideration money was never paid over to him within two years from the date of the instrument, when it would seem that the obligor has the power, by denying the payment, of throwing upon the obligee the proof of that fact: Voet Lib 12. tit. par: 31. though, according to Van Leeuwen, [if the writer's memory does not fail him, for he has not that little work before him] it is incumbent on the debtor, even though the two years have not expired, to prove the non-payment; After that period, however, there seems no doubt that if the obligor wish to set up this defence, he must be prepared to prove it: Voet par: 33. An action was brought in 1835 on a bond for money lent, dated in 1828, which the defendant admitted, but denied the consideration; The plaintiff contended that after so long a period, the defendant was bound to show that the money had not been paid; and that in default of such proof, payment must be presumed. The D. C took the same view of the case and gave judgment for the plaintiff; and the S. C affirmed the decree No. 693, Jaffa 2nd May 1835.

3. Whether an obligation must be performed without demand or whether a demand be necessary before any cause of action can exist must depend on the nature of the contract, and the terms of it, if they be express. An action was brought on a bond for money borrowed by the defendants who thereby promised that certain title deeds, about to be executed in favor of one of the defendants, should be delivered to the creditor, the plaintiff, [no time being fixed] who should then receive a deed of mortgage for principal and interest due on this and other bonds, all of which should then be returned. This bond was dated 5th March 1834, and the action was commenced on 20th June following. The defendants admitted the bond, but alleged that the time which had elapsed, three months and  $\frac{1}{2}$ , was not sufficient for the execution of what they had agreed to per-

form. The D. C., however, thought otherwise, and decreed for the plaintiff. On appeal, it was further contended that the plaintiff had no right of action, without showing a demand of performance on his part, and a refusal by the defendants, The S. C. affirmed the decree observing "with respect to the last objection, that no demand, in the opinion of the Court, was necessary; that the defendants had undertaken to perform certain things, which, when performed, would have furnished a substitution of the instrument now in suit,—that it was for the defendants, therefore, to perform those engagements, if they wished to relieve themselves from their liability under the original instrument—With respect to the objection as to time, the S. C. was of opinion that three months and a half allowed a reasonable time for the performance of what was to be done; that if, when the action was brought, the defendant had averred that they were ready to give the stipulated security, the D. C. might possibly have stayed the proceedings, in order to give time for the execution of the mortgage bond, but that it did not appear that the title deeds of the property, which was to form the subject of the security, had as yet been passed in the name of the defendants. No. 492. *Cultura* 31st December 1834.

4. A bond or other instrument may sometimes, for want of certain formalities or requisites, be declared invalid for the object for which it was more expressly intended, and yet stand good for other purposes. Thus in one action on bond by which the defendant mortgaged certain land for a debt of his father of 60 Rix-dollars, which debt he promised to pay with interest, the defendant objected among other defences, that the instrument had not been executed before a Notary, and was therefore void, under Regulation No. 20 of 1824 sect. 2. The D. C. was compelled to admit the objection, but decided that the instrument was still valid, as a simple money bond, and gave judgment upon it for the amount accordingly. And the S. C. affirmed that decision; No. 3640 *Chilaw and Putlam*, 26th June 1834 on circuit.

5. The following case was decided on the same principle:

An action was brought on a bond, or rather agreement, by which the defendant agreed that her daughter should marry the plaintiff's son; and a penalty was annexed of 300 Rix-dollars, if either party should break the contract, which the defendant had done. It appeared that the instrument bore a stamp of 1s. 6d. which the D. C. considered insufficient under Regulation No. 4 of 1827 sect. 9 and table E. and the action was accordingly dismissed. On appeal the S. C. considered that this instrument fell within the third exception at the foot of the table E "Agreements and contracts to marry," but that the penalty of 300 Rix-dollars by which the parties mutually bound themselves to the performance of the contract was not protected by the exception, and could not be recovered; that the instrument must therefore be considered as a naked contract, without penalty, for the intended marriage: And it was referred back to the D. C. to hear evidence on both sides, as to the execution of the contract, the alleged breach of it, and any damage which the plaintiff might have sustained by the nonperformance, to which amount of damage the judgment must be limited, supposing it should appear that the defendant had broken the contract: No. 604. Trincomalie, 27th August 1834 *infra*; title Stamp par: 7. On the inquiry so directed, the plaintiff was unable to prove any damage; and the action was accordingly fully dismissed on that ground.

6. It has been matter of some doubt and controversy in the English Law, whether judgment can be given on a bond for a sum exceeding the penalty. In Ceylon, where no technicality of pleading exists, there seems no good reason, why the damages awarded should be so limited: For if the instrument be established, it may be received merely as evidence of the contract, and if the debt be shewn to exceed the penalty, there is no reason for tying the plaintiff down to the amount of that penalty or for considering his claim to rest on the terms of the bond further than they may be necessary to shew the intention of the parties. Thus an action was brought for the arrears of a bond, given by a husband for maintenance of his wife, on their separation. The arrears amounted to £95 and the penalty of

the bond, which might have been sued for on any failure to pay the stipulated annuity, was only £ 30. The defendant contended that he was only liable for the latter amount: But the D. C. gave judgment for the whole arrears, and the S. C. was prepared to affirm that decision, but the case was compromised No. 893. Galle 11th September 1835 on Circuit.

7. As regards the mutual performance of contracts by parties, and as to what shall be sufficient writing and signature on a contract for land to satisfy the Ordinance against frauds, see No. 109. Caltura, supra 205 et seq.

8. As to contract of hiring between master and servant and the remedy given to the former by the Colombo Police Ordinance No. 3. of 1834, see title "Pleadings" par: 19 and title Police, par. 3.

9. A distinction was mentioned in the beginning of this title between *express* and *implied* obligations, the former is where a special contract is entered into, whether verbally or in writing, as to do certain work, or furnish certain goods at a price agreed upon and fixed between the parties. The latter is where the work is done, the goods are sold, or any other service rendered without any price or remuneration having been agreed upon; in which case the law raises and implies an obligation and undertaking, on the part of the person for whom the service has been rendered, that he will pay the person rendering as much as the goods may be worth, or the workman may deserve for his labor &c. [we have already taken occasion to explain the meaning of the *quantum meruit* and *quantum valebat* supra 57, note] And this obligation the law not only implies but enforces.—It sometimes happens that a party is unable to prove the express agreement, which he alleges was entered into, in which case, generally speaking, he may be permitted, provided the service has actually been performed, to shew what that service was reasonably worth, and so recover the amount on the *quantum meruit*, or implied obligation. But if an express agreement be proved to have been entered into, he cannot, on failing to shew performance of it on his part, or because he may find it advantageous to

abandon it, give up such express contract and have recourse to the obligation or undertaking, which the law would have implied, in the absence of any express agreement.

10. Thus an action was brought by a medical practitioner for £54 being for the value of medicine and attendance furnished to the defendant; the defence was that the plaintiff had entered into an agreement on the principle of "no cure no pay," as it is called in familiar language; that is, he was to receive a handsome remuneration [no sum however being specified] if he succeeded in curing the plaintiff; and nothing if he failed: And as it appeared that the cure had not been effected the defendant contended that he was not liable for any thing beyond a sum of about £8 which he had advanced to the defendant for the purchase of medicines. The evidence was somewhat conflicting as to the agreement; but the D. C. gave credit to the witnesses on the part of the defendant who proved a verbal contract to the above effect and thereupon dismissed the action. On appeal to the S. C., it was contended that the plaintiff had a right, notwithstanding his failure in the promised cure, to recover a reasonable price for his medicines and attendance, that as no sum was specified, to which the plaintiff would have been entitled in case of success, there was no mutuality in the contract, and the plaintiff would have been at the mercy of the defendant. The S. C. after taking time for consideration, affirmed the decree of the D. C. on the following terms "The plaintiff rests his claim on the implied contract, which the law considers every man to enter into with the person whom he employs, to give him a fair remuneration for his services. The defence set up is an *express* contract, by which the plaintiff agreed that, if he did not effect the defendant's cure, he should not be entitled to any thing. It is admitted that the plaintiff failed in curing the defendant, and the only question, therefore was, whether this express agreement, which must be taken as fully established by the evidence, was a legal one, for if it were, there is an end of the implied contract, on which the plaintiff has rested his cause. The law only

raises a contract by implication, where the parties have failed to state their agreement in express terms. The doubt which occurred to this Court, when the case was argued, as to the legality of this agreement, arose out of the uncertain terms on which the remuneration, in case of success, was promised. For it appears that the Defendant promised the Plaintiff that "if he succeeded in curing the Defendant, he should be handsomely paid for his trouble." The Court entertained strong doubts whether, on a promise so vague and undefined, the Plaintiff would have been entitled to recover any thing against the Defendant, even if he had succeeded; at least beyond the sum he had already received. And if that had been so, there would, as the Plaintiff contends, have been no mutuality and the contract must have been treated as a nullity. While this point was under consideration, however, a reported case has presented itself, so similar to the present one; that the Court feels bound to decide in accordance with it. The case is that of *Jewry vs. Busk*, 5 Taunton 302, where the Defendant wishing to let his house, told the Plaintiff, that if he would take care of the house, and shew it to persons applying for it, he would make the Plaintiff a handsome present. "It appeared also that the Defendant had paid the Plaintiff some small sums, as in the present case, amounting to £2; upon this evidence the majority of the Court of Common Pleas considered that the Plaintiff was entitled to recover a reasonable recompense, such as a Jury would award him. The C. J. dissented from that view of the case, which is certainly a sufficient justification of the doubts entertained by this Court on the subject: but still the decision of the Court was in favor of the contract. On this authority, therefore, the Plaintiff would have been entitled to remuneration if he had succeeded. The difference between that case and the present is, that the Plaintiff did not, as in the present instance, agree to forfeit all remuneration if he failed in the desired object. That stipulation, however, certainly cannot affect the validity of the contract. It is a stipulation which in the liberal professions, espe-

cially in that of the law, would be infinitely better avoided, [vide *infra* title Proctor.] But if entered into, unless contrary to some positive law or order, a Court of Justice is bound to enforce it in the same way as if a person were to agree to clear a forest, or drain or marsh, and to forfeit all claim for remuneration, if he did not succeed. An express agreement, therefore, having been proved to have been entered into by these parties and that agreement containing nothing illegal to invalidate it, the Plaintiff must stand or fall by the terms of it: And as the condition on which alone he was to be entitled to remuneration, has not been performed, it follows that the Plaintiff has no claim at law against the Defendant, and consequently that the action was rightly dismissed." No. 3352 Colombo South 2nd May 1835.

11. But in order to defeat a claim on an implied obligation for the value of services by setting up an express contract, such contract must be shown, to the satisfaction of the Court, to have been entered into by both parties and must not be left to mere presumption or inference. For if the law is to presume or imply any contract it will rather be the ordinary obligation to pay a *quantum meruit*. Thus in an action also brought by a Medical Practitioner to recover £17 for medicine and attendance furnished by him to the Defendant and his family; the Defendant objected to the amount, on the ground that the Plaintiff had only attended him as the substitute of his [the Plaintiff's] father who had been accustomed to attend the Defendant's family at a fixed salary of Rds. 50 per annum. It appeared, in evidence, however, that the Plaintiff's father had discontinued his attendance, that the Plaintiff had been called in by the Defendant, apparently on his own account, and not as a substitute for his father, and that the propriety of the charges was not called in question, supposing that the Plaintiff was entitled to shape his demand in that way. The D. C. gave judgment for the Plaintiff for the amount claimed. The Defendant appealed, on the grounds, First.—That the Plaintiff had not proved that he had rendered the special services, and

furnish the specific medicines, for which he claimed. Secondly That it was to be presumed that the Plaintiff never expected a higher remuneration than his father, and that he was not entitled, therefore, to a *quantum meruit*, exceeding that amount. The S. C. affirmed the decree of the D. C. as follows: "With respect to the proof of the medicines and attendance furnished to the Defendant, and of their value, the Plaintiff may not unnaturally have inferred from the answer, that it was not intended to put those facts in issue, for the defence rests on a distinct ground. Taking, therefore, the fact of those services having been rendered to have been virtually admitted, and it having been proved that the charges are not unreasonable, the only question is, whether the Plaintiff must be satisfied with the same sum which it appears the Defendant had been in the habit of paying the Plaintiff's father yearly. This mode of remunerating medical attendants, by a stipulated annual sum is very common, it is believed, both in this community and all over India. But before such contract can be insisted upon, it must be shown to have been expressly entered into, and to have been reciprocally binding upon both parties. It is not contended that any such agreement was ever expressly entered into; nor indeed would it necessarily follow, that the son would agree to the terms of the father. But it is quite clear that the mutuality would have been wanting: For suppose the Plaintiff's bill had amounted to less than 50 Rixdollars, suppose the Plaintiff had only attended for one month, the Defendant requiring no attendance for the remainder of the year; it is impossible to say that the Plaintiff could have maintained an action for the whole sum of 50 Rixdollars at the expiration of the year, unless he could have proved an express agreement to that effect." No. 6675, Colombo South 16th December 1835.

12. Among the different rights or claims enumerated at the beginning of this title, as forming the subject of obligations, was mentioned that class which arises out of crimes or offences. We have seen that both the Civil Law and the Kandyan Law

permit a civil action as well as a criminal prosecution to be instituted for the same offence, *supra* 247. 8.

See Title Pearl Fishery.

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## OFFICER OF GOVERNMENT.

See Title Government.

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## OFFICER OF COURT.

1. We have seen under Title "Interpreter" par: 237. S. that the practice of allowing a Secretary of a D. C. to draw pleadings and translate documents had been discontinued, with the approval of the S. C., on the ground, that no Registrar or a Secretary of a Court ought to be allowed to take any part in the proceedings of litigant parties. On the same principle where a Defendant had been arrested for debt and it was brought to the notice of the S. C., that the same person had appeared as Proctor to move for the arrest and as Acting Secretary of the D. C. issuing the order of arrest, the C. J. directed it to be intimated to the D. J., that though it was not the province of the S. C. to inquire by what authority persons were appointed to act as Secretaries in the D. Cs., he could not but feel strongly impressed with the impropriety of the same person acting at the same time as Secretary and Proctor; and the necessity was therefore suggested of the Gentleman in question ceasing to exercise the functions of Proctor; so long as he continued to perform the duties of Secretary: L. B. 6th November 1835.

2. The reasons why the functions of Proctor should be kept separate and distinct, as regards the person performing them, from those of any Officer of the Court are too obvious to require argument. For though it is to be hoped that no person who had been judged worthy of holding an Office in a Court of Justice would be capable of abusing the confidence reposed in him, by exercising his authority in favor of his clients, still, it is quite a sufficient objection that opportunities of partiality would present themselves and that suitors might think those

opportunities had been made use of. It is true that in the Courts of Westminster Hall, attornies hold, or used to hold, the Offices of secondaries, and other similar ones: But these instances can scarcely be quoted as precedents to be followed, since the union of functions so inconsistent with each other has been a frequent source of regret, if not of complaint. When it is recollected how prone the Natives of Ceylon are to suspicion and distrust, it will be admitted that the objection presents itself with at least equal force in that Island.

3. It has already been observed under title "Appeal," p. 28 that the D. J. and Officers of his Court, is the authority to whom alone the S. C. can look for the due execution of its orders. That person and all other Officers of the Court are to be kept strictly within the limits of their duty on the one hand, and are to be supported in the due discharge of it on the other, see title "Process," par: 4.

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#### PARATE EXECUTION.

Vide supra page 173 to 183.

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#### PARTNERSHIP.

Fact of, how tried as between the partners; as regards others, Paragraph 1. case of circumstantial evidence of partnership, 2. and 3. Former case 4. Husband and wife traders, wife's property liable, 5. As a defence should be pleaded 6.

1. In the only case of any importance on this subject, which seems to have come before the S. C. since the promulgation of the new Charter, the question was, whether under the circumstances which will be mentioned, and no former contract of partnership being proved, the Defendant was to be considered a partner with one Slema Lebbe, so as to be answerable for a debt of that person. It may be useful to premise that the question, partner or no partner, must sometimes be tried by different tests, according as the matter in dispute arises between the alleged parties themselves, or between them and third parties. As between themselves a communion of pro-

fit and loss is essential to establish a partnership, and this is the true criterion by which to decide whether they are partners or not. But as regards the rest of the world, a person may, and often does, render himself liable for the debts of another, by holding himself out to the public as his partner, though in reality no community of profit or loss may exist between them. For otherwise, the person so lending his name, would be obtaining for the person to whom it is lent a fictitious credit and might induce others to entrust him with goods or money which they would probably have denied to his own unsupported application. This distinction will be found in *Hesketh Vs. Blanhard*, 4 East, 143; and many other English authorities.

2. In the case above referred to, the Plaintiff alleged that he had sold cloths to the value of 3000 Rixdollars to one Slema Lebbe, at Colombo, who had thereupon opened a Bazar at Kandy which was kept by the Defendant as his partner; that in default of payment the Plaintiff had sued Slema Lebbe at Colombo, and obtained Judgment and execution against him, by virtue of which he was in Gaol at Colombo; and that he then brought the present action, in the Court of Kandy, against the Defendant, as partner of Slema Lebbe, and also sequestered the property in the Defendant's Bazar; The Defendant by his answer denied that he was indebted either to the Plaintiff, or to Slema Lebbe, and averred that the property which had been sequestered was his own. The evidence on the part of the Plaintiff was in substance as follows: That cloth had been sent on a former occasion from Colombo to Kandy by Slema Lebbe who then came himself to Kandy and traded jointly with the Defendant. That they occupied the same shop and transacted business together, living and trading together like partners, for which reasons, and because they used to say that the stock in trade was joint property, the witnesses supposed them to be partners, as so they were generally understood to be; That Slema Lebbe told the first witness to send the cloths in question to the Defendant for sale, as his partner, not as his Agent, and

that the Defendant also told the same and other witnesses, that he and Slema Lebbe were partners in trade; that on one occasion Slema Lebbe remained in Kandy, while the Defendant went to Colombo, and returned with cloths, which he took to the joint Bazar, and that on other occasions, though cloths might have been purchased by one separately, they still were put with and sold as joint stock; that Slema Lebbe had given his sole bond for the cloths in question, though when the Defendant heard of the writ being out against Slema Lebbe, he offered to pay the Plaintiff's agent 400 Rixdollars and the balance in four months; and that on another occasion, the Defendant had taken upon himself a debt due from Slema Lebbe to one of the witnesses, whether as partner or agent, the witness did not know; On the part of the Defendant it was proved that the Defendant alone rented the Bazar, and paid the rent, that Slema Lebbe never paid it, and that the Defendant had on other occasions made purchases on his sole name and credit, and had given bonds for them, without any mention of Slema Lebbe.—It further appeared from the accounts and letters of these two persons, that they had been jointly carrying on business, but whether as partners or agents did not distinctly appear. On this evidence the Court of Kandy considered that as the Plaintiff was bound to prove either that Slema Lebbe was the Defendant's partner, or that he possessed property in charge of the Defendant at Kandy, neither of which facts had, in the opinion of the Court, been established, the action must be dismissed with costs. On appeal to the S. C. this Judgment was reversed on the following grounds;

3. "The Judgment of the Court below appears to have proceeded on the supposition, that a person can only be held liable as a partner, on proof of a real and bonâfide partnership having existed either by deed or otherwise. This is not the case, If any person holds himself out to the world as partner of another, whether by express words, or by the general tenor of their dealings, such person is equally liable for the debts of his ostensible partner, as if a deed of Co-partnership had been en-

tered into in the most regular form. And this is a question, it is to be recollected, depending upon the general principles of the Mercantile law, rather than upon local usage. The contract, indeed, which is sought to be enforced by this action was entered into, not at Kandy, but at Colombo; In this view of the Case, the evidence on both sides is very strong in favor of the Defendant's liability. It is admitted on all hands that Slema Lebbe and the Defendant occupied the same shop, and retailed the contents of it, as joint and partnership stock, even in those instances in which the original purchases were made by one of these traders separately. The Plaintiff's third witness deposes that they used to say that their stock in trade was their joint property: The first witness was told by the Defendant himself that he and Slema Lebbe were partners in trade, and by Slema Lebbe [whose statement is good evidence against the Defendant considering how closely they were connected together] that he Slema Lebbe had sent cloths to the Defendant for sale, as his partner not as an agent. The Defendant made the same avowal to the sixth witness who also states that these persons were generally understood to be partners. It may be that in the case of the purchase in question, and in other similar instances, the bond was given by Slema Lebbe alone for the amount of purchase. But it by no means follows that the Vendor intended thereby to look to Slema Lebbe alone for payment, or that even if such had been his intention, he would not be entitled to pursue his remedy against the Defendant, if it ultimately appeared that the latter was disposing of the goods purchased as partnership property. The offer to settle Slema Lebbe's debt with the Plaintiff and the Bond granted by the Defendant to Sewani Chitty do not weigh much with this Court. These acts might be those of an agent or of a friend, as well as of Partner. On the other hand no weight is to be attached to the hiring of the shop, and the payment of the rent by the Defendant alone. These are offices which may naturally enough be performed by one partner without the intervention or any mention being made of

the other, more especially when that other appears to have been oftener at Colombo than at Kandy ; The accounts which have been examined prove nothing, because the name of the debtor does not appear. From the letters passed between the Defendant and Slema Lebbe, a partnership is rather to be inferred than otherwise. That the letters from Slema Lebbe to the Defendant, after his imprisonment, make no mention of a Partnership will not appear extraordinary ; when it is recollected, that the liability of the goods at Kandy would have been involved by an admission of the partnership ; and that it is no rare occurrence to see persons of the description of Slema Lebbe, prefer a temporary imprisonment to a seizure of their property in payment of their debts." No. 6070, Kandy 23d November 1833.

4. A case was decided in the former S. C. about the year 1830 on some what similar grounds to the foregoing. The circumstances are not sufficiently distinct in the recollection of the writer of these notes, to enable him to state them. But the question was whether a Mr. Frederick had, by his acts, so held himself out to the world as the partner of one Mr. Bedier, as to be liable for the debts of that person. The judgment of the Court was in the affirmative ; but it was that of the C. J. sitting alone.

5. We have seen *supra* par : 223. 4. that by the law of Kandy, when a husband and a wife have been trading together in partnership, the wife's property may be seized in satisfaction of the husband's debt.

6. If it be intended to rely on the partnership as a ground of defence it should be stated in the answer ; *infra* title "Pleading," par : 13.

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#### PAUPER SUITORS.

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Reasons for strict performance of Condition par : 1. Plaintiff concealing property not allowed to deduct the amount to which her children would ultimately be entitled 2. A party not allowed

to plead the illegality of his title in order to pauperize himself  
3. Mode by which poverty should be ascertained: D. C. not  
to try title to land on this enquiry 4. Pauper retaining a  
Proctor 5. Affidavit of poverty dispensed with for a foreigner  
9. Court generally relies on Proctor's Certificate as to cause  
of action 7. Former decree against Plaintiff consistent with his  
having an apparent ground of action: After dismissal fresh  
action only allowed, as Pauper, where no negligence appears  
8. Course on rejection under 45th Rule, how the 14 days to  
be reckoned 9. Application to appear as a Pauper during the  
suit, as after Defendant committed for want of answer, 10.  
Execution by Pauper 11. Fees of survey 12. Appeal by Pau-  
per 13.

1. The Forty-second and four following rules of the first section lay down the course to be pursued by persons claiming the privilege to sue or defend as Paupers, a privilege which ought not to be granted unless the party shows himself to be fairly entitled to it. For though if the only consideration on this subject were the paying or with-holding from the public Treasury the Court Fees payable in any particular case, Courts might not be disposed to exercise great strictness in their inquiry into the circumstance of applicants, yet it must be recollected that as the immunity from expense gives the Pauper party a great advantage over his adversary, inasmuch as the former has nothing whatever at stake, while the latter is saddled with costs even if successful, it becomes a matter of mere justice, that this indulgence and advantage be not awarded to the applicant, unless he have fully and fairly fulfilled the conditions imposed upon him. These conditions are two-fold: First, that he make a declaration, supported by the affidavit of two respectable persons, that he is not possessed of lands, money, goods or other property above £5, as to which the opposite party is allowed by the 45th Rule to offer counter proof:—Secondly. That a Proctor shall certify his belief that the applicant has a good ground of action or defence as the case may be. A third condition, not indeed mentioned in the rules, but which, as in the

instance of every indulgence or privilege claimed, is necessarily implied, is that nothing like fraud or bad faith shall appear in the conduct of the applicant. Applications for this privilege are too frequent in the Courts of Ceylon, not to give rise to numerous questions and decisions. The following are the principal ones which had been brought to the notice of the S. C. up to March 1836.

2. As regards, first, the declaration and proof of poverty. A Plaintiff having applied to sue for certain landed property in formâ pauperis, was opposed by the Defendant who proved that the Plaintiff was possessed of lands, not alluded to by the Plaintiff in her declaration to the D. C., considerably above the prescribed value. It appeared, however, that her children would be entitled to certain shares out of these lands, the value of which, if deducted, would have reduced the property below £5; and on this ground, the D. C. granted permission to the Plaintiff to proceed as a Pauper. On Appeal to the S. C., however, this order was set-aside. The Judgment of reversal observed "Two reasons appear in the face of these proceedings, why the indulgence sought for should be withheld, from the Plaintiff: First the deduction made from the value of the lands proceeds on the grounds that her children are entitled to certain shares of them. They will be equally entitled, it is presumed, to any shares which their mother may recover in the present action: Either, therefore, they ought to be made parties to the action, or, being interested in the result, they should contribute towards the expence of it. Every permission to sue or defend as a pauper, unless the applicant shews himself strictly entitled to it, is an injustice to the opposite party who has to contend at a great disadvantage. But, secondly, the permission ought never to be granted to any one who does not come into Court, free from all suspicion of fraud or deception. Now the present plaintiff was manifestly guilty of gross concealment, in the statement she made to the Court, and the two De Silvas, who support the statement, have been guilty of something very like perjury in so doing. For not a syllable is said about Land of any kind, in the enumeration of pro-

perty which consists of a few household articles of the most trifling description. The D. C. would do well to send for the De Silvas, and give them a very severe admonition on their rash and dishonest deposition." No. 220 Amblangodde 24th September 1834.

3. On a Buddhist Priest applying for administration to the estate of his predecessor, in formâ pauperis, it appeared that he was in possession of lands of value, title deed of which stood in his name, he endeavoured to get over this difficulty, by alleging that by the rules of his order, he was incapacitated from holding property, that the transfer to him in his own name was illegal and void, and therefore interposed no impediment to his appearing in Court as a pauper. The D. C. however, rejected his application, and the S. C. on appeal, affirmed that decision, on the ground that a party must not be allowed thus to avail himself of the illegality of his own act, assuming the rights of ownership, or divesting himself of them as unlawfully obtained, as might suit his convenience. "Whether the deeds in favor and in the name of applicant," the judgment observed, "be in contravention of the rules of poverty prescribed by his religion is a question which cannot affect this case. If the purchase were in trust for the temple, that ought to have been inserted in the deed; and as no such trust appears the applicant must be considered as the proprietor. But even supposing him to have established the fact of poverty the S. C. as we have seen under title "Administration" p. 5 doubted whether that circumstance would not have been fatal to his claim of administration, as being inconsistent with the necessity of his finding valid security. For it would be at variance with that highly solitary provision, to allow a person to administer an estate, who is avowedly a pauper, and for whom therefore, especially if he could not legally possess property, no solvent person would reasonably be expected to give security" No. 32 Matura 9th December 1835.

4. As regards the mode in which the D. C. should obtain necessary information, so as to satisfy themselves of the real

circumstances of the party applying to appear as a pauper, without consuming time unreasonably or unnecessarily in this preliminary inquiry. A D. J. applied to the S. C. for instruction under the following circumstances. A defendant having opposed the plaintiff's application to sue as a pauper, filed a list of property as belonging to the plaintiff, who, however, denied it to be his; whereupon the Court ordered Commissioners to proceed to the spot to ascertain the truth. They made their report on oath, that the plaintiff had property, in land and moveables, to the value of £15 and upwards. The parties then wished to summon witnesses to prove their respective statements; but the D. J. observed, that if this were permitted, and the defendant were obliged to prove the plaintiff's right to every item, the loss of time and expense would be endless, and the Court would be involved in the trial of several land cases before it could decide the question of pauperism, and he accordingly inquired whether he might not safely rest on the oaths of the Commissioners, and direct the plaintiff to proceed in the usual course. The D. J. was informed in answer, that unless the parties had agreed to the nomination of these Commissioners, as arbitrators [as to which see title "Arbitration" p. 34 5.] the better course would be to let them be examined as witnesses on oath, in open Court, as to the plaintiff's property generally without going strictly into questions of the plaintiff's title to land, or other possessions, L. B. 11. 14th February 1835. And on another occasion where the D. C., after inquiry at some length into the plaintiff's circumstances, decided against their right to sue as paupers, on which the plaintiff's appealed, praying for an inquiry into the validity of their alleged title to certain land; the judgment was affirmed. The plaintiff appears" the S. C. observed "to have had every reasonable opportunity of establishing their poverty, and justice to the defendant requires that some limit should be put to the length of investigation into the value of the plaintiff's property. If these appeals were to be listened to, the D. C. might be required, in every case of contested pauperism, to enter into any number of

trials to land, before they could begin upon the question really at issue between the parties" No. 1238 Negombo 25th November 1835.

5. Where a D. J. represented to the S. C., that a person, who had been allowed to defend several suits in formâ pauperis, was said to have retained a Proctor of the S. C. on payment of the usual sum as retainer, the matter was referred to the Proctor for his report which was transmitted to the D. J., to assist him in his decision, whether the party should be again allowed to appear as pauper.—L. B. 30th July 12th August 1835.

6. A foreigner having applied to the D. C. of Jaffna for leave to sue as pauper, the D. J., applied to the S. C. for instruction how to proceed; the applicant being a total stranger in the place, and having no acquaintance to whom he could refer with regard to his property. The S. C. returned for answer, "That as the applicant was a stranger in the Is'and, it would be unreasonable to expect that he should be able to adduce affidavits of his poverty, that on this point, therefore, the D. J. was recommended to use his own discretion, with reference to the applicant's appearance and mode of living, but that the other preliminary question, as to his cause of action would still remain to be inquired into" L. B. 5. 12th August 1835.

7. Secondly, the certificate by a Proctor, that the applicant has a good ground of action or defence, is a condition which the litigious disposition of the Natives renders highly and obviously necessary to be enforced, and the Court would generally feel bound by such certificate, though when it is unfavorable to the application, the party applying for the privilege is rarely disposed to acquiesce in the decision, and frequently appeals against it to the S. C. On one occasion where a plaintiff appealed and accused the Proctor of connivance with the defendant, the S. C. affirmed the decision, observing "that a Proctor's certificate of a good ground of action was absolutely necessary under the rules of practice, before the applicant could be permitted to sue as a Pauper, and to insinuate that the Proctor had combined with the opposite party, to prevent the plaintiff from enjoying that privilege

was absurd ; since it was the interest of the Proctor to certify in favor of the application. For if he succeeded in the suit he would get his costs ; and if he failed, he could but lose his trouble No. Wademoratchy 7th October 1835. And on appeal by a defendant against a similar decision, on the ground of the Proctor's certificate being unfavorable, the S. C. gave a similar decision. No. 414 Wademoratchy, 17th December 1834. Where a plaintiff applied to sue a pauper in the D. C. of Jaffna, but it appeared from the proctor's report that the property in dispute was situated at Manar, where the witnesses also were resident, the D. J. of Jaffna suggested the expediency of referring the application to the D. C. of Manar, and the S. C. expressed its concurrence in that course in order that a Proctor of Manar might make the necessary inquiries to enable him to certify: L. B. 16. 23, April 1835. It has been observed that a plaintiff may have good ground of action, and still the defendant may shew a good *prima facie* defence: *Petition Book of 1833 p. 4.* When such cases present themselves, the Court can only decide by the certificate of the Proctor on the application to appear as a pauper, for otherwise the case must be tried on the merits before the question of admissibility as a pauper can be decided.

8. Where a D. C. refused an application to sue as pauper on the ground that a former decree had passed against the plaintiffs, which the D. J. considered decisive of their claim, the S. C. affirmed that rejection on the ground that it was impossible to say that the plaintiffs, in the teeth, of the former decree, had an apparently good cause of action: But it observed; the plaintiffs were mistaken in supposing that the rejection of their application by the D. C. amounted to a final decree; they were still at liberty to commence their action in the ordinary way, if they thought they could shew that the former decree was not conclusive against them: all that was now decided was, that they must not be allowed the indulgence of suing free of expence. No. 445 Walligamo 5th May 1835. On another occasion where a pauper's action had been dismissed, the

S. C. intimated an opinion that a fresh action, in formâ pauperis, should only be allowed provided no negligence appeared on the part of the plaintiff. *Petition Book of 1834.* p: 128.

9. As regards the course to be pursued, when an application is rejected, under the 45th Rule, the S. C. on one occasion drew the attention of a D. C. to this rule, observing, that the intimation which the Court is thereby directed to make to the plaintiffs "that their case will be dismissed, unless, within 14 days, they shall pay the costs of such proceedings as shall have been already instituted" would more conveniently perhaps form part of the decree, in order that parties might be under no mistake, as to the course to be pursued, after decision against the application; and the 14 days would be reckoned from the day on which the affirmation of the decree was made known to the applicant No. 3907 Colombo 19, November 1834. For as long as the question was in appeal, the applicant might be presumed to suppose that the decision was in his favor, in which case he would not be called upon to pay the costs of the former proceedings L. B. 1st 8th April 1835.

10. A defendant, after commitment for default of filing his answer, applied for leave to defend as a pauper, which application was rejected as too late; and he then appealed as well against that rejection as against the order of commitment. The judgment of the S. C. was, "that the interlocutory order, by which, the defendant stands committed, till the answer be filed, be affirmed: But it is further ordered that the defendant's application to defend as a pauper be referred and taken into consideration in the usual manner. The defendant being already in contempt for not filing his answer was properly committed; for to have allowed him to be at large till his application had been decided on, would have furnished a course by which every defendant, after exhausting the time allowed for filing his answer, might still obtain further delay by pleading poverty. On the other hand the S. C. does not consider that a defendant is absolutely precluded from applying to defend as a pauper, because the application has not been made in the first instance. Misfor-

tunes might befall a party during the progress of the suit which might incapacitate him from pursuing his claim or defence, though he may have been in circumstances to commence it in the ordinary way. Although, therefore, the present defendant must not be allowed to screen himself by this method from the consequences of his contumacy, there is no reason why his application should not be attended to, he remaining, meanwhile, in the situation to which he has subjected himself by his own neglect. But the defendant is entitled at any time to apply to the D. C. to be brought up, when convenient to the court, and to make his answer or defence verbally, according to the tenth rule of the 1st section of the Rules of Practice, No. 6,319 Colombo 2nd May 1835.

11. As regards execution by a pauper party see title "Costs," p. 74 and Title "Execution" p. 161.

12. As to the fees of survey by a pauper party see title "Survey."

13. The S. C. has, on several occasions, observed that applications to appeal in forma pauperis must be received and decided upon in the same way as those to *sue* or *defend*.

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#### PAWNING.

See title "Debtor and Creditor," p. 94. 5.

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#### PAYMENT OF MONEY INTO COURT.

Either such payment, or a tender of the amount should accompany the admission of a debt, in order to save the costs of ulterior proceedings; see title costs, par. 73.

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#### PEARL FISHERY.

1 Two cases only present themselves, as having been decided on this subject, and as they turned on the peculiar circumstances incident to that speculation, they are placed by themselves; in preference to being classed under any more general heads.

2. An action was brought in the D. C. of Colombo, to recover the sums of £62 and £103, under circumstances which

will appear from the following judgment of the S. C. to which the case was carried up in appeal by the defendant.

“It appears that by an instrument, dated 20th November 1832, the defendant on whom the Government had bestowed a certain charity or temple boat for the ensuing Pearl Fishery agreed in consideration of 3000 Rupees paid to him, and which he acknowledged to have received, to transfer to the plaintiff the right of fishing this boat, according to the price at which Government should sell its other boats, and after deducting that price, to repay the balance of the 3000 Rupees, with interest at 12 per cent. The price was afterwards fixed by Government at £310 2 2½ each boat; and five regular days fishing were to be allowed. Owing, however, to the boats in question not being provided with the necessary license on the first day, that day's fishing was lost to the plaintiff, who accordingly seeks by this action, as one ground of damage, to recover back 1-5th of the price or £62 0 5¼. And as it has not been satisfactorily proved that the plaintiff received the profit of any extra day's fishing, as a compensation for this loss, the S. C. concurs with the Court below in thinking that the plaintiff is entitled to recover that sum back from the defendant with interest.

3. “It appears further that after the Fishery was concluded the result having turned out less profitable than had been anticipated, the Government granted a remission to those who had purchased boats from the Government, of one-third of the price. And the plaintiff also claims the same remission, or a further return of £103 7 7½ from the defendant, contending that both by the terms of the agreement, and by the custom of the Pearl Fishery, the defendant was bound to imitate the Government in allowing this deduction. The Decree of the District Court is in favor of the plaintiff upon this point also. But here the S. C. is compelled to dissent, though it does so with some reluctance. For it is very probable that, if the attention of the parties had been drawn to the particular point, if they had contemplated the remission being made by Government, the plaintiff would have stipulated for a similar indulgence from the defendant. But the

Court cannot supply this omission or introduce by implication a condition which the parties could have expressed, if they had thought proper so to do. The Court must decide according to the terms of this agreement, or of any other into which the parties may have subsequently entered and which the law would recognize. The D. C. in its anxiety to do what it considered would be substantial justice, construes the price at which Government sold its other boats, as expressed in the agreement, to signify the amount of that price, minus the subsequent remission. But there appears to be an obvious fallacy in this construction in as much as the remission made by Government was purely arbitrary, both as to its being made at all, and if made, as to its amount. If, indeed, Government, when fixing the price, had bound itself to remit, if the fishery should prove less productive than was expected, and in proportion to such diminution of profit, it might then have been said, and truly said, that the price would be the sum which Government ultimately retained, because the price would not have been fixed at the time of making the contract, but would have remained open and contingent, by express stipulation, upon subsequent events. One test by which this question may be tried is by asking whether Government would have been liable at law to be compelled to make this remission? But it is not pretended any such legal liability existed. Then how can the Defendant be compelled to the performance, as a duty legally incumbent upon him, of that which was a mere voluntary act of indulgence on the part of the Government? It is possible too, that this compulsory imitation of the act of Government, might work real and substantial injustice to the Defendant. Many causes may combine to induce the Government to grant these remission, which could not operate, or be expected to operate on private persons. It may be a matter of public policy, not to let strangers leave the Fishery dissatisfied with the result of their contract with Government. But this or similar motives, would form no ground of claim on the part of the private purchaser upon a private seller. Nor does this claim receive

any additional strength from the circumstance of the boat having been bestowed gratuitously on the Defendant. The boat was as much his own and he had the same right to make the most of it, as if he had given value for it to Government: It has been urged at the Bar, that there are several stipulations introduced into the agreement, from which it would appear to have been the intention of the parties to follow the course pursued by Government. But the very expression of those stipulations operates, according to a well known maxim of Law, as an exclusion of such as are not so expressed.

4. "With respect to subsequent promises to refund, alleged to have been made by the Defendant, the evidence is much too vague to support them, even supposing that sufficient consideration existed for them. The Defendant said he would make the remission provided the Warden of the Temple assented. They have been examined before this Court and whatever may have been their former inclination towards liberality, that feeling appears, by some means or other to have been chilled down to the freezing point: For the majority of them now refuse to give their consent.

5. "The custom of the Fishery has also been relied upon, and a case is stated by Comaresamy Modliar to have occurred in which the remission was adopted by a private person, and allowed by him to his purchaser. But in the first place it appears that this was a mere voluntary surrender by the seller of this proportion of the price; and in the second place, even if it had been decreed by a Court of Law, it would be no authority in the present case, without an opportunity of comparing the contracts by which the several parties were respectively bound." The decree in favor of the Plaintiff was accordingly reduced to the first of the two grounds on which he claimed: The costs in the D. C. reduced to the 5th Class to be borne by the Defendant: Each party paying his own costs in appeal: No. 1967. Colombo 15th October 1834:

6. In the other case, the Defendants had agreed to procure for the Plaintiff for the Fishery of 1833; certain divers who

were to be at Condatchy one month previous to the Fishery. The Plaintiff had advanced £2 9. 6. to the Defendant and now claimed £20 as damage for the nonfulfilment of their contract by the Defendant. It appeared that the Defendant's divers did not attend precisely one month before the Fishery, but that they did afterwards; that meanwhile, however the Plaintiff went to Jaffna, and did not return to Condatchy till after the Fishery had begun. The D. C. considered the Claim unjust, and dismissed it with costs; On appeal to the S. C. it was decreed that the Plaintiff should recover the sum advanced by him, because the Defendant had not punctually performed their part of the agreement; but on the other hand that he was not entitled to recover any loss of profit he might have sustained, because he should have waited a reasonable time to see whether the divers arrived in time to commence operations, though they had failed on the exact day stipulated. Each party was decreed to pay his own costs No. 305. Manar 8th July 1834, on Circuit.

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### PENALTY.

Distinction between that which is imposed as a punishment and the penal sum inserted in Bonds &c. see p: 280.

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### PER CENTAGE.

*See Title Commission.*

As to construction of the 20th Rule of Section 2. See Title "Prosecution," p: 27.

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### PERJURY.

As to construction of the 20th Rule of Sect: 2, see Title "Prosecution" paragraph 27.

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### PETITION.

S. C. refused to receive an anonymous one. Petition Book

of 1835. p: 186. see also Title "Government."

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## PLEADINGS.

Rules 1., 5 and 7. object of to shorten the issue and evidence p: 1. & 2. Libel amended, in preference to a fresh action, by adding or substituting parties 3. 4. and 5. or by adding principal to claim for interest, 6. Action against several Defendants for same Land consolidated 7. parties bound by their pleadings 8. Scandalous matters expunged 9. Answer should disclose the real defence, special facts should not be given in evidence under a General denial 10 & 11. still less if inconsistent with such denial 12. Partnership should be pleaded 13. Action for produce, Defendant makes no answer, and Plaintiff not prepared to prove his title, referred back to enable him to do so 14. In action for ground share, if Defendant disputes title to Land which Plaintiff proves decree for Land itself 15. Action for goods sold, defence, that they were only lent, should be stated 16. Action on Mortgage, defence; an absolute sale, verbal evidence of Mortgage admitted, without notice to produce deed, 17. Defendant cannot get Judgment without evidence, by calling his answer a Plea or Demurrer 18. Prosecution on Police Ordinance for leaving service, Defendants may be called on to admit or deny contract 19. Plea to Jurisdiction overruled; Defendant should answer to the merits 20. Replication, always proper, if answer states any thing to be replied to 22. Failing to reply, no ground of dismissal 23. Demurrer 24. Drawing Pleadings, how limited 25. Petition of appeal included in pleadings 26. Answer taken verbally from Prisoner for Treason 28.

1. The first Rule of the first section directs, that the Plaintiff's Libel shall state the cause of action or complaint as shortly as the nature of the case will admit and the relief or remedy which he seeks. The fifth rule directs "that by the answer of the Defendant all the material facts alleged in the Libel, and all the written Documents therewith filed, shall be

either admitted or denied, or confessed and avoided; (1.) so as to throw the utmost light possible upon the merits, and to ascertain and shorten the proofs necessary to be adduced on either side." By the seventh rule "the Replication shall admit or deny the material facts alleged in the answer, and any written Documents therewith filed, but shall not state any new matter, not arising directly out of the answer." "And no further Pleading is to be admitted, unless by permission, or order of the Court." From these few plain and very simple rules for regulating the written Pleadings, the enforcement of precise accuracy of language, which is so conspicuous in the English Law, and in different degrees, in some of the countries where the Civil Law prevails, is not to be expected: Nor, even admitting that the same degree of strictness would be adapted to the state of Society in Ceylon, would it be possible to exact it, at all events at present in many of the D. Cs; But rude and in-artificial as the rules above extracted would appear to an English special pleader, they would still be sufficient, if the directions thereby conveyed were pursued in the fair spirit of them to prevent any very illogical results. The obvious intention is to bring the parties to issue as speedily as possible; and by obliging each of them to state unreservedly the facts and circumstances on which he rests his own case, and either to admit or deny those alleged by his adversary, to simplify and render plain, both to the litigants and to the Court, the evidence requisite on either side, according to the first general rule of evidence, given under that head; supra 107. 8. And see title "Issue" 240. 1. The system of mutual examination of parties, introduced on the suggestion of Mr. Cameron, assists very materially in the attainment of this object, supra: 151. et seq: What one would wish to see as an improvement in some of the D. Cs. is the written pleadings aiming

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(1.) As this somewhat technical term, which has crept into the 5th rule, may not be familiar to all who refer to these notes, it may be well to observe that a fact alleged by a party is said to be confessed and avoided when the opposite party admits it to be true, but adds some other fact, by which the effect of the first is destroyed or neutralized.

more directly at the point, that is, more free from irrelevant matter: The evil here pointed at, however, as well as the less serious one of faultiness of language, will no doubt be cured by time.

2. Simple as the rules of pleading are in Ceylon, and wide as is the latitude allowed to parties in explaining their ground of Complaint, or in repelling the Claims made against them, questions must constantly be arising, rarely indeed on any nice technicalities of construction, but as to the effect of the respective allegations, as regards the evidence to be adduced, or permitted to be received: and this is unavoidable. For it is obvious that if a party were not held to be bound by his own statements in the pleadings all pleadings would be useless as serving only to mislead both the Court and the litigants. The Courts, therefore, must frequently be called upon to decide on this connection between the pleadings and evidence, that is, to pronounce what proofs became necessary or admissible from the mutual averments of the parties, as well as to decide on averments of pleadings, and other points of minor importance. The following are the principal decisions, it is believed, which had taken place in the S. C. on the subject of pleading, up to March 1836.

3. First, as regards the Libel:—The S. C. has always been anxious to spare parties, if possible, the expense and inconvenience of double actions, and most of the decisions under this head proceeded on that principle. Thus in the case mentioned under title "Land," supra. par: 17. on a mortgage bond, by which the first Defendant and another person, not joined in the action, acknowledged to owe the Plaintiff £7. 10. 0. and promised jointly to pay within three months; and the first Defendant engaged that if it should not be so paid he would deliver up a Garden to be held till payment: The Plaintiff averred that he had accordingly had possession of the Garden till interrupted by the second Defendant, who had taken the fruit under color of a bill of sale from the first Defendant, of subsequent date to the bond. The Defendants pleaded that

the other debtor ought to have been joined in the action; and the D. C. being of the same opinion, and considering that the Libel could not be amended under the 9th Rule, after the Documentary evidence and Lists of Witnesses had been filed, dismissed the action: On appeal to the S. C. this decree of dismissal was set aside, and the case was referred back for evidence. In the first place, the S. C. considered that the action was not improperly brought against the first Defendant, without joining his creditor, for the stipulation out of which the action arose was by the first Defendant alone. If the other debtor had paid the amount, that payment might be proved, but as far as the Mortgage was concerned, the first Defendant had promised for himself alone, from the expiration of the three months. But secondly, there would have been no objection to adding the other Defendant, if that had been necessary. For it would not have been an amendment within the meaning of the 9th Rule which, from the terms of it, only contemplates such alterations as would not make the line of evidence different. No. 3,149. Amblangodde 22nd March 1834. Circuit. Vide supra: title "Intervention."

4. In another Case, which was an action for freight, the Defendant endeavoured to avail himself of the bill of lading having been signed by a brother of the Plaintiff to insist that the action should have been brought by that brother, and not by the Plaintiff. The liability of the Defendant, however, to the Plaintiff being established, the D. C. gave Judgment in his favor. And on appeal the S. C. concurred in that Decree but observed that if it had been necessary, the D. C. might have joined the Plaintiff's brother as a Co-Plaintiff No. 723. Galle, 7th March 1835 on Circuit.

5. In an action for Land, the Defendant disclaimed all right but a third party intervened in the suit and contested the claim of the Plaintiff: The D. C. considered that the present action must be dismissed, and that the Plaintiff must seek his remedy by a fresh suit against the Intervenient. The S. C. however, on appeal, saw, no necessity for obliging the Plaintiff to bring

a fresh action, and referred the case back to be proceeded with, by substituting the Intervient in the place of the Defendant. No. 1465. Caltura, 14th October 1835. And see title. "Practice" paragraph 18. as to the substitutions of the Defendant's son in the place of the father who had died.

6. In an action for the interest due on a bond, the Plaintiff, before appearance by the Defendant, moved to amend her Libel by adding the principal to her claim. The D. C. refused the motion on the ground, that the principal ought to form the subject of a fresh action. The S. C. however, on appeal, observed that in this early stage of the case there could be no doubt that the Plaintiff was entitled to amend her Libel, provided the proposed amendment were such as if it had been introduced in the first instance, would not have rendered the Libel inadmissible, that as there was nothing to prevent a Creditor from suing for his principal and interest in the same action, and as it would therefore have been no objection to the reception of the libel in the first instance, that it included both principal and interest, so there was no reason why the Plaintiff should not be allowed to add her claim for principal to that originally made for interest, without subjecting the parties to the expense of a double action" No. 6776 Colombe 13th January 1836. This Judgment of course supposes that any additional stamps, which the increased value might render necessary would be supplied.

7. A Plaintiff having brought several actions respecting the same land against different Defendants, whose interest were the same, the D. C. directed that they should be consolidated and proceed to trial together. The Plaintiff having appealed against this interlocutory order on the ground that it would create a difficulty as to the class and also that the revenue would suffer, the S. C. affirmed it and directed that the Plaintiff should pay the costs of appeal. The Court could see no reason why the objection to this order of consolidation should have been made, unless that the Proctor's costs would thereby be diminished. The difficulty raised with respect to the class would be easily

got over by fixing the united case in that class to which the real value in dispute would shew that it ought to belong : And as to loss which the revenue might sustain, that was a subject on which it was unnecessary for the Appellant to concern himself No. 516. Amblangodde 25th November 1835. In like manner we have seen, supra 164. 5. that when claimants to property, seized in execution, are called upon to establish their respective claims, in pursuance to Regulation No. 13 of 1827 this may be done by making them Intervenients in the original suit without putting the parties to the expense and delay of fresh actions. And see No. 333 Amblangodde supra 6. 7. title "Administration" as to amending the Libel.

8. The following decision proceeded on the principle above alluded to, par : 2 that parties must be bound by their pleadings, and must not be permitted to shift their claim or defence according as the evidence may make it convenient for them so to do. The Plaintiff, on behalf of a temple over which he presided in the District of Ratnapoora, sued for a field which he alleged in his libel had been sold by one Samarapolle to the temple 39 years ago, and had been in its possession till the Defendant took the produce unlawfully. The Defendant, by his answer, denied the sale to and possession by the temple but admitted that a proportion of the produce had been paid to the temple, on account of a debt of 25 Ridies which the Defendant tendered five years ago, and afterwards 30 Ridies, but which offers were refused on the part of the temple whereupon he had taken the produce. It appeared from the evidence that the *Ande* share had been paid to the temple, but there was no proof of any sale, or of the temple having had possession of the field, which on the contrary had been possessed by the Defendant, and uninterruptedly, paying *Ande*. The first Assessor was of opinion that if there had been any sale to the temple, it would have been followed by possession, and that as there was no proof of this, the Defendant was entitled to Judgment : The D. J. and the two other Assessors considered that the Defendant's property in the field should be

confirmed, but that he should be decreed to continue to pay *Ande* to the temple : And it was so decreed accordingly. On Appeal by the Defendant, the S. C. observed, "That it could not entirely concur in opinion either with the first Assessor, or with the rest of the Court. If the Plaintiff had rested the claim of the temple to the *Ande* share on the prescriptive right acquired by long payment, he might very probably have been entitled to a continuance of that payment. But he founded his libel on an alleged sale, 39 years ago, and on uninterrupted possession from that time till about four years ago. Now of the sale there had not been a syllable of evidence offered, for the bare production of an instrument, unsupported by proof, amounted to nothing at all [vide supra. 114.] And with respect to the possession, so far from that having been proved, the Plaintiff's own witnesses, as well as those of the Defendants, proved constant possession of the field by Samarapolle, and the Defendant, paying *Ande* indeed to the temple. If, therefore, the case rested solely on the libel and the evidence, the opinion of the first Assessor would be correct, and the action ought to be dismissed. But on the other hand the Defendant admitted that a debt was due to the temple, and that he tendered first 25 Ridies and afterwards 30, both of which were refused. To the extent, therefore, of this admission, but no further, the field must be held liable. It was, therefore, ordered that the Defendant should pay to the Plaintiff on behalf of the temple, the sum of 30 Ridies ; and that in default of such payment the field should continue to pay the *Ande* share to the temple : That the property of the field was declared to be in the Defendant ; and that after payment of the 30 Ridies, it should be exempted from the payment of the *Ande* share," No. 747 Ratnapoora 20th January 1836.

9. Scandalous or abusive matter in a libel or any other pleading should be animadverted upon and expunged by the Court, but as to such matter affording a ground of action; see title "Libel," paragraph 4.

10. Secondly, as regards the Plea or Answer : It is on this branch of pleading that the vigilance of the Courts is more especially required, to prevent the answer being made the means of concealing the truth, and of diverting the attention of the Court from the real points in issue, instead of, in the words of the fifth rule, "throwing the utmost light possible upon the merits and ascertaining and shortening the proofs necessary to be adduced." Thus the answer should state the real ground of defence intended to be insisted upon ; and a Defendant, after entering a general denial, ought not to be allowed to go into evidence of special facts, which the Plaintiff could not have anticipated. A Plaintiff complained that the Defendant had cultivated her field and then refused to give her the accustomed share of the produce : The Defendant, by his answer, denied in the most general and absolute terms all right in the Plaintiff to the field in question ; but at the trial went into evidence of particular facts, which, if true, might have furnished a defence to this particular claim, though they admitted the title of the Plaintiff. The District Court gave judgment for the Plaintiff for the value of the share of the produce claimed, and on appeal, the S. C. affirmed the decree, observing "that if the facts, on which the Defendant endeavoured to rest his defence, and on which he founded his appeal, had been true, he ought to have set them forth in his answer, whereas by his having entered a general and absolute denial of all right on the part of the Plaintiff, she must have been left in total ignorance of the particular grounds on which the Defendant intended to rest. No. 363 Manar 18th November 1835.

11. On the same principle, where to an action for medicines and attendance [mentioned supra title "Obligation" par. 11.] the defendant's answer rested on an alleged contract by the plaintiff to attend the defendant's family at a fixed yearly salary, the S. C. refused to entertain in appeal the objection that the plaintiff had not proved the special services for which he claimed : For the plaintiff might not unnaturally have

inferred from the answer that it was not intended to dispute the value of the attendance and medicines since the defence rested on a distinct ground. No. 6,875 Colombo 16th December 1835.

12. An action was brought for the value of certain cattle which the Plaintiff alleged had been seized by the Defendant, on pretence that they were damaging his land, and one of which had died. The Defendant denied that he ever had any of the Plaintiff's cattle in his possession. From the evidence of both parties there appeared no doubt that the plaintiff's cattle had broken into the Defendant's garden, and had done damage there, that the Defendant had desired the Plaintiff to take them away, and, on his refusal to do so, had secured them, and that one of them had died, though from what cause did not distinctly appear. The Assessors were of opinion that the Plaintiff had proved his claim. The D. J. differed from them and decreed that the Plaintiff should pay 43 Rds. to the Defendant for the damage done by his cattle to the Defendant's garden; deducting 2 Rds as the value of the one which had died. On appeal by the Plaintiff this decree was set aside. The S. C. observed, "That so far from asking for compensation for damage done to his garden, the Defendant, in his answer, denied that he ever had any of the Plaintiff's cattle in his possession—that the Plaintiff might have been misled by the disingenuous line of defence, and at all events could not be expected to come prepared to resist this counter claim for damages; that on the other hand, it appeared to have been owing to the plaintiff's negligence that his cattle got into the defendant's garden, and he was not, therefore, entitled to compensation for the loss of that which died, it being doubtful from the evidence to what cause it's death was owing: It was, therefore, decreed that the cattle, in their present state, should be restored to the plaintiff, if that had not been already done;—that each party should pay his own costs, a subject on which nothing was said in the decree of the D. C.; and that the right of the Defendant to bring an action for the damage done to his garden be reserved to him. For though the

S. C. was unwilling to do any thing likely to encourage litigation, still it was necessary that the Plaintiff should have an opportunity of making his defence against this claim for the trespass, which as yet he had not had, but that this action might be avoided, by the Plaintiff consenting to pay such moderate sum as might be considered just and equitable." No. 2499 Ruanwelle 24th June 1835.

13. In an action for the balance of an account, the Defendant having neglected to make any answer, a general denial was entered: and after the Plaintiff had proved the transactions, out of which arose the present claim, the Defendant attempted to shew that a partnership existed between the Plaintiff and his brother. The D. C. gave judgment for the Plaintiff, and the Defendant appealed, on the ground that he had proved the partnership, and that the action therefore should have been brought in the names of both the partners. The S. C. on affirming the decree, observed, "That if the Defendant had intended to rely on the partnership of the Plaintiff with another person, he should have pleaded the partnership, and if it existed, the partner might have been joined in the action, but that it was too late to make the objection at the trial, even supposing the partnership to have been satisfactorily proved. No. 460 Caltura, 9th May 1835."

14. A Plaintiff claimed the value of ten Parrahs of Natchereen, being the produce of his Land, which he alleged had been forcibly taken by the Defendants. No answer being filed a general denial was entered; and on the trial, the Plaintiff not being prepared to prove his title to the Land, the case was dismissed. The Plaintiff appealed, alleging that he did not call witnesses to prove his title because the Defendant had not denied it; and he had only, therefore, come prepared to prove that the Defendants had taken the produce. The S. C. referred the case back to the D. C. "in order to give the Plaintiff an opportunity of establishing his title to the land, and if he succeeded in that object, then to offer proof of the Defendants having taken the Natchereen." The dismissal of the Plaintiff's suit "the judgment observed, " was justifiable, because he certainly

was bound, in point of law, to prove his title to the land, before he could claim damages for the loss of it's produce. But he may not unnaturally have imagined, more especially as he does not appear to have been assisted by any legal adviser, that as the defendants filed no answer to his claim for the Natchereen, they had no intention of disputing his title to the Land. The case is, therefore, referred back, not from any doubt of the propriety of the decision, as the case presented itself, but in order to save the parties the vexation and expense of a fresh action, to which the present decision would have been no bar. [supra 245 and infra title "Practice" paragraph 10 as to Non-suits] No. 5046 Colombo 30th April 1834.

15. We have seen under title "Land" supra : par. 4 that where in an action for ground share, the Defendant denied the Plaintiff's right altogether, and claimed the field as his own, and on the Plaintiff proving his right, the D. C. gave him judgment for the field itself as well as for the ground share ; the S. C. affirmed the decree to it's full extent, on the ground that as the Defendant's answer had challenged the Plaintiff's right to the soil, it was incumbent on the Plaintiff to prove it, and on the D. C. so to word its decree as to prevent future litigation between the parties. No. 241 Ratnapoora 22d December 1834.

16. In an action to recover value of a Table, alleged by the Plaintiff to have been sold to the Defendant, the latter denied the Plaintiff's claim altogether. The Plaintiff proved the delivery of the Table to the Defendant, and that it was still in his possession, and there being no defence, the D. C. gave judgment for the Plaintiff. The Defendant appealed, alleging that the Table had not been *sold*, but only lent to the Defendant, and that if the cause of action had been truly stated in the libel, the Defendant would have had the option of returning the Table to the Plaintiff. In affirming the Decree, the S. C. observed [laying out of consideration that this objection had not even been made at the trial] "That in order to make this a just and equitable ground of defence, the Defendant should have set it forth in his answer, as that on which he intended to rely,

accompanied with a tender of a return of the Table, instead of which, he had contented himself with entirely denying that the Plaintiff had any claim at all upon him" No. 5420 Kandy 27th May 1835.

17. A Plaintiff sued for the recovery of certain Land which he alleged, had been mortgaged by his Father to the Defendant. The answer of the Defendant averred an absolute sale from the Plaintiff's father, by virtue of which the Defendant had possessed for many years. At the trial, the Plaintiff proposed to go into verbal evidence of the mortgage, to which the Defendant objected, on the ground that no notice had been given to him to produce the original deed of mortgage, and the D. C. considering the objection to be valid, refused to hear verbal evidence of the transaction, and dismissed the case. The Plaintiff appealed, contending that the answer of the Defendant made any such notice unnecessary; and the S. C. referred the case back, for the reception of the evidence, observing "That as the answer was a virtual denial of any such mortgage; as no such deed of mortgage could be in existence if the answer were true, it was absurd for the Defendant to complain of want of notice to produce it." The evidence was accordingly received and the mortgage was proved to the satisfaction of the D. C. No. 5276. Kandy 20th June, 14th October 1835.

18. To an action by a tithe renter against several persons for having reaped their Crops, without paying the tithe to the Plaintiff, the Defendant put in as a plea, that they had not cultivated any Land within the limits of the Plaintiff's rent, and therefore moved the D. C. to dismiss the action, without going into evidence, the D. C. however, considered that there was as yet no ground for dismissal, and ordered the parties to go into evidence. The Defendant appealed, and the S. C. affirmed the interlocutory order, and directed that the Defendants should pay the costs of the appeal. The Defendants seem to imagine," the Judgment observed, "that by calling an answer a *Plea* or *Exception*, they obviate the necessity of proving the facts, on

which such plea [so styled] is founded. The Cultivation of Land by the Defendant, within the limits of the Plaintiff's rent, is one of the facts which must be established by the Plaintiff, before he can recover in the action: and it will be open to the Defendants to shew that the Land cultivated by them was not within those limits: But this no more forms the subject of a plea or exception on which the Defendants could demand the dismissal of the action without evidence than would the allegation of payment or any other grounds of defence. Strictly speaking, indeed, the Defendants were bound to go to trial on the general denial which their Proctors moved to have entered, as appears from the pleadings, on the 9th instant. The better course will, perhaps, be, to let this plea stand as the Defendant's answer, together with any other ground of defence which they may think fit to add." No. 1872. *Caltura*, 25th November 1835. see a similar decision, where a Defendant asked for Judgment without evidence on what was entitled a Demurrer, but which amounted to an answer, Title "Appeal" p. 16. 7.

19. A case occurred in the D. C. of Colombo, in its Criminal Jurisdiction, which will be mentioned more fully under Title "Police" par: 3. but which will not be out of place here, as regards one of the points decided by the S. C. It was a prosecution under the Colombo Police Ordinance No. 3 of 1834. S. 17. instituted by a Master against certain Coolies who had entered into a contract of service, receiving part of their wages in advance, and had quitted his service before the contract was fulfilled. The Defendants pleaded, generally, not Guilty, and when the Case came on for trial, the prosecutor considering it unnecessary for him to prove the contract came prepared to prove the breach of it only, on which the D. C. dismissed the complaint; on appeal by the prosecutor, the S. C. referred the case back for further inquiry. The Court observed "the evidence in support of the prosecution is certainly defective as it stands at present, but as that defect may very probably have arisen from the prosecutor being misled by the general terms of the Defendant's plea, he ought to be allowed an op-

portunity of supplying it by more satisfactory evidence. He may naturally have supposed, from the Defendant's pleading simply "not Guilty" that they did not dispute the agreement or the receipt of wages, but only intended to deny any infraction of the contract on their part. This proceeding, though undoubtedly a Criminal prosecution in its form and in its consequences, yet partakes very much of the nature of a Civil action. It is in truth a remedy given to Masters against their servants, for the breach of a purely Civil contract; the only remedy, in very many cases, which from the relative situation of the parties, and from the circumstances of most servants, can be made available to their employers. There would be no impropriety, therefore, as it appears to this Court, in calling on Defendants so situated to admit or deny the contract, which they are alleged to have broken. Not compelling them to answer, but giving them an opportunity of so doing if they thought proper, and of offering any explanation in their power; and if they declined to answer without good reason, giving such weight to their silence as ought fairly to be ascribed to it. This course would tend to simplify and shorten the proceeding, and to obtain a more certain disclosure of the truth, without pressing unfairly or harshly against the Defendants, because the Complainant would, in his turn, be obliged to answer any questions, which the Defendants might wish to propose to him, or which their explanation might render necessary to be proposed by the Court." No. 910, Colombo [Criminal] 5th August 1835 Infra title "Police," par: 3.

20. Where a Defendant pleads that the action does not fall within the Jurisdiction of the D. C. in which it is brought, and that plea is overruled, he should be allowed to prepare his answer to the merits of the action, supra Title "Jurisdiction" 257. 8. Pleas to the Jurisdiction, obviously untenable, animadverted upon: supra 15. 16.

21. Conviction or acquittal of a Criminal offence, not a conclusive plea to a Civil action for the same act. Supra title "Judgment" 247. 8.

22. Thirdly, as respects the Replication, very few questions have been brought to the notice of the S. C. In an action for the value of certain Coconut trees, the Defendant having alleged circumstances in his answer not amounting to a mere General denial the Plaintiff's Proctor moved to file a replication, which motion the D. C. rejected as unnecessary. On appeal the S. C. set aside this order of rejection, and directed that the Plaintiff be allowed to file his Replication, in conformity with the rules of practice. The S. C. observed, "if the answer of the Defendant had been such as to render a replication absolutely unnecessary, as for instance, if a General denial had been entered, this Court would have been very reluctant to rescind the order of the D. C. for the purpose of allowing a replication which, in such case, could only have had for its object to swell the costs: For though the 7th rule makes no limitation of the right of reply, still a replication, if utterly useless, might fairly be said to fall within the meaning of the 8th Rule which allows the D. J. to reject irrelevant allegations. In the present case, however, there are circumstances stated in the Defendant's answer, which the Plaintiff may not unnaturally consider as requiring to be replied to." No. 296. Pantura, 14th May 1834. A replication may sometime be useful in sparing the unnecessary cost of proving facts stated in the Defendant's answer by admitting them to be true. No. 918. Negombo, supra: "Costs" 72. 3.

23. A D. J. applied to the S. C. for instructions, whether the D. C. would not be justified in dismissing a suit, when the Plaintiff failed to file his Replication on the day appointed. To which the S. C. returned for answer. "That if the Plaintiff failed to file his replication within eight days, the 7th Rule had provided the remedy, viz. that the Defendant might move that a general replication be entered; that the D. C. would not be justified in dismissing the case on such failure, because a plaintiff might consider a replication wholly unnecessary, and besides might trust to the defendant

entering a general replication, if he thought such a step essential." L. B. 14th 16th November 1835.

24. For the meaning and use of Demurrer, and how it is distinguished from an answer or other pleading, see title "Appeal." Supra 16, 7.

25. As regards the question, who should be authorized to draw pleadings: soon after the promulgation of the new Charter, representations were made to the S. C. from several of the D. Cs., of the inconvenience occasioned by the pleadings being drawn by persons not admitted to practice as Proctors, and over whom the Courts, therefore, had no control; and it was suggested that the right to draw pleadings should be limited to the Proctors, or, in some Courts where no Proctors had as yet been admitted, to persons named by the D. J. This suggestion was adopted in every instance, it is believed, in which it was made. But the S. C. on issuing the necessary orders, intimated to the Proctors and others, to whom the privilege was limited, "That in the exercise of it, they should recollect that it was only granted to them in the expectation that they would shew themselves worthy of it by reducing the statements of their clients, whether obtained from their own mouths, or translated from narrations produced by them in the native languages, into clear and concise language, omitting all matter which was not strictly relevant to the subject in issue, and that in the event of their not exercising the privilege to the satisfaction of the D. J., and in such a way as to shew that the exclusive right was a benefit to the public, it would be withdrawn from them, and the right thrown open again." L. B. 18th September, 6th October 1835. We have seen under Titles "Interpreter" 237 8 and "Officers of Court," that no person holding those situations ought to be allowed to draw pleadings, or to take any part in the proceedings of the litigants.

26. A Petition of Appeal was presented to the S. C. from one of the D. Cs., in which the power of drawing pleadings had been restricted to the proctors; and was rejected by the

S. C., as not having been drawn up and signed by a Proctor. The order of rejection observed, "That there appeared no reason why a distinction should be made in this respect between petitions of appeal and other written pleadings, that on the contrary, it was of importance that petitions of appeal should be drawn up with at least as much care, and should be as free from irrelevant matter as other pleadings, that the S. C. had been obliged, in two instances, to animadvert on the improper and scandalous matter introduced into these petitions, a practice which could only be effectually checked by restricting the privilege of drawing them to those who were under the control of the court, and liable to animadversion if they exceeded the limits of their duty—that the S. C. entertained no fear of any want of independence on the part of admitted Proctors, in asserting the rights of their clients, in the strongest and most forcible terms, consistent with decency, and the respect due to the court, that in the present instance, the appellant had no reason to complain of the rejection of his petition, inasmuch as it appeared that the writer of it had been warned by the D. J. that he was exercising a function which did not belong to him; but that the appellant should not be debarred by lapse of time, from now presenting a petition of appeal regularly drawn and signed, if he should think fit so to do." In the matter of the petition of P. S. P. Mahamadoo, of Tanjoore, now at Trincomale, 24th December 1835. And the D. Js. were informed that petitions of appeal were included within the term "other written pleadings," used in the order restricting the drawing of pleadings to the Proctors, and were, therefore, subject to the same restriction as other pleadings. L. B. 29th December 1835.

27. For certain points relating to the costs of drawing pleadings, see title "Costs" supra 79.

26. Where an action was brought against a person in gaol, on a charge of Treason, the answer was on the suggestion of the D. J., and with approbation of the S. C., taken from the mouth of the defendant, and certified to the court L. B. 22. 27. August 1834.

As to parties setting up unfounded claims or defence see Title " False claim."

See also title " Stamps on Pleadings."

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## POLICE.

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General Police Ordinance in contemplation, Rules for Police, Vidahns paragraph 1. Warrant to search a house should always be obtained, if possible par: 2. Colombo Police Ordinance No. 3 of 1834 clause 17. Persons engaging as labourers, to build and repair walls, held to be servants &c. within that clause par 3. And a breach of such contract being proved, S. C. awarded more than a nominal punishment: But no *damages* can be given to the master under the Ordinance, nor can a specific performance be awarded par: 4. under clause 29. owner of premises complained of as encroachments &c. must have an opportunity of shewing that they are not so, par: 5. For what purpose the report of the constable to the Superintendant of Police may be produced in court par: 6.

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1. It was observed under title "Gaming," supra 210 that a general Police Ordinance for the whole Island of Ceylon had long been in contemplation, and was, probably, by this time in force, and the difficulty of legislating on this subject was also hinted at. A D. J. having submitted to the S. C. certain rules which he proposed to lay down, for regulating the conduct and duties of the Police Vidahns in his District, the Judges acquainted him, "that they did not consider it advisable to give any opinion on the rules proposed, that the duties of those officers were already stated, though it must be confessed in very general terms, by the general Police Regulation No. 6 of 1806, as well as in other Regulations passed for the establishment of Police in particular places, that, moreover, there was reason to believe it to be in the contemplation of Government to propose to the Legislature an Ordinance for better regulating the Police of the whole Island and that it would, therefore, be better, perhaps

to let the office of Police Vidahn be performed as it had hitherto been done, than to lay down general rules in any particular district, which it might soon be found necessary to cancel”  
L: B. 7. 17. August 1835.

2. A question arose in the D. C. of Matura on the right of a Constable to search houses, without warrant, the Constable prosecuted the occupant of a house in that town [if the writers recollection be correct, for he has only the judgment of the S. C. before him] for resisting him in the execution of his duty, while attempting to search the house for stolen property. The D. C. dismissed the complaint on the ground that the Constable was not furnished with a search warrant, and on appeal by that officer, the S. C. affirmed the decree of dismissal on the following grounds. “The fourth clause of Regulation No. 14 of 1820, on which the appellant relies, only authorizes the Constable to search suspected houses after sunset, leaving a party to the ordinary and more constitutional mode of proceeding by warrant, if the search is to be made in the day time. And the 16th Rule of the second section of the Rules of practice contemplate the issue of search warrants on all occasions where stolen property is to be sought for in a suspected house. The S. C. will not go so far as to say that extreme cases of necessity may not arise, in which the Constable would be justified in searching a house without waiting for a warrant, and in the country, where the delay of resorting to the D. C. would probably defeat the ends of justice, this necessity is constantly occurring. But in towns like Matura where a D. J. is, or ought to be, constantly resident, and accessible, such necessity can only, it is to be supposed, arise in rare and extraordinary instances, forming exceptions to the general rule in which the Constable or other Police Officer must act on his own responsibility, and will be justified or not, according as there may exist a sufficient ground for summary interference, arising out of the danger which would accrue of the purposes of justice being defeated, by the delay necessary for having recourse to the D. C. As regards the motives of the appellant in the present instance, the S. C. is perfectly in ac-

accordance with the Court below, in ascribing to him none but the purest intentions. And the Court is equally bound to observe that the opposition and resistance, if really offered to the search, as described by the appellant, reflect no credit whatever on those who instigated or countenanced such conduct. They would have acted much more creditably and wisely if they had submitted to the Constable's authority, and had afterwards taken legal proceedings against him if he had exceeded that authority. There is one argument of the appellant which must not be passed over in silence, the possible absence, namely of the D. J. at the time when the search was about to be made, such an occurrence would, no doubt, increase the necessity of acting without warrant to the highest possible degree, in as much as the Warrant could, in such case, only be obtained by going to an adjoining district. The S. C., however, is unwilling to enter into the consideration of such a conjuncture, because it can scarcely contemplate the possibility of an office of such extreme importance being left vacant for even a single day." No. 655 Matura, 3d June 1835.

3. The few remaining points on the subject of Police arose out of the Ordinance No. 3 of 1834 for improving the Police of Colombo. In the case already partially stated under title "Pleading" par. 19 the Defendants had agreed to serve the complainant as *Mudwall* builders, repairing and building up all such walls as should be damaged and which the complainant should require, receiving their hire according to the established rate to be settled by reference to proper persons acquainted with such works; and they acknowledged to have received 15 Rixdollars in advance. The complaint was founded on the 17th clause of the Ordinance, for having quitted the service of the complainant, without leave or reasonable cause, before the contract was fulfilled. Independently of the complainant not being prepared to prove the contract, for which purpose and for the reason already stated the proceedings were referred back for further inquiry, it was objected that the Defendants did not come within the reach of the 17th clause, either as regards the

character of "menial or domestic servants," or the breach of the alleged contract. On those points, the order of the S. C. referring the case back, observed "The Court feels bound to record its opinion, at this stage of the proceedings, that supposing the Defendants to have entered into such a contract as that now filed—still more if they received in advance the sum alleged, they would come within both the terms and spirit of the 17th clause. The description of persons set forth by that clause, and within which description, therefore, the Defendants must be brought, before they can be rendered liable "to the penalties thereby awarded is as follows." "Any menial or domestic servant within the said town &c. who may be employed in or about the house &c. grounds or gardens or as Palen-queen bearer or cooly, and shall willingly agree or contract with any person to serve such person for a month, or other fixed period or in any manner whatsoever." From the moment, then, of entering into this agreement the Defendants becomes; to all intents and purposes, "the menial or domestic servants" of the complainant "employed about the house, grounds or gardens as Coolies," If the word "Menial" were to be taken in its strict meaning, assigned to it by the law of England viz. "a servant who lives within the household and with the family of the employer, the clause would be nearly inoperative; since there are few servants in the place who answer to that description: But the word *Cooly*, which is a very general term and would certainly include persons engaging to serve as *Mud-wall* builders and repaireis, puts the case, in the opinion of the Court, out of all doubt. The first condition of the clause, then, with reference to nature of the service, being satisfied, the remaining questions are, whether the Defendants have entered into such a contract the breach of which would render them liable to the penalties of the 17 clause, and if so, whether they have actually been guilty of such a breach of it. On those points much must depend on the evidence to be adduced, not only as to the due execution of the contract, but as to the sums paid, on the one hand, and the work performed on the other;

This Court will only at present observe that the written agreement is extremely indefinite as to duration,—the only limit induced, which the terms of it points out would be, there being no more *Mud-walls* to build up or repair. But then the ordinance embraces contracts entered into “for a month or other fixed period, or in any manner whatsoever” whether the Defendants be or be not entitled to be relieved from this indefinite contract, supposing them to have entered into it, can only be determined when all the circumstances attending the completion of it, wholly or in part, are known. Another point, on which this agreement is very indefinite, is the mode of remuneration; which is to be settled “by reference to proper persons acquainted with such works,”—without saying that the validity of the instrument is hereby effected, it is impossible not to be struck with the inexpediency of entering into any contract for services without settling the rate of remuneration beforehand, whenever that is practicable.”

4. The case accordingly underwent further inquiry in the D. C. The complainant proved the execution of the contract and that the Defendants had left their work, unfinished, without leave or reasonable cause; and the D. C. sentenced them to pay a fine of three shillings each, or in default of payment, to be imprisoned for one week. The complainant again appealed, and after hearing him in person in support of his appeal, the S. C. affirmed the conviction, but changed the sentence by raising the fine to twelve shillings on each of the Defendants, and the term of imprisonment, in default of payment, to one month for the reasons assigned in the following judgment. “It is rarely and with reluctance that this Court interferes with the sentence of a D. C., especially for the purpose of increasing the punishment awarded: But as the Court below has found the Defendants guilty of having left the work unfinished which they had agreed to perform, and as the former order of the S. C. has already pronounced the Defendants, if they had entered into this contract, to have brought themselves within the 17th clause of the Ordinance, it becomes necessary to mark their conduct

by imposing some thing more than a mere nominal penalty upon them. The fine which has been imposed upon them is less than what, by their own admission, they are at this moment indebted to the complainant, as the balance of what has been advanced to and not earned by them. It has been urged this day by the complainant as the Ordinance imposes the forfeiture of all wages due at the time of quitting the service, besides further punishment at the discretion of the Court, and as an advance of wages is generally necessary with Laborers of this description, the money so advanced ought to be considered as "wages due" within the meaning of the Ordinance, and should be forfeited accordingly. The Court cannot adopt this construction of a penal enactment, but certainly in apportioning the additional punishment directed by the Ordinance it ought not to be forgotten that when wages are paid in advance, the first branch of the penalty becomes nugatory and, consequently, that whatever loss the delinquent is to sustain must be imposed in the shape of the additional discretionary punishment. And if in the present instance, the D. C. had fined the Defendants in the full amount which they had received in advance, this Court would not have felt disposed to reduce that amount; for no excuse, whatever has been established for the abandonment of the unfinished work. The complainant has also urged that a fine to the King is no compensation to himself, personally, for the damage and inconvenience which he has sustained by the breach of the Defendant's engagement; and he has cited an expression in the former order of this Court that "this proceeding partakes very much of the nature of a Civil action." [Supra, Title "Pleading" par: 19.] But on reference to that order, it will be seen that the analogy there pointed out has relation merely to the course recommended to be adopted with respect to the Defendant's admission or denial of the agreement. The proceeding is still declared to be, "a Criminal prosecution, in its form and in its consequences." "As such, it is impossible to award damages to the complainant under it. And it would be equally inconsistent with the end and object of a Criminal pro-

secution, and with the terms of the Ordinance, to decree a specific performance of the agreement, as prayed for, by the Petition of Appeal. These would form the proper objects of a Civil action. But as was intimated in the former order, it is because the circumstances of most servants would incapacitate them from paying damages that the breach of their Civil contracts of service are thus punished criminally. In other words, the fear of punishment, operating on the mind of the servant, is given to the Master as a protection against misconduct, in the room of a pecuniary indemnity which, if awarded by a decree, could seldom be actually recovered." No. 910. Colombo. [Criminal] 5th August, 23d September 1835.

5. On appeal from an order of the D. C. of Colombo, under the 29th Clause of the same Ordinance, empowering the Surveyor General to remove a Verandah which that Officer had represented as an encroachment, the D. J. being in Court, and having stated that the Defendants had no opportunity of shewing that the Verandah in question was *not* an encroachment upon the public street, as stated in the notice of the Surveyor General "It was ordered that the Defendant be at liberty to adduce any evidence to that effect which she might think proper, which evidence would be returned with the opinion of the D. C. thereupon to this Court together with the rest of the proceedings. The terms of the 29th Clause justified the D. C. in considering that it was bound to issue the order, directing and empowering the removal of the nuisance, without hearing evidence against the application. But after mature consideration of the words and of the general tenor of the Clause, this Court is of opinion that the owner of the premises complained against must be allowed an opportunity of shewing that they are no encroachment, or nuisance in any other respect. Without such opportunity, indeed, the necessity of any application at all to the D. C. would not be quite obvious. It is, therefore, recommended that on all future occasions, when application is made by the Surveyor General or Superintendent of Police, for the order of removal, such order be issued in the shape of a

rule to shew cause, returnable within a reasonable time, why the object of complaint should not be removed in terms of the Ordinance." No. 592. Colombo [Criminal] 3rd November 1834. See Title "Injunction" supra 231, where this case is also mentioned with reference to that remedy. And see title "Prosecution" par: 5, as to the question, whether encroachments &c. should be treated as Criminal Offences or Civil injuries, under the 24th and 25th Clauses of the Ordinance.

6. The question was proposed to the S. C. by one of the D. Js. of Colombo, whether the production in Court by the Superintendent of Police, of the copy of the report made to that Officer by the Constable, was illegal. The report contains the names of persons charged with offences, and of the complaint, accompanied with the remarks of the Constable. The S. C. observed in answer. "That the question proposed must very much depend on the use intended to be made of the report in the D. C. that it was scarcely necessary to say that neither a copy nor the original report itself could be received by the Court as evidence of any of the facts therein stated, as the application of it to any such purpose would undoubtedly be illegal, but that if it were merely used as a mode of informing the D. C. of those charges which it was intended to prove by regular evidence, the instrument, so far from there being any thing illegal in it, appeared well calculated to promote the ends of Justice, by facilitating the necessary inquiry into petty offences, and by preventing the complainant, whether a Police Officer or a private person, from varying the nature of the Charge." From a subsequent communication of the D. J. it appeared that it was merely in the shape of this preliminary notice or introduction of a complaint, that it was proposed to make use of the report. L. B. 17. 18. 19. August 1835. As to the service of notice or ticket for Patrol duty, see title "Process" paragraphs 4. 5. & 6. see also title "Judgment."

#### POST OFFICE.

Prosecution for alleged attempt to defraud, see "Prosecution." paragraph 39.

## POUNDAGE.

See Title "Fiscal." 194. 5.

## PRACTICE. p: 459. M. S.

Law and practice distinguished Par: 1. Rule 24; Case dismissed, if Plaintiff absent on day for hearing par: 2. so if Proctor absent 3. But not on other days, as on the return day of the process 4. or on the day for filing answer 4. or list of witnesses 5. or documentary evidence 5. or on adjourned day, if he had no notice, or insufficient notice, or incorrect notice 6. Nor should a suit be dismissed because instituted in a wrong class. 7. Nor because Plaintiff declined answering questions 6. Dismissal for absence of Witnesses discretionary with D. C. 9. such dismissal or non-suit not final, unless in extreme and vexatious cases 10 & 11. Hearing *ex parte*, if defendant absent, notice of trial left at his last abode 12. Excuse for absence must be proved 13. Absence of Proctor, same as that of client, costs on postponement 14. Postponement not to be permitted without good cause; payment of opposite witnesses 15 & 16. Illness of witnesses if proved good ground of postponement 17. Defendant dying his son substituted 18. Time for filing documents 20. one party appearing for the rest: Consolidation of actions 21. How the value of Land should be ascertained in order to fix the class 22. Former rules of practice when to be followed: construction of 47th Rule. 24. Reference to other Titles 25.

1. By this term, is understood the form and manner of conducting and carrying on suits or prosecutions, Civil or Criminal, through their various stages, from the commencement of the process to final Judgment and execution, according to the principles of Law and the Rules laid down for the practice of the Courts. "Law Dictionary, title Practice." We have already had occasion more than once, to refer to the distinction between the *Law*, properly so called, by which the rights of persons and of property are to be governed, and *Practice*, or the course of procedure, by which the law is to be had recourse to and administered: *supra* titles "Execution [Parate]" 181 "Law,"

par: 8 and 9. and "Nantissement" par. 6. Many of the decisions which have been given under the preceding titles refer to matters of practice, and will be referred to at the conclusion of this head: We are now to notice such points of practice as have been decided and which have not been classed under any other more definite title.

2. The 24th Rule of Sect: 1 directs that "on the day fixed for hearing, the case shall be called on in its turn: if the Plaintiff do not appear, either in person, or by advocate or proctor, and the Defendant be ready to proceed, the case shall be dismissed with costs." Thus where a Plaintiff, on the day regularly fixed for hearing of his case at Jaffna, was absent, giving as a reason that his presence was required at the Pearl Fishery on other business of his own, and without authorising his Proctor to proceed in his absence, the D. C. dismissed the case, and the dismissal was affirmed in appeal: The S. C. observed: "That according to his own statement, the Plaintiff had taken upon himself to leave the District of Jaffna at the time when his case was coming on for hearing, not from imperative necessity, as to obey the summons of any other D. C., or even in the service of Government, but for the purpose of prosecuting his own private affairs at the Pearl Fishery, that a party had undoubtedly the right of making his election, to which of several objects of interest he would devote his time and attention, but he must not be allowed to do so to the prejudice of others; that when a Plaintiff instituted an action, he was bound, in fairness to the Defendant, to carry it forward to a conclusion, without any delay, except what might arise from causes beyond his control—that ignorance of the practice, which the Plaintiff pleaded, was an excuse which could rarely be admitted, but could not be listened to in the present instance, since it appeared that the Plaintiff had a Proctor engaged from the commencement of the suit, who could not urge such ignorance and who was perfectly competent to conduct the case in the Plaintiff's absence" No. 1503 Jaffna 5th August 1835.

3. The S. C. has decided that the rule as to dismissing, or hearing *ex parte*, is the same, whether such proceeding be occasioned by the absence of the party himself or his Proctor. No. 6105 Colombo 8th July 1835, No. 12241 Caltura 1st April 1835. In the latter case, the S. C. directed that the case should be restored to the list, on the payment by the Plaintiff's Proctor of the costs incurred by both parties on the day on which he was absent "this was a condition" the judgment observed "which common justice required should be imposed: For no private interests ought ever to induce a Proctor to quit his post, without either obtaining the consent of all parties to the postponement of such cases, as might otherwise come on in his absence, or else transferring his cases, with the consent of his respective clients, to other hands, any excuse for absence, whether of Plaintiff or Defendant, such as illness, or any other unavoidable cause, should be established to the satisfaction of the Court." No. 2161 Colombo 8th October 1834.

4. But such dismissal is not to take place, on the ground of the Plaintiff's not appearing at other stages of the case, at which his presence is not indispensably required. Thus where a Defendant not having appeared, the return of the process was after many delays, enlarged to a day fixed, on which day neither Plaintiff nor Defendant were present, and the D. C. struck the case out of the list, the S. C., on Appeal by the Plaintiff, ordered it to be "restored and proceeded with:" "The D. C.," it was observed, "appears to have been under an impression that the Plaintiff, as well as the Defendant, was in default, by not appearing on the last return day. On further reflection, however, the Court will see that the Plaintiff's attendance was not, in reality, required upon that occasion: for the Defendant had not as yet appeared, and till such appearance had been enforced, the Plaintiff could take no further step in the case: the Warrant of Attachment for the contempt had already issued and the Plaintiff might naturally and justly expect that this process would be carried into execution, and the Defendant be compelled to answer, after which,

and not till then, the Plaintiff's presence would be required," No. 261 Caltura, 11th June 1834. So where cases have been struck off, on the ground of the Plaintiff's absence on the day fixed for filing answer, the S. C. ordered them to be resumed, because this not being a day of hearing, there was no necessity for the Plaintiff's appearance, or for noticing his non-attendance. No. 21 Amblangodde, 22d March 1834 [Circuit] No. 1859 Caltura, 28th October 1835.

5. On the same principle, where a case has been dismissed, because the Plaintiff was absent, on the day fixed for filing the list of witnesses, the S. C. has directed it to be resumed. "The 21st Rule of the 1st section, which regulates the mode in which list of witnesses are to be filed, does not impose the penalty of dismissal on the Plaintiff's failure in this respect, without giving him an opportunity of shewing cause against such dismissal; for which purpose the Defendant is to move for a rule according to the Form No. 15. On the day appointed the Plaintiff would either come prepared with his list, or would shew such cause for his omission as would satisfy the Court, or else, the action would *then* be dismissed." No. 400 Caltura, 27th May 1835. No. 87 Jaffna, 2d May 1835, vide supra : 122. 3. where we have seen that the list of witnesses need not be delivered by the party himself or by his Proctor, so it was decided on one occasion by Mr. Justice Norris, that it was no ground for dismissing a suit, that the Plaintiff had not filed his documentary evidence on the day fixed for that purpose. The writer is unable to cite the case, in which this decision occurred. The penalty for such omission would be that he would not be allowed to produce such evidence afterwards, unless he could satisfy the Court, according to the 20th Rule, that it was not in his power to produce the documents on the day fixed. Another penalty to which either party would probably subject himself, by his absence on this occasion, would be that the documents produced by the opposite side might be taken as admitted. So when a day was appointed by a D. C. for the parties to take out their Subpœnas [an unnecessary proceeding

altogether] and the case was dismissed on account of the Plaintiff's absence on that day, the S. C. ordered its restoration to the list. No. 7934 Tenmoratchy and Pachellepalley 3d December 1834.

6. Where a case had been adjourned for hearing to another day, on account of the absence of the D. J., and the Plaintiff was absent on the adjourned day, but it did not appear that he had notice of that day, the D. C. having dismissed the action, Mr. Justice Norris, ordered it to be restored to the list. And in another case, the order of dismissal was set aside, where the notice was unreasonably short. It appeared that on the 10th November 1834 it was ordered that blank notices should issue for the appearance of the parties on the 24th, that the notice, however, was not issued to the Plaintiff till the 17th and was not served upon him till the 22d, "so that" as the order of reversal observed, "twelve days were allowed to elapse between making the order, and serving the notice on the Plaintiff, [for which delay no reason was assigned,] and only one entire day was left for the Plaintiff to prepare to obey the summons of the Court. It really appears extremely hard upon parties, that they should be put to the expense of appealing, in consequence of neglect in carrying the orders of the Court into effect. If the D. C. had enquired, on the 24th November, when the notice had actually been served, it could scarcely have failed to see that it was unreasonable to strike the case off, on account of the Plaintiff's non-attendance; on so short a notice" No. 569 Calura, 20th February 1835. So where it appeared doubtful, whether the Secretary had not assigned a wrong day to the Plaintiff for the trial of the case, the S. C. ordered the case which had been struck off, to be restored to the list, and that a fixed day for hearing be appointed. "It was quite sufficient to induce the S. C. to make this order, that the D. J. reported that the Secretary might have desired the Petitioner to summon his witnesses for the 10th instead of the 8th September, the day really fixed by the Court. It was true, as suggested by the D. J., that the Plaintiff might have applied to

the Court, to know which day was the proper one, but it was only natural to suppose that a suitor would receive information on such points from the chief ministerial officer of the Court with that degree of confidence, which the public ought to be enabled to place in the Secretary of every D. C. No. 819 Four Korles 24th November 1834.

7. Where it appeared that a suit had been instituted in a class below that which the amount in dispute required, and the D. C. dismissed it on that ground, Mr. Justice Norris observed, "that the institution of a suit in a wrong class was not, of itself, a sufficient ground of dismissal, but that the Plaintiff ought rather to have been called upon to supply the additional stamps required," and it was accordingly ordered that the case be resumed on the Plaintiff's supplying such stamps. No. 378 Matura, 20th August 1834.

8. In an action in which certain points arose as to the partnership of the parties, the D. J. after the written pleadings were concluded, put some questions to the Plaintiff, which he refused to answer, upon which the D. C. dismissed the action. The S. C. referred the case back for evidence, observing that "the questions were properly put and that the refusal to answer them might probably prejudice the Plaintiff's case; but that this refusal was scarcely a sufficient reason for dismissing the action without hearing the evidence. The Plaintiff, perhaps, felt that he could not safely answer questions of Partnership Law." No. 3157 Amblangodde, 6th March 1835, [Circuit.]

9. The postponement of cases, on account of the absence of witnesses, [as to which a few observations will be made presently] must be left, in a great measure, to the discretion of the D. C. No. 2502 Ruanwelle 16th December 1835. In a case in which, on the day fixed for hearing, the Plaintiff's witnesses did not appear, and the Fiscal returned that they were not to be found, the suit was dismissed, and on the Plaintiff's appealing, the decree of dismissal was affirmed. The S. C. was even then ready to have listened to any good reason for the

non-attendance of the witnesses, though it observed, that the D. C. had no alternative, but to dismiss: But the appellant did not even appear in support of his appeal. No. 12,313, Colombo 30th April 1834.

10. Generally speaking, however, these dismissals, for default of appearance on the day of hearing, are to be considered rather in the light of mere *Non-suit* than of absolute and final decision. The word *Non-suit*, though peculiar to English Law, is made use of here, and in some of the decisions of the S. C. as conveying the idea of temporary dismissal, rather than irrevocable adjudication. For by the Law of England, a Plaintiff may, after having been non-suited, bring a fresh action for the same cause, on payment of the costs of the first;— which he cannot do after a verdict has passed against him, unless the Court set aside the verdict: So in Ceylon, the Plaintiff is not debarred by dismissal on the ground of default, whether of himself or his witnesses [except in very extreme cases, one of which will be mentioned presently] from instituting a fresh suit on payment of former costs, though after a final decree against him he no longer possesses that power, vide supra: 115, 243. In many cases, even in which evidence has been gone into, and the suit has been dismissed for want of sufficient proof to support them, the S. C. has taken occasion to observe, on affirming the dismissal; that the Plaintiff will not be precluded from bringing a fresh action, if he should come into possession of more satisfactory evidence. The reservation of the right of the Plaintiff will be found in the Judgment of the S. C. in the following cases No. 546. Chilaw and Putlam 7th October, 1835 supra: 101. No. 2601. Hambantotte 19th March 1835 [Circuit] No. 2027. Islands 6th May 1835. No. 964. Jaffna 27th January 1836. No. 277. Amblangodde 19th November 1834. No. 84. Caltura 22d December 1834. No. 2775. Matura [transferred to Hambantotte] June 1835. In such cases, care should be taken, as was observed, under Title “Land” par: 2, so to shape the decree, as not to give a title to the Defendant, merely because the Plaintiff

has failed in establishing his case.

11. In one case, however, to which allusion has just been made, the S. C. thought it right to declare that a decree of dismissal should be final. The Plaintiff had sued his Mother for certain property, in October 1833, from which time up to March 1835, the Plaintiff kept the case hanging over the Defendant's head, several days having been appointed for the hearing, and as many adjournments, made on the Plaintiff's motion, on the ground of the absence of some of his witnesses: At length the D. C. dismissed the suit under the 24th Rule, the Plaintiff not having paid Batta to the Defendant's witnesses as thereby required. The S. C. after asking the Plaintiff's Proctor, whether he really believed that certain interrogatories which had been issued might be expected to be returned, and the Proctor not being able to answer that question satisfactorily, affirmed the decree, and there being but too much reason to believe that the action had originated in malice, ordered that it should be considered final, No. 12, Amblangodde 7th March 1835. [on circuit.]

12. The 24th Rule after imposing this penalty of dismissal on Plaintiff's non-appearance, directs that "If the Plaintiff be ready to proceed, and the Defendant do not appear, either in person or by Advocate or Proctor, the case shall be heard for the Plaintiff *exparte*." In an action for goods sold and delivered, the Defendant admitted the purchase, but pleaded payment, which the Plaintiff denied. After several adjournments, the case was fixed for hearing, and the Defendant not being to be found, the D. C. directed notice of the day appointed to be left at his last place of abode. On that day, the Defendant did not appear, and the case having been heard *exparte*, when the Plaintiff proved a promise on the part of the Defendant to pay if the Plaintiff would withdraw the action, the D. C. gave Judgment for the Plaintiff. The Defendant appealed alleging that the notice had not reached him, but the S. C. affirmed the decree, observing that the D. C. being satisfied that the notice of the day of Trial had been left at the

Defendant's last place of abode, was perfectly right in hearing the case *ex parte*, and that if the Defendant's answer of payment had been true, he would have been eager to prove it. No. 1497. Colombo 30th April 1834.

13. Where a Defendant and his witnesses are absent on the day of hearing, he ought, if possible, to make known to the Court the cause of such absence, and to establish it to the satisfaction of the Court, which will then exercise its discretion as to the sufficiency of the reason assigned; and where after a case had been heard *ex parte* and Judgment for the Plaintiff, the Defendant appealed on the ground that he was prevented from illness from attending, but no proof of that fact had been offered to the D. C. the Judgment was affirmed. The S. C. observed that if the Defendant really were ill, it was his duty to have sent some person to represent and prove that circumstance before the D. C. or he might have employed a Proctor to conduct his defence for him, as he has since done to conduct his appeal. No. 2161, Colombo 8th October 1834. And on a similar occasion the S. C. said, that it could not listen to the naked assertion of the Defendant, that he was prevented by illness from attending the Court, or summoning his witnesses, or even employing a Proctor. No. 351, Jaffna 15th October 1834. And where the D. C. has expressed itself dissatisfied with the reason assigned by a Defendant for his absence, the S. C. has usually expressed its approval of the case being heard *ex parte*. No. 12,090 and 4,555. Colombo 30th April 1834.

14. In one case the D. C. postponed the hearing of a case on the ground that the Defendant's Proctor was absent, and that the 24th Rule was silent as to that particular occurrence. No necessity was shewn for the Proctor's absence, and the Plaintiff who had urged that the case should proceed *ex parte*, appealed against the postponement, and claimed the whole of his costs up to that day. The S. C. modified the order of postponement, by directing that the Defendant should pay the Plaintiff's costs, if any incurred on the day on which the case should

have been heard. "It is true" the S. C. observed, "that the 24th Rule makes no provision for the absence of Proctors, nor was it necessary to make any such express provision: a party appears either in person or by proxy: if by proxy, the Proctor stands in the place of his client, and the consequences of his non-appearance on the day of trial must be the same as if the client himself made default. If the absence of the Defendant himself be an insufficient reason to postpone the trial, the absence of the Proctor cannot be considered sufficient for the purpose. Every Proctor must be supposed to know the day fixed for the trial of any cause in which he is engaged, and if compelled to be absent, he should provide for such absence, by procuring some other Proctor to conduct the case for him. The S. C. would not lay this down as a rule absolutely inflexible, or without allowing any discretionary power to the D. C. but certainly a very strong case should be established of unavoidable absence, as from illness or other uncontrollable cause, before a trial is postponed on this ground, without the consent of the opposite side: and when postponed on such ground, it should be on payment of the costs incurred by that postponement. In the present instance, the postponement having already been made, nothing remains but to fix another day for trial. The claim which the Plaintiff makes for the costs incurred by him up to this day, cannot be admitted to that extent. When a case is postponed on the application of one of the parties, it is usually done on the payment of the costs of the day, but not of any costs previously incurred. No. 6,105. Colombo 8th July 1835. In one or two cases, where the hearing has taken place *ex parte*, on account of the absence of the Defendant's Proctor, and it has appeared that there was a good ground of defence, the S. C. has considered it hard that the Defendants should suffer for the neglect of their Proctor, and has ordered a new trial, the Proctor paying the costs of the former one. And so even, where the day fixed for the trial was the King's birth-day, the D. C. having found it necessary, from the pressure of business, to sit on that day, and

the Defendant's Proctor having had due notice that the case would be called on for hearing on that day. No. 226. Wale-gammo 8th July 1834 on Circuit. No. 1,703. Islands. In another case, which will be mentioned more fully under Title "Proctor" the D. C. proceeded to hear the case in the absence of the Defendant's Proctor, and directed him to refund the sums he had received, exclusive of those for stamps. And the S. C. finding on inquiry that the Proctor had no sufficient excuse to offer for his absence, expressed its approval of that order. L. B. 13th 17th 20th and 25th October 1834.

15. The subject of adjournment of cases, which also forms part of the 24th Rule, is one of great importance, not only as regards the undoubted right of a party to have the hearing postponed, provided he can shew good and substantial ground for that step, but also, on the other hand, as respects the protection of fair litigants from the vexatious delays which, in the greater number of Cases, form the sole object of the party seeking the postponement. Those who were in the habit of seeing the cases which used to come before the late High Court of Appeal, must remember the number of adjournments which usually appeared in the proceedings, from month to month and from year to year, the naked order for postponement being usually entered in the Minutes, on account of the absence of one or both of the parties or their Witnesses, but without any reason assigned, much less proved for absence, and often, indeed, on the bare motion of one of the parties. This easiness on the part of the Courts, proceeding no doubt from an anxiety to accommodate, and a fear lest any party should be able to say that the trial had been brought on before he was completely prepared, was sadly abused by the litigants, and could scarcely fail to lessen the respect due to the Courts themselves, as well as to inflict great injustice on those parties who were actuated by an honest desire to bring their suits to a termination. It was with a view of applying some check, if possible, to these almost interminable delays, that the 24th Rule provides for the payment of the adverse witnesses, as the

condition of postponement. It may at first sight appear hard upon a party, that he should be called upon to pay for an inconvenience, which may be the fault of the Fiscal or his Officers. But there is good reason to believe that the absence of Witnesses is more frequently occasioned by the supineness of Plaintiffs, and the wilful delay of Defendants, in procuring their citation to be served, than in the Fiscal's deputies in serving them. It is to be remembered that, owing to the great number of persons in every village, who are known by the same name, the co-operation of the party with the server of the writs is absolutely necessary in many cases to ensure the attendance of the right person. And where delay is the object of the party, the commonly received opinion is that he finds it no difficult matter to procure the co-operation of the Officer, by making a false return of the absence of the Witnesses from their homes. Where the neglect is really imputable to the Fiscal, or his subordinates, a party has his remedy against him, either as an officer of the Court, or by action for damages. But the evil of delay, as it formerly existed, cried so loudly for remedy, that this provision against one of the most fruitful sources of it was considered well worth the experiment. If the result of that experiment should now be deemed unfavorable, the rule should, as in other cases, be altered.

16. An action to compel the Defendant to give a receipt for alleged payments made on a bond due from the Plaintiff, was commenced in a former P. C. and was at length dismissed for want of proof in June 1834. The S. C. on affirming the decree, drew the attention of the D. C. to the preposterous number of adjournments, which had been allowed on account of absence of witnesses. It observed "that a case so simple and so easily proved should have been dismissed on the very first, or certainly on the second, default of the Plaintiff. The greater number of adjournments, it is true, took place before the new system came into operation. But even before the D. C. the case was called on no less than six times, extending over a period of seven months, before it was dismissed. The S. C.

can readily understand the unwillingness of a zealous and conscientious Judge to dismiss a case, while there is any chance of the necessary evidence being produced. But by a close adherence to the rules laid down in this respect, parties would soon discover the inability of attempting to protract cases, while a relaxation of those rules, without good cause, must operate not only as an encouragement to the old system of procrastination, but as a hardship on those parties, towards whom the rules respecting default may be enforced. No. 1,897. Batticaloa 17th October 1834. In the foregoing case it is to be observed that by keeping this action pending, the Plaintiff might very probably hope to defeat or delay any action which the Defendant might bring upon the bond. So where a case was heard *ex parte*, and after judgment for the plaintiff, the Defendant appealed, on the ground that the hearing ought to have been postponed, his witnesses being absent, but no reason was assigned for their absence, except the Fiscal's return that they were not to be found; the S. C. affirmed the decree, and expressed its approval of the refusal of the D. C. to postpone the hearing without a good reason assigned for the witnesses not being forthcoming. Carr vs. — Colombo 5th February 1834.

17. The foregoing observations it is scarcely necessary to say, apply to those cases only, in which no reason, or no sufficient reason, is assigned and proved, for the absence of the witnesses. If the absence be satisfactorily accounted for, as regards the *nature* of the excuse and the proof of it, it would be the height of injustice to force the case to a hearing on evidence which must be incomplete. Thus the illness of a witness, if satisfactorily established, has always been considered a sufficient ground for postponement; and where a party appealed against a second adjournment, which had been granted on this ground, the S. C. affirmed the order, observing "That this was a matter which must be left to the discretion of the D. C., under the conditions imposed by the 21th Rule, and subject to appeal, if a party considered that the indulgence had

been unjustly granted or refused; that in the present instance, the S. C. could not take upon itself to say that this second postponement was unreasonable, because it must be presumed that the Court believed the account given of the illness of the absent witness, that it would have been better, however, to have fixed the day for hearing peremptorily instead of declaring that it shall be fixed for hearing on an early day. No. 2,502, Ruanwelle 16th December 1835. But if such ground for postponement do exist, it should be put forth, and the party should move to have the case postponed, before the hearing is entered upon: and if he omit to do so, the S. C. will scarcely listen to the objection that all his witnesses have not been heard as a ground for directing a rehearing, though where a case is dismissed for want of evidence, such dismissal, as we have seen, is not considered to bar the Plaintiff from bringing a fresh action. No. 2,354. Chilaw and Putlam, 7th October 1835. *Supra* 1801.

18. The desire felt by the S. C. to spare parties, as much as possible, the delay and expense of double or circuitous actions, has been adverted to under title "Pleading" par. 3. A. D. J. applied for instructions in a case in which on the day fixed for trial the son of the Defendant appeared and stated that his father had died a few days ago; and it appeared that the son was sole heir to the father's estate. The D. J. postponed the case till he should be informed whether it would be necessary for the Plaintiff to commence a fresh action; and in that case who ought to pay the costs of the former one. The answer returned was "That there appeared no necessity for instituting fresh proceedings on account of the Defendant's death; that if this fact were established to the satisfaction of the D. C., the best and most simple course would be to substitute the son, if he represented his deceased father in those rights which were called in question by the present action, in the place of the original Defendant, that it would be well to call on the Plaintiff to state whether he had any objection to offer to this course; but that if he persisted in bringing a fresh action, without good

cause for so doing, the costs incurred by such unnecessary proceeding ought to fall upon himself" L. B. 4th 9th October 1834, See p. 1 as to the necessity of parties taking out administration, before action in those districts, into which the system of Administration had only recently been introduced. The case just referred to occurred in the District of Madawaltenne.

19. Where a Defendant had been committed for contempt in not filing answer, we have seen that he was not permitted to obtain his release, by applying to sue as a Pauper. *Supra* title "Pauper" par : 10. No. 6,319. Colombo 2nd May 1835.

20. As regards the filing of documentary evidence. The S. C. had occasion to remind the D. C. in one case that the first rule of practice only requires documents to be filed with the libel as are therein referred to ; and by the 20th Rule, the Plaintiff is at liberty to file Documents *not* so referred to, on the day to be fixed for that purpose. No. 277 Amblangodde 19th November 1834. And where it appeared that no day had been so fixed, a case was referred back by the S. C. to receive certain documents tendered by the Defendant, and which he alleged he had no opportunity of producing. No. 772. Four Corles, 20th February 1836. [on circuit.]

21. We have seen *supra* 225, 6, that one of several joint parties to a suit may appear for all, unless the attendance of others be required by the other side for the purpose of examination under the 29th 30th and 31st Rules. The consolidation of several actions against different Defendants, having the same interests respecting the same Land, we have also observed, has been sanctioned by a decision of the S. C. Title "Pleading" Par : 7.

22. In an action for Land, the Plaintiff having estimated it higher than the Defendant considered to be its real value, the D. C. appointed Commissioners to inspect the Land, and report its real value. Against this order the Plaintiff, who sued in formâ pauperis, appealed, alleging that there was no regulation or rule of practice, by which this course was pointed out or permitted. The S. C. affirmed the interlocutory order, ob-

erving "that it would be the height of injustice to allow a Plaintiff to put the opposite party to unnecessary expense for the purchase of stamps, higher than the value of the property really required, that this injustice would be still greater, where the Plaintiff had the advantage of suing as a Pauper, for if he were allowed to fix the value at his own estimate, without giving the Defendant an opportunity of contesting its correctness, he might from motives of personal ill will, put his adversary to the expense of stamps exceeding the value of the property itself, without incurring any, the slightest expence himself:—that the practice of the Courts at Colombo had always been to allow these commissions, where the value fixed by the Plaintiff was disputed, whether as being too high or too low, that it by no means followed, because this course was not expressly provided for by regulation, or by the rules of practice, that it could not legally be adopted; and that those rules were never intended as providing every possible emergency, or for every collateral step, which might become necessary in the progress of the suit." [This last observation also occurs in the judgment on the case of Clark vs. M. Lebbe, *Supra* title "Nantissement."] It was ordered that in case of the Plaintiff obtaining a decree in his favor on the merits, the costs incurred by the Defendant in this appeal should be deducted out of those awarded to the Plaintiff. No. 1,982. Caltura 27th January 1836. See also title "Stamps in pleadings" par: 18.

23. We have before had occasion to observe. p: 230 1, that where any matter of practice is left unprovided for by the rules of practice now in force, recourse may properly be had to those followed by former Courts, but that where the practice is prescribed by the rules of 1st October 1833, all former rules, conflicting with them, must give way. p: 39. The forms appended to the rules, may be altered to meet the circumstances of any particular case, *supra*: 160 195.

24. As to the construction put upon the 47th Rule, and the distinction between questions of Law and practice, see title "Law," par: 9. and "Proctor" par. 19.

25. There is scarcely one of the titles, of which this little work is composed, in which points of practice do not incidentally occur: "Appeal:" "Assessors:" "Bail:" "Contempt:" "Copies:" "Costs:" "Examination," "Execution," "False claim:" "Fisca'," "Injunction," "Issue," "Judgment:" "Motion:" "Oath:" "Pauper:" "Pleadings:" "Process:" "Proctor:" "Sequestration" "Stamps:" par: 16 et seq: tender.

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### PRE-EMPTION.

See Title Land par: 11.

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### PRESCRIPTION.

Ordinance 8. of 1834 how differs from Regulation No. 13 of 1822. What promise, admission or act shall take a case out of the Ordinance paragraphs 2 and 3. Explanation of "adverse title" 4. It may be derived from or dependent on that of the claimant 5. Mortgagee cannot claim by prescription against the Mortgagor 6. Nor trustee against the person interested 7. Possession must be absolute, not partial or qualified 8. And undisturbed Suit commenced bars prescription: other modes of opposition 9. Services for Land lost by non-claimant 10. Title by prescription not affected by informality of original possession 11. Silence of claimant ought not to prejudice him, as long as he is unable to assert his claim 12. Suits not to be dismissed as prescribed without hearing evidence. Term of prescription as affecting instruments, to be decided by the tenor of the instrument, not by its denomination 14. Application of clause 8. of the Ordinance &c. Decrees not within the Ordinance, 15. Alienation of entailed property; prescription does not run against the heir, till his right accrues 16. Claim may be rejected on the ground of long silence, though prescription not pleaded 17.

1. This word has a much more extended meaning in Ceylon than in the Law of England, by which it is confined to certain personal rights, claimed by virtue of immemorial usage: Whereas with us in Ceylon, following the language of the Civil Law, *Prescription* is used synonymously with the English expression *Li-*

*mitation of actions*, and is applied to all those subjects, on which the Law has laid down certain periods of time within which actions relating to those respective subjects must be brought.

2. The Ordinance No. 8 of 1834 by which the previously existing Regulations and Kandyan Proclamation on this subject are consolidated and amended, leaves the respective periods of prescription as they were fixed by the former Regulation No. 13 of 1822. The principal alterations, or rather additions introduced by the Ordinance, consist in explaining the term "adverse title" in the second clause, as regards the possession of Land and in giving *Plaintiffs* the benefit of such Ten years possession, which by the strict terms of the Regulation of 1822 would have been limited to Defendants. In applying the rules of prescription as regards bonds, bills, promises, book debts &c. to claims in reconvention and set off, as well as to actions; and in providing expressly for those classes of cases, which may be considered as taken out of the scope of the Ordinance.

3. This latter proviso, which forms the subject of the 7th clause, is of material importance in the construction of the Ordinance, and may be considered an imitation, to a certain degree, of statute 9. Geo: 4. ch: 14. sect. 1. That statute which is usually, it is believed, called Lord Abinger's act, seems a striking instance of reaction in Judicial opinion. To judge from the cases on this subject in our English Reports, one should infer an anxiety on the part of the courts to find some ground for declaring a case out of the Statute of Limitations or at least for leaving it to the jury to say, whether a subsequent acknowledgment of the debt had not been made within the limited period. At length it seems to have been felt that this hostility to the Statute of James 1st., by which its provisions in so great a number of instances were neutralized, had been carried too far, and accordingly the Statute 9. Geo: 4. was passed, by which it is enacted, that no acknowledgment or promise shall be sufficient to take an action of debt or simple contract out of the Statute of Limitations, unless it be in writing and signed by the party chargeable thereby: provided that the offer of any

payment of principal or interest shall not be taken away or lessened. The 7th Clause of the Ordinance provides that if the creditors shall prove, to the satisfaction of the Court, any written promise, acknowledgment or admission made, or any act done by the debtor within the term prescribed for bringing the action, from which the Court shall be convinced that the debt had been paid or satisfied, it shall be lawful for the Court to give Judgment for the creditor, as if the action &c. had been brought within the period limited. This proviso, therefore, varies from the Statute 9. Geo: 4. in two particulars. 1st. It does not require the written promise &c. to be actually *signed*, by the party making it. 2nd. It allows of any *act* done by the debtor, not confining such acts to payment of principal or interest, to be received in evidence, as the proof that the debt is still unsatisfied. It may be observed that the act was not before the Colonial Legislature when the Ordinance was passed, or its provisions might perhaps have been more closely followed. But it should be recollected that there may be many acts done by the debtor, besides payment of part of the principal or interest, which, while they are liable to the misconception or misrepresentation which may be put upon mere verbal acknowledgments, are utterly irreconcilable with the idea of the debt having been satisfied: and this observation is perhaps entitled to peculiar weight as regards the Kandyan districts where debts are so often secured by a partial delivery of Land to the creditor: the debtor continuing to perform certain acts indicative of the right of ownership, but permitting and perhaps assisting in the cultivation of it by the creditor, so as to shew, beyond all doubt, that the incumbrance or debt still exists.

4. The expression "adverse title" in the Regulation No 13 of 1822, Section 3 having been sometimes understood as requiring the production of Title deeds, expressly contradictory of a right in any other person, it was thought advisable, in adopting the term in the Ordinance, to give some explanation of what the law intended by a title adverse to that of the party claiming the Land. And even after the Ordinance had been some time in

operation, a D. J. observed that possession for 18 years in a Defendant, unless he could prove a bonâfide title to the Land, would not be an adverse title. The S. C. on the question being brought before it said that this proposition was not correct; that where possession had been enjoyed for many years uninterruptedly, and without contest, the title or right of possession did become in fact an adverse one against all the world, because no body having disputed it the Law presumed that the possessor had a better right to it than any one else, even though he might not have a single paper or document to shew in support of his title; that this was the very essence of a title by prescription, the 2nd Clause of the Ordinance only requiring possession for ten years to have been undisturbed, uninterrupted, and "unaccompanied by payment of rent, or produce, performance of service or duty, or by any other act, from which an acknowledgement of a right in another might be inferred." No. 1652. Negombo, 6th January 1836. see also Title "Evidence," Supra 120 as to the presumptions on which the Law of prescription is founded.

5. The following cases, and indeed almost all which are about to be mentioned on the subject of prescription, came before the S. C. on the Regulation of 1822, but the points thereby decided will not be found inapplicable to the Ordinance. In an action for Land which the Plaintiff claimed in right of her deceased husband, the Defendants pleaded possession since 1790, and also produced certain deeds which it was unnecessary to consider, because no sufficient proof was offered of them. The only evidence for the Plaintiff was a very loose statement by one witness, of the Land having been mortgaged by the Plaintiff's husband, but which the witness could only have known by report. For the Defendant, several witnesses proved possession by him for 25 or 30 years. The D. C. however, considered that this possession by the Defendant did not give him an undisputed right to the Land, and decreed in favor of the Plaintiff. The S. C. on appeal, finding no evidence of the Defendant's possession having ever been disturbed or disputed by the Plaintiff's late

husband, or by herself until the institution of the present suit; reversed the decree in the following terms: "There is absolutely nothing proved on the part of the Plaintiff by what can be considered legal evidence. The Defendant, on the other hand, has proved possession for considerably more than ten years: And this possession must be taken to be by a title adverse to that of the Plaintiff within the meaning of the Regulation. The meaning of that expression is, not that the title must, in express terms, negative that of the claimant; this would be impossible. All that is intended is, that the right of the possessor should not be derived from that of the claimant, as in the case of a tenant holding of his Land-lord, or dependant on that of the claimant, as when a person is allowed to occupy by permission from the real owner, or collateral to it, as in the case of one or two joint tenants. In other words the possession must be such as is inconsistent with the probability of any just right or title on the part of a claimant who allows ten years to elapse without asserting such claim." No. 1271, Chilaw 27th August 1837.

6. On the principle that the possession of the person claiming by prescription must not be derived from, or dependant on that of the claimant, a mortgage will convey no prescriptive right, as long, at least, as the power to redeem the mortgage remains in the mortgagor. A Plaintiff sued for a field which he alleged had been mortgaged to the Defendant's father twenty years ago, and which he was desirous of redeeming, but which redemption the Defendant refused to allow, and the Plaintiff stated other circumstances to shew that the field had been so mortgaged. The Defendant in his answer, claimed by right of purchase by his father. The D. C. considered that, by the Plaintiff's own shewing, the Defendant had obtained a prescriptive right to the field, and that it was unnecessary, therefore, to hear evidence, and the action was accordingly dismissed. On appeal to the S. C. the case was referred back, in order, that the evidence might be heard on both sides "If it be true, as the Plaintiff states, that the Land was merely mortgaged to

*Worham's Reports art. 5.*

the Defendant's father, the possession of that person and of the Defendant, under such a temporary transfer, would give no right by prescription. That right can only be acquired by an occupation adverse to, or at least independent of the claimant. Now supposing this to be an ordinary mortgage, the mortgagor or his son had a right at any time during the 20 years to resume possession, on payment, of the money borrowed, such an occupation, therefore, is a mere tenancy at will, which the real owner of the Land may put an end to at any time, on the performance by him of a certain condition, namely, repayment of the sum borrowed; If, indeed, the mortgage bond had fixed a limited period within which the Land must be redeemed, and at the expiration of which, therefore, the power of redemption would be gone; that would furnish a substantial ground of defence. But the right of prescription in the Defendant certainly does not arise, if the Plaintiff's statement be correct." No. 1814. Seven Korles 25th October 1833 see also No. 5401 Kandy 20th November 1833, to the same effect. *mortgage*  
The Courts of Equity in England hold that Mortgages do not come within the statute of Limitations. *act.*

7. On the same principle, possession of Land in trust for another can give no title by prescription at least as against the person for whose use the trust was created. A Plaintiff claimed certain Lands alleging that they had belonged to her aunt who died 20 years ago, when the Plaintiff was Eight years of age, intrusting both the Plaintiff and the Land [for the Plaintiff's use] to her Cousin, a Mohandiram, who died two years ago, enjoining his wife, the Defendant, to give up the Land to the Plaintiff on being repaid the expenses. The Defendant denied the Plaintiff's claim, and averred a right in her late husband by deed which, however, she was unable to prove. The D. C. held that the Plaintiff by remaining so many years silent, since the death of her aunt, had allowed the Defendant to acquire a prescriptive title, and dismissed the action. The S. C. however, on appeal, referred the case back for evidence, observing "That if the Plaintiff should be able to prove that the Mo-

handiram had given the injunction to his wife, as stated, there would be an end of the Defendant's claim by prescription, for such an injunction would go very far towards acknowledging that the Mohandiram only held the land in trust for the Plaintiff." The Judgment then remarked on circumstances of suspicion appearing in the Defendants answer, but which do not bear on the subject of prescription. No. 4901 Kandy 2nd November 1833.

In another case also in the Kandyan district the claim was for a Pangua, which the Plaintiff alleged had been entrusted by his father, on his leaving his village at the time of the scarcity in 1812, to Ellawitte Nilleme, and by that person to the Defendant who now refused to deliver it up. The Defendant pleaded possession for 27 years. It appeared in evidence that the Plaintiff was an infant at the time of his father's leaving his village in 1812, and also that money and produce had been transmitted by Ellawitte Nilleme to the Plaintiff's father during his absence from the District. The Judicial Agent of Ratnapoora considered that the Defendant had acquired a title by prescription, his Assessors thought that the Plaintiff was entitled to Judgment. And of this latter opinion were the Judicial Commissioner of Kandy and his Assessors, both on the ground of the Plaintiff's minority and of the money and other articles rendered by the Nilleme to the Plaintiff's father. The S. C. concurred with the Court of the Judicial Commissioner on both grounds, observing that these payments must be considered in the light of acknowledgements of the right of the original owner, as much as if regular rent had been paid; that the Nilleme, therefore, was only a Trustee for the Plaintiff's father and that the Defendant had no right to be considered in a better situation than the Nilleme himself, from whom alone the Defendant derived his temporary right of possession. No. 5809, Ratnapoora 19th December 1833.

8. The possession of the person claiming by prescription should also be an absolute one, and not partial or qualified: Thus, where the original owner continued to perform the Rajekarea [which we have already had occasion to observe is one mode

of shewing that the person performing it had not parted with the legal title to the Land, supra: Title "Kandy" par: 3, and Land par: 15,] and his permission was considered necessary for the cultivation of the Land, the S. C. observed that these circumstances so qualified the actual possession of the Land, that the person enjoying it could not claim, by virtue of it, a Title by prescription; No. 5930, Ratnapoora, 3rd February 1834, see also No. 6500 Ratnapoora 19th December 1833.

9. Again, the possession required by the Ordinance must have been undisturbed and uninterrupted; because any interruption would be inconsistent with the acquiescence on the part of others which is the very soul and essence of title by prescription in the possessor. Such interruption or disturbance may turn out, on inquiry, to be without foundation, but at least it tends to shew that the person who interposes it has not assented even by silent implication, to the right of the possessor. The safest and most obvious course, by which to express dissent from the right of the possessor, on which, if pursued before the ten years of possession are completed, will be an answer to the Claim by prescription, is to institute an action for the land, the title to which is disputed. (In England it is sufficient to bar the Statutes of limitations, that an action for the object in dispute has been commenced before the expiration of the term prescribed) Whether other protests or oppositions to the possession of land shall be considered sufficient to defeat the title by possession must depend upon the circumstances of each case: The question to be asked would seem to be this, can the possession under which the party claims, be considered to have been undisturbed and uninterrupted by the assertion of other claims for the space of 10 years? On one occasion, the S. C. expressed its opinion, that the award of a Gangsabé against the party claiming by prescription was sufficient to bar that claim, although he had refused obedience to the award, and had kept possession of the land in spite of it. For the Gangsabé might not have the power of enforcing its decrees, [supra: 37.] but the circumstance ought not to prejudice a claim made and established

through that channel, as regarded an adverse claim by prescription, No. 8450, Seven Korles 23d November 1833. In another case, the question arose, whether the presenting a petition to the Judicial Commissioner of Kandy [the usual mode of commencing action in that Court] respecting the land in dispute, was sufficient to bar a title by prescription: The Chief Justice was of opinion that it would have that effect but is not sure whether the case was decided on that ground. No. 5276 Kandy, 14th October 1835. On one occasion, a party petitioned the S. C. to be allowed to bring his action notwithstanding the lapse of time, but the Court considered it had no power to entertain the application. *Petition Book of 1835* p. 189.

10. The question has more than once arisen, whether the prescription for land, founded on ten years' possession, be applicable to services claimed by owners of villages in the Kandyan districts and reserved to them by the Proclamation of 12th April 1832. In an action by a Ninda proprietor for services which he claimed from the Defendant as his tenant, but which the latter denied his liability to perform, it appeared that the services now claimed had not been performed since 819. The D. C., however, considered that the Plaintiff had established his claim, and decreed in his favor accordingly. The S. C., on Appeal, referred the proceedings back to the D. C., in order that the question might be considered how far the claim of the Plaintiff was barred by prescription, at least as regarded those services which it appeared had not been performed or, it might be presumed, exacted, since the institution of the grain tax in 1819. The Proclamation of 18th September 1819 [establishing the periods of prescription for the Kandyan Provinces] had been held by the S. C. to bar actions for the enforcement of services, or to recover possession of land for refusal to perform them, where it had appeared the party claiming them had allowed ten years to run, without demanding the performance of them. Indeed if this Proclamation did not apply to such cases a tenant might be called upon

to perform service to the Ninda holder though a hundred years might have elapsed, without any such demand being made on the tenant or his ancestors" No. 7190, Ratnapoora 31st December 1834. The writer is unable to give the result of the inquiry thus directed to be instituted, as regards this particular case: But he refers the reader to No. 493, Kandy 19th November 1833, and he believes that other cases may be found in which the S. C. decided that actions for these services fell within the term of prescription limited to actions for land.

11. Where a person has gained a title by prescription, by undisturbed possession for ten years, it is no objection to the validity of such title, that the instrument by virtue of which he originally obtained possession was insufficiently stamped, or irregular on any other ground. No. 1953 Islands, 22d December 1834. Such instrument might, in truth, be laid out of consideration altogether, since the claim by prescription rests not on written documents, but on the silence of all other claims.

12. A case has, however, been mentioned, title "Land," par. 9. in which silence for more than ten years was held not to debar the original owner of land from asserting his claim,—namely: Where the land had been taken possession of by Government as Cinnamon ground during the time when the cultivation of that plant by private persons was prohibited. As the assertion of the owner's right during that period would have been useless, the S. C. considered that his silence could not be construed into that degree of acquiescence in the possession of Government which ought to preclude him from bringing forward his claim, when the alteration in the Cinnamon Laws left the land once more open to him for cultivation. No. 6715 Colombo, 6th February 1836.

13. The foregoing cases arose out of claims to landed property: the few which still remain to be noticed relate to the other clauses of the Ordinance or, more properly speaking, of the Regulation No. 13 of 1822.

14. An action was brought on an instrument dated 31st December 1827 by which the Defendant agreed to supply the

Plaintiff with a certain quantity of Arecanuts within twenty days from the date, which the Plaintiff complained that the Defendant had failed to do. The Defendant pleaded performance, and also that the claim was prescribed by the 5th clause of the Regulation, not having been sued upon within six years. Both parties, in their pleadings, called the instrument a *Bond*, by which term indeed the natives usually designate every species of written contract. The action not having been instituted till January 1834, the D. C. considered it to be prescribed on the face of the instrument, and dismissed it accordingly. On appeal, however, the S. C. referred the case back for evidence on both sides; observing: "That suits should very rarely be dismissed on the ground of prescription without hearing any evidence which the Plaintiff might be able to adduce to take the case out of the scope of the Regulation. As for instance, part performance by the Defendant within the term prescribed, payment of interest, acknowledgment of the debt being still due, or any other act or expression by the Defendant within that period, which would be but the presumption of payment, on which the defence of prescription is founded." [See also No. 14,025 Galle, 2d April 1834 and No. 1 Amblangodde 22d March 1834 on Circuit, to the same purport.] The evidence was accordingly gone into on the part of the Plaintiff, but it was so weak, and it was so doubtful whether the Witnesses were even deposing to the same instrument as that filed, that the S. C. fully concurred with the D. C., in considering it sufficient to take the case out of the Regulation: And the nature of the contract which was to be performed in 20 days, made it very improbable that the Plaintiff would have allowed six years to elapse, without suing on it. "But the Instrument," observed the Judgment, "was incorrectly called, a *Bond*, which would require ten years to bar it, under the 4th clause of the Regulation, amended by No. 5 of 1825 sect. 2. It was in truth, a mere agreement, and fell, therefore, within the 6th Clause of the Regulation of 1822." No. 216 Caluruz 14th May, 22d December 1834. The S. C. has had occasion

in other instances to observe that in deciding by what clause of the Regulation or Ordinance an instrument is to be governed, the Courts should consider what is the nature and effect of it, rather than the nominal designation which may be given to it, whether by the pleadings, or in the body of the instrument itself, see No. 580 Amblangodde 12th September 1835 on Circuit, where a "debt Ola" was called by the parties a bond, though in its tenor and effect it was a mere promissory note, and therefore fell within the 5th clause of the Regulation or the 4th clause of the Ordinance. And so with regard to Stamps see title par. 12.

15. An action was brought in 1835 on a decree obtained in a Sitting Magistrate's Court in 1827; the Plaintiff in the present action being the administrator of the original creditor who had obtained the decree. The defendant pleaded the 8th clause of the Regulation No. 13, of 1822 corresponding to the 8th clause also of the Ordinance. The D. C. overruled the plea, and the S. C. affirmed that decision: The S. C. observed, "That the 8th clause of the Regulation only applied to the term of three years to which actions on promises, contracts and agreements were limited by the 6th clause of the Regulation, and to the term of one year, to which the 7th clause limited actions for goods, shop-bills &c.; and that a decree certainly did not fall within any of those description of claims; that judgments were not mentioned at all in the Regulation, nor did they fall within the intention of it;—that the only term which would bar a judgment would be such a lapse of time as would raise an irresistible presumption that it had been satisfied; as in England under the statute of Limitations" No. 1096. Caltura 6th May 1835.

16. We have seen that where the *fiduciarius* or trustee of property in fidei Commissum alienates such property without due authority, the parties interested may recover it back, as soon as their right accrues, whatever length of time may have elapsed since the wrongful alienation; for as he could not assert his claim till his right accrued, no prescrip-

tion would begin to run against him till then. *Supra* ; 191. 2. And the decision of the S. C. on the claim to the Ciunnamoz garden, just mentioned par: 12, proceeded on a similar principle: Because until the law ceased, which forbade the cultivation of the ground except by government, it would have been impossible, or at least useless, for the Plaintiff to have attempted any assertion of his claim.

17. Though prescription be not expressly pleaded, the length of time which may have been suffered to elapse between the right of action accruing and the institution of the action, may often be taken into consideration in doubtful cases, in deciding on the probability of the claim having been satisfied. No. 1118, Putlam, 26th June 1834, circuit. But if a Defendant, instead of resting on the plea of prescription, offer to prove payment, the defendant ought not to be shifted to that of prescription, supposing the plaintiff to have established his case. An action was brought on 5th February 1835, on an instrument called by the parties a bond, but which was merely an agreement, dated 14th February 1825, so than ten years, within a very few days, had elapsed between the date of the instrument and the institution of the suit. The Defendant admitted the instrument, but pleaded payment, which, however, he failed to prove. The D. C. then called on the Plaintiff to prove the payment of interest in February 1826 as endorsed on the instrument; and witnesses were accordingly examined to that effect. After that evidence had been received, however, the D. C. decided that the claim was barred by prescription, and dismissed the action. On appeal, the S. C. referred back the proceedings on the following point; "There can be no doubt that the action would have have been prescribed, if the defendant had rested his defence on the ground of prescription: for the instrument, though called a bond, is in truth no more than a common agreement. But as the Defendant did not call in aid this bar by prescription, but professed to be able to prove payment, the D. C. could scarcely change the ground of defence, and substitute the presumption of payment raised by the Regulation

or Ordinance, for the actual and substantial liquidation which the Defendant undertook, but failed to prove. But though the positive law of prescription, not having been pleaded by the Defendant, cannot now be invoked to his assistance, it is still a question for the D. C. whether, putting that law aside, the Court may not feel convinced that this agreement has been in some way satisfied. 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, and to dismiss the action, without the help of the positive law of prescription.” The case was accordingly reconsidered by the D. C. which recorded its opinion, partly from its disbelief of the Plaintiff’s witnesses as to the payment of interest; and partly from the suspicious appearance of the endorsement of that alleged payment that the claim had been satisfied, and that the Defendant was entitled to judgment: and the original decree of dismissal was thereupon affirmed by the S. C. No. 1117 Caltura, 18th November 2nd December 1835.

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#### PRIEST [Budhist.]

Administration to, as a pauper, refused; supra p: 5.

Not exempted from giving evidence on Criminal prosecutions, supra: p: 127. to 131.

Inability of, to possess land; see title “Kandy” par. 77 and title “Land” par: 14.

Action by, for a libel, accusing him of irreligion, see title “Libel” par: 12.

See also title “Temple.”

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#### PRINCIPAL AND SURETY.

1. It is a rule which governs the respective liabilities of these parties, that if the Creditor has been guilty of negligence in endeavouring to obtain payment of a debt, or the performance

of any other contract, from his principal debtor, or if he has given time, or shewn any other indulgence, to such principal, without first obtaining the assent of the surety, the latter is thereby discharged from his liability. For as the very essence of a surety's engagement is that he will be answerable, only in the event of the principal failing to perform his engagement, he has a right to expect due diligence on the part of the creditor in compelling fulfilment by the principal. The law, therefore, considers that any unnecessary delay on the part of the creditor, in as much as the opportunity of recovering against the principal may thereby be lost, operates as a release of the surety and throws the risk of ultimate failure to obtain satisfaction from the principal, on the negligent or indulgent creditor.

2. But the diligence which the law thus exacts from the Creditor is to be exercised by the enforcement of those rights only which the Law gives him. In the only case which appears to have become before the present S. C. on this subject, the Surety required the Creditor to interpose before he had any legal right so to do. An action was brought by Government against the sureties of a deceased Arrack renter, for the monthly instalment of £343 due by the Renter on the 31st December 1834. The Defendants admitted their suretyship for 1834 but alleged that in December of that year, execution issued against their principal, the Renter, at the suit of one Juanis, and that a quantity of Arrack belonging to the Renter was seized and sold for £93; that they, the Defendants, had requested the Government Agent to sequester this property for the arrears due to Government, as having a preferable claim, but that the Agent had refused; and they, therefore claimed to be entitled to deduct the sum of £93 from the amount demanded. The plaintiff replied that the Arrack was seized on 7th November 1834, and that it was not incumbent on the Government to sequester it. The D. C. decided the case on the pleadings, considering that the Government was not called on to interfere with the sale, since the present suit was not then instituted, nor could it then be foreseen that such an action would be necessary: and judgment

was accordingly given for the plaintiff, which was affirmed on appeal. At the time of the seizure at the suit of Juanis, not only had the Government instituted no action, but no debt had as yet accrued to the crown. So far, therefore, from being called on to interfere with that seizure, the Government would have had no right or power to interpose, and could not have been listened to. No. 6975, Kandy, 29th July 1835.

See Titles "Bail," and "Debtor and Creditor."

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### PROCESS.

Service at *party's* house, in his absence; on *witnesses*, must be personal, paragraph 1. Return should be positive, par: 2. How issued into other districts, 3—Officer is justified in peaceably entering a house to serve process; fine on Peon for so entering set aside 4, 5, and 6. When process is to be delivered in Fiscal's Office, [Colombo] 7.—Process on soldiers 8.

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1. The following are the points which appear to have been decided by the S. C. on the subject of the service and return of process, up to March 1836. The Fiscal of the Northern Province applied to the S. C. for instructions, whether he was justified in adopting the practice of leaving copies of process with the inmates of the house, where the party to, whom the process was directed was from home: and he suggested that it might be better, in case of such absence, that the process should be returned to the Court with a report to that effect, and that the Court should then, as a matter of course, make the order for service at the last place of abode. The Fiscal was informed in answer, "That the practice in the department of the Fiscal of the Western Province was as follows: If the defendant be absent from his usual place of abode, the process is served on one of his relations, being an inmate of the house, and of proper age; and if no such person be in the house, then the process is pasted, or otherwise fastened to the door, or other conspicuous part of the house; the return is made to the Court according to the fact, and this service is considered sufficient. The S. C.

would recommend the adoption of this practice in all other Provinces, unless any objection should present itself, of injustice likely to be worked thereby, as being less circuitous than that proposed. But with respect to witnesses, it was to be observed, that the Courts would not grant an attachment against *them* for non-attendance, unless the Subpœna had been served personally upon them." L. B. 8th 25th October 1834—See also "Evidence" 125, 6.

2. The terms in which the service of any process, order, or notice, is sworn to [or declared, under the Supplementary order of 4th October 1833] should be positive and unequivocal; No. 569 Caltura 4th February 1835, for otherwise, the Court can neither act upon the return, as regards the person disobeying the order, nor could the officer be punished for making a false return. Any circumstances, out of the ordinary course, which occur in making such service, should be stated in the return. (Petition Book of 1835 p. 7.

3. Doubts arose on the construction of Rule 14, sect: 1 whether when a defendant is not found within the district into which the process was first sent, such process must, in *all* cases, be returned to the Court out of which it issued, for transmission to, and endorsement by the Judge of the District in which the Defendant may really be found. The point having been referred to the S. C., the opinion of the Judges was conveyed to the D. Js. and Fiscals by a circular letter, of which it may be not useless to give the substance here. "Such transmission and endorsement are not necessary, if the defendant be found in any district, within the same Fiscal's Province." For the return contemplated by the 14th Rule is that of the Fiscal himself who cannot correctly return that the Defendant "is not to be found within his district," if in truth he be found within any district forming part of his Province. If any Deputy Fiscal returns that the Defendant is not to be found within his district, there is still nothing to prevent the Fiscal, as principal, from re-issuing the Process into any other of his districts, in which he may be informed that the Defendant is really to be found. These

observations have no reference to the jurisdiction of the Court out of which the Process issued, which must be decided by the tests prescribed by the 24th clause of the Charter. This construction of the 14th Rule is not to be extended to the 36th. When *Execution* is carried into a district different from that in which it was obtained, it is better that it should go through the Court of the district, in which it is to be put in force. For as there may be other Writs of Execution against the same person or property, the D. C. ought not to be left in ignorance of a seizure, about to be made at the suit of a Claimant out of a foreign district." Circular letter 27th February 1834. And see Letter Book 11th February 1834, for the correspondence out of which the question arose. It may further be observed that the word "Province" would probably have been used in the 14th Rule, instead of "District" if it had been known, at the time the rules were framed, that the former word would be made use of by Proclamation of 1st October 1833 to designate the Fiscal's limits in their full extent. L. B. 19. 27. February 1834, see also Title "Sequestration" paragraph 3.

4. A case was brought before the S. C. in appeal, involving the question, how far a Peon or other Officer is justified in entering a house for the purpose of serving process: For though the notice or order in question in this case does not fall within the term "Process" in its more usual application, the rules as regards the mode of service must be the same. Certain peons were charged before the D. C. in its Criminal Jurisdiction, with unlawfully and forcibly entering the house of the prosecutor; and that Court, considering that the charge was established against them, in point of law, though acquitting them of any Criminal intention, imposed a nominal fine upon them. The prosecutor, being dissatisfied with the amount of fine, appealed to the S. C. by whom the following Judgment was given from which the facts of the case will appear. "It is ordered that the conviction and sentence of the D. C. be set aside; that the Defendants be acquitted and discharged,

“ and that the fine which has been imposed upon them be  
 “ remitted.—This case has been brought up to this Court by  
 “ appeal, on the part of the Prosecutor: But being before  
 “ the Court, the Defendants are entitled to the benefit of any  
 “ error, whether in Law or in fact, which may appear on the  
 “ face of the proceedings. The charge against them is of having  
 “ committed a breach of the Peace, by forcibly entering the  
 “ house of the complainant, and certainly if this offence had been  
 “ proved against them,—if they *had* entered the House by  
 “ force, without lawful authority they would, as Peons, Officers  
 “ appointed for the maintenance of the Public Peace, have  
 “ been liable to severe censure and punishment for such an  
 “ infraction of it. But it appears from the evidence, from  
 “ the Petition of Appeal, and from another Petition now pre-  
 “ sented to the court by the complainant himself and two other  
 “ persons, that the defendants went to the house, in their char-  
 “ acter of Peons, to serve a notice or ticket upon the complain-  
 “ ant for Patrole duty ; that on inquiry for him of his wife ;  
 “ they received for answer from her, that he was not at home ;  
 “ that one of the defendants then opened the lower half of the  
 “ door, the upper half being already open, and went into the  
 “ Hall ; that he then handed the notice to the wife, telling  
 “ her to give it to her husband ; that she refused to  
 “ receive it, and told them to wait till her husband got up  
 “ [for it appears that he was *not* from home, but lying on a  
 “ cot at the time] and then come back and give it to him ;  
 “ that the defendant then put the paper on the cot, and went  
 “ away. This is the account given by the complainant’s own  
 “ servant, and may fairly be supposed, therefore, to contain all  
 “ that is favourable to the complainant. Whoever advised the  
 “ institution of this prosecution seems to have confounded the  
 “ law, which is applicable to entries made, as in the present  
 “ instance, for a purpose lawful itself, with that which is ap-  
 “ plicable to Burglary.—In order to constitute that offence ac-  
 “ cordingly to the law of England, any slightest degree of  
 “ violence, the twining a key, or lifting a latch, or unloosing any

“fastening is sufficient; and this, on account of the felonious intention of the offender, for if no such felonious intention appeared, he would be only a trespasser, even though the breaking took place in the night. Whereas in the execution of civil process, or serving an order or notice like that in question, the officer entrusted with that duty, though he would not be justified in *breaking open* an outer door, is fully authorized, nay bound in the execution of his duty, to gain admittance in a peaceable manner if he can; and having gained that admittance, would even be justified in breaking open an inner door to effect his lawful object.”

5.—“The defendants are stated to be Peons;—a word sufficiently known in this Island, as indicative of ministerial authority in the execution of writs, notices, orders or process of any description. And this Court must presume that the order or notice left at the house of the prosecutor was legal and regular; because, if it had been otherwise, he might, by the production of it, have shewn its illegality. The hour at which the occurrence took place, does not appear from the evidence; but as the wife of the prosecutor told the defendants, they had better go away and return *in the evening*, it is to be inferred that the time was sufficiently early in the day for the purpose of such service. The first answer which she gave was, that her husband was not at home; and as the defendants, in the execution of their ordinary duty, had probably learned that when a party on whom process was to be served was from home, the paper should be either delivered to an inmate, or be left at the house, they very naturally considered it their duty, on the refusal by the wife to receive it, to go into the house, for the purpose of leaving it either with some other inmate, or in some safe and conspicuous place. If they had, in the first instance, been told that the complainant was asleep, they possibly might have gone away and returned; though this Court is far from saying that they would have been bound so to do. The complainant, in his Petition of Appeal, speaks of “the peace of his house having been disturbed,” and of the “daring trespass” and “brutal conduct” of the defendant: but there is really nothing in the evidence, either of the complainant’s wife or of his servant,

to warrant the use of these strong expressions. If the defendants were authorized to serve this order or notice at all,—and it is not even asserted that they were not,—they appear to have done no more than their duty in the mode of serving it.”

6. “The Court has entered thus fully into the grounds of its judgment in this case, because, however small the amount of fine imposed [on the defendants, and however insignificant the injury which the complainant fancies, or has been made to believe, he has sustained, it is of the utmost importance that Peons, and all other Officers entrusted with the subordinate powers of Justice or Police, should be kept most strictly within the limits of their authority, and be exemplarily punished for any abuse or wanton excess of it; and on the other hand, that they should receive from this and all other Courts of Justice that protection and support, in the honest and legal discharge of their duty, to which they are by right entitled, and without which the efforts of higher authorities to administer justice, and maintain the public tranquillity, must prove abortive. For these reasons, and to discourage such vexatious and unfounded prosecutions for the future, the Chief Justice, after consulting with the Hon’ble the Senior Puisne Justice on the subject, recommends that this decision be read and explained in the District Court; in as open and public a manner as possible.”—No. 370 Negombo (criminal) 6th September 1834.

7. We have seen, *supra* : p. 125-6 that in the District of Colombo, in consequence of the inconvenience occasioned by processes and subpoenas being delivered at the Fiscal’s office, without allowing sufficient time for the service and return, a supplementary rule of the 3d December 1834, directs that they shall be delivered into the Fiscal’s office six days (for service within the gravets,) and ten days (if without) before the day of appearance.

8. As regards the service of the process upon Soldiers, and how affected by the Mutiny Act, see title “Debtor and Creditor.”—*Supra* : p. 95 et sequel.—See also titles “Contempt” “Copies” p. 69; “Fiscal,” “Practice,” “Sequestration.”

## PROCTOR.

Admission in Supreme Court under 17th clause of Charter, limited as to number, paragraph 1.—So in District Courts; and certificate required from District Judge, 2.—Proctors of all District Courts admitted in Supreme Court, on Circuit, 3.—Same Proctors, when admitted in several District Courts, 4.—General Attorney, when allowed to appear for his principal, 5.—No exception as regards Government, 6.—But one joint party, may appear for the rest, 7.—If defendant's proctor appear, no summons necessary, 8.—Proxy necessary to appear in appeal, but not on Stamp, 9.—Prosecutors allowed to appear by Proctor, 10.—Absence of Proctors on hearing, &c. 11.—Party bound by his Proctor's acts, 12.—Denial by Proctor, of a fact admitted by his client, animadverted on, 13.—Notice by Proctor to opposite party, to appear, not binding, 14.—Admissibility as witness, 15.—Proctors should not be bail for their clients, 16.—Nor act as Officers of the Court, 17.—Their fees ought not to depend on the success of the suit, 18.—Supreme Court declined to give an opinion to a Proctor on a matter of practice, 19.

1. As regards the admission of Proctors to practise generally, in the several Courts, the 17th clause of the Charter authorises the Supreme Court to admit as Advocates or Proctors in that Court all such persons, being of good repute, as shall, upon examination by one of the Judges, appear to be of competent knowledge and ability: and in case of refusal to admit any person applying for admission, the Judges shall, in open Court, assign and declare the reasons of such refusal. In acting upon this clause, however, the Judges have exercised a discretionary power to refuse admission, with reference to the number already practising and the quantity of business to employ them. For, as has been observed by the writer on the occasion of the amendments which he suggested to the Charter, "if the number of Proctors be disproportioned to the quantity of business, some of them must either be without practice, or may be tempted to have recourse to unworthy means of creating business for themselves: And even though such malpractices should not be the result of the bar being overstocked, still, the business not being sufficient for the adequate support of all, their independence and respectability, as a body, would, to a certain degree, be impaired. For it must be recollected that the profession is only resorted to in Ceylon as the real means (and if

pursued, it must be the *exclusive* means) of gaining a livelihood; and never, as in England, merely for the sake of honorary distinctions.”

2. The 51st clause of the Charter authorizes the S. C. to make rules and orders of Court, among other subjects, for the admission of Advocates and Proctors in the D. Cs. Up to March 1836, such admission to practice in the D. Cs. was by order of the S. C. The reason for the adoption of this course was the apprehension, just adverted to, of the number of practitioners being disproportioned to the business; to which may be added the necessity of regulating the admission to all the D. Cs. by one uniform system, and the doubts whether the District Judges would always be able to resist the importunities of applicants for admission. The power thus reserved to the S. C. may be truly said, however, to be one of mere negative restraint, and not of patronage; for no such nomination, it is believed, ever took place, but upon the District Judge certifying, 1st that another proctor was required in his Court, and 2nd that the person applying was fit to perform the functions. And where a person applied to the S. C. for admission, requesting that his application might be kept secret from the District Judge, it is scarcely necessary to say that the S. C. refused to take it into consideration on any such condition.—Petition Book of 1835, p. 122 and 123, so where a proctor had been struck off the list, the S. C. refused to reinstate him without the recommendation of the District Judge. *Id.* 146.

3. The 17th clause of the Charter directs that no one shall be allowed to appear on behalf of a suitor in the S. C., unless duly admitted and enrolled: on circuit, however, it has been the custom to admit all the proctors of each of the D. Cs. within the circuit, to appear for their respective clients during the sessions. A difficulty arose as to the mode in which proctors under such circumstances should be remunerated, the table of fees to be taken by the proctors of the S. C. being found to be too high for the circumstances of many of the provincial suitors: and as it would have been almost impossible to frame

a scale, applicable with equal fairness to all the districts in the Island, it was recommended that the Proctors should make arrangements with their clients as to remuneration, before engaging in the appeal. L. B. 28th February, 9th March 1835. See also L. B. 16, 20. Novr. 1835, where the S. C. took occasion to observe that any remuneration stipulated for ought to be payable at all events, and not left contingent on the success of the party; a practice which ought never to be introduced.

4. In some instances a proctor has been admitted to practice in more than one D. C. But this has only been done, it is believed, where the districts have been adjoining, and where the double admission has been recommended by both the District Judges, as tending to the convenience of suitors, the distribution of whose property may make it necessary that they should be represented in both Courts, and who may wish to have but one legal adviser. But the S. C. has not thought advisable to go beyond the recommendations so made in individual instances; and it has refused to throw open the practice of two D. Cs. to all the Proctors of each, indiscriminately. *Petition Book of 1835 p: 45.*

5. The question was on two occasions submitted to the S. C., whether a person, holding a general power of attorney for another, could appear for his principal in a D. C., in which there were no admitted Proctors. In one of the cases, the attorney had appeared in the suit, before the new Courts came into operation; and there seemed no irregularity in allowing him to represent his principal to the termination of the suit. *Letter Book 7. 13. November 1833.* In the second case, it did not appear that the suit had been instituted before the new Charter came into operation; but it was considered that the general attorney might be permitted to appear for his principal, on one condition: It was observed that "one of the objections to this course, that of infringing the 1st and 4th Rules, by which none but admitted proctors (over whom the Court could exercise an immediate controul) might appear on behalf of suitors, could not be said to exist in the present case; inasmuch as there were no

regular proctors in the Court in question. But another objection arose out of the privilege of mutual examination by the parties, which was one of the prominent features of the new system of practice; if the cause of action had arisen out of transactions or dealings between the general attorney, as agent, and the person whom he wished to cite as defendant, this objection also would vanish; because he would, in that case, be as well or better able to answer the questions of the opposite party, as his principal would be. If this should not be the case, the permission to sue should only be granted to the attorney, on condition, and with the understanding, that if the presence of his principal should be required either by the opposite party, or for the satisfaction of the Court, the proceedings would be suspended, until he should so present himself to the Court. Letter Book 24. 28. May 1834.

6. Inquiry was made by another District Judge, in one of the Kandyan districts, whether an exception was made of Government cases, with respect to appearance by admitted Proctors; and whether the Koralle or other Head of the Korle might appear on behalf of Government. To this, an answer was returned that no exception was made with respect to Government cases, as to their being conducted by persons substituted for the parties, and not duly admitted to practice as proctors.—It was, however, suggested that a person should be recommended by the Government Agent, to be admitted as a proctor for that purpose, and that on the District Judge forwarding that recommendation, such person would be forthwith admitted; this course having already been pursued in several of the Kandyan Districts. Letter Book, 14th 18th November 1833.

7. We have seen that one of several joint parties may appear for the rest, subject to the other parties submitting to examination, if that should be required by the opposite side. *Supra.* 225, 6.

8. A District Judge inquired whether when a proctor filed a proxy to defend a suit, it was necessary to issue the summons to the defendant to appear. He was informed, in answer

that if the proctor for the defendant, *appeared* on behalf of his client, the summons to the defendant himself would be superfluous; but that if the proctor merely filed his proxy, and waited for the commencement of the action, then a summons should issue, which might be served either on the defendant or on his proctor, who would be bound to appear on the day fixed, in default of which he would be considered in contempt. Letter Book 11th October 1833.

9. The Supreme Court has decided that a proxy is necessary to enable a proctor to appear before the Supreme Court, though he already held one from his client to represent him in the District Court. Petition Book of 1835 p. 137. But no stamp is required before the Supreme Court, the stamp on which the petition of appeal is drawn being regulated by the table of Court Fees, with a view to cover all Court fees, incidental to proceedings in Appeal. Letter Book, 21st July, 3d August 1835.

10. A District Judge applied to the S. C. for instructions, with respect to permitting proctors to appear in support of Criminal prosecutions before the D. C. "without feeling inclined to object to the employment of proctors for the *defence*, he considered the spirit of litigation so prevalent, and the disposition to turn private grievances into public wrongs so strong in his district, as to render the advantage of affording any facility to the *accusing* party very questionable." The S. C. returned for answer "That it would scarcely be consistent with the general right of all parties to be assisted by proctors, and would certainly not be in conformity with the practice observed in other D. Cs. to debar complainants in criminal prosecutions from this advantage; that some description of offences, indeed, such as forgery, conspiracy, perjury, and the like, from their nature and intricacy, required the aid of legal assistance, in the due prosecution of the preliminary inquiry; so that even if the general rule were admitted, the D. C. would constantly be under the necessity of making exceptions to it; that the prevalence of a spirit of litigation, and

of a disposition to turn private grievances into public wrongs, was no doubt to be lamented, but if the proctors did their duty, they would discourage any attempts to make the criminal jurisdiction of the Court subservient to private interests; that as the excuse of ignorance, which parties themselves so frequently claimed, could not be allowed to their proctors, the D. C. would not fail to animadvert on the impropriety of their undertaking to conduct cases in the shape of criminal prosecutions, which they ought to know, and to advise their clients, would more properly form the subject of civil actions; and that a refusal to allow the proctor his costs in cases in which no doubt could be entertained that they did not form the subject of criminal inquiry, would soon check any inclination to give wrong advice on this subject, if such inclination should unfortunately be found to exist." L. B. 29 January, 1st February 1836.

11. The foregoing points are all that present themselves on the subject of the admission and admissibility of proctors to practise. As regards the intimate connexion which necessarily exists between a proctor and his client, we have already observed that as the proctor stands in the place of his client, the consequences of the proctor's non-appearance in Court, when his appearance is required, are the same as if the party himself, when not represented by a proctor, were absent: Though, in order to prevent parties suffering from the negligence of their proctors, the S. C. has been inclined to afford them relief, when that could be done without injustice, the proctors paying the costs incurred through their default. *Supra.* title "Practice" par. 3 and 14. Where a plaintiff's proctor withdrew his proxy, declining any longer to act for the plaintiff, Mr. Justice Norris decided that this was no ground for dismissing the action, at least without due notice being given to the plaintiff. No. 7654 Jaffna.

12. As a general rule, and as a necessary consequence, indeed, of the relative situation of proctor and client, every party is considered bound by the acts of his proctor. Thus, where a plaintiff's proctor waived some of his witnesses, and the case

was afterwards dismissed ; the S. C. would not admit as a reason for directing further inquiry, that all the plaintiff's witnesses had not been heard. For it was to be presumed that the Proctor would not have waived them, if he had not considered their evidence prejudicial, or at least unnecessary, to his case ; No. 285, Putlam, 26th June 1834, on circuit. And this, it will be observed, is entirely different from the refusal by the D. C. to hear all the witnesses of a party, the effect of which was considered under title "Evidence," p: 148. In the same case from Putlam, the plaintiff endeavoured to set aside an agreement of accord, satisfaction, and release, on the ground of an alleged interpolation of one of the clauses of the agreement : But it appearing that the clause in question was introduced with the consent of the plaintiff's proctor, that objection also was overruled, both in the D. C. and in appeal. So in a case which has been mentioned under title "Pleadings," par : 4, where the defendant's proctor admitted the amount claimed, though he contended that the plaintiff was not the person entitled to sue, the D. C., and the S. C., in appeal, having over-ruled the latter objection, decided that the defendant was bound by his proctor's admission, and could not now allege with any effect, that the proctor was not authorized to make such admission. No. 723 Galle, 7th March 1835, on circuit.

13. An admission, once made by a party, cannot afterwards be retracted. A defendant, being sued on a bond, admitted the instrument, and pleaded part payment, for which he offered to produce receipts. At the trial, the defendant's proctor denied the bond altogether. The D. C. decided on the plaintiff's previous admission, and no proof being offered of the payments, decreed in general terms for the plaintiff. The defendant appealed on grounds undeserving of notice. But in affirming the decree, the S. C. felt compelled "to observe on the extremely improper course pursued by the defendant's proctor at the trial, in denying the bond which his client had previously admitted, and which he alleged he had partially satisfied. In adopting this contradictory line of defence, the proctor ought to have known

that he was lending himself to the dishonest object of defeating or delaying the just and admitted claim of the plaintiff, without any chance of ultimately benefiting his client." No. 2424, Batticaloa, 17th October 1834.

14. A question of some importance, as a matter of practice among proctors, was submitted for the consideration of the S. C. by one of the D. J. Whether it was regular or legal for a Proctor, of his own authority, and without the intervention of the D. C. or any intimation to the Proctor on the other side, to send notice to the opposite party to appear before the court and produce documents; or whether such notice ought not to proceed from the court, on regular motion for that purpose; when the court would form its opinion of the sufficiency of the ground stated. The right to issue such notice was supported on the ground that the practice existed, and without opposition, in the Colombo Courts; that as each party had an undeniable right to examine the other at any stage of a case, an application to the court was unnecessary, except when there was reason to suppose that notice from the Proctor would not be attended to, and that intimation to the opposite Proctor could scarcely be necessary, since the party, whose presence was required, would never fail to consult his Proctor on the subject. On the other hand, the practice was opposed, on the ground, that it was an infringement on the authority of the court, and that a party was not bound to pay any attention to such notice from a Proctor. After making some inquiry on the subject, the S. C. directed the following answer to be returned: "It appears that it has not been uncommon in the D. C. of Colombo, for Proctors to send notice to the opposite parties, either to give their personal attendance, or to produce documents in court. It would, however, be better, in the opinion of the Judges, that this practice [considering the notice as an *order* to appear] should be discontinued. For though the object of the Proctor would no doubt be to expedite the progress of the suit; that object would be accomplished with greater certainty, and with less risk of inconvenience, by pursuing the more regular course, of applica-

tion either to the opposite Proctor, or, if no Proctor were engaged, or if he declined to interfere, to the D. C. with greater certainty; because, as the Proctor has no authority to *compel* the attendance of the opposite party, it would be optional with such party, whether he would comply with the requisition, or not; there would be less risk of inconvenience; because, when a party appears or produces a document by order of court, or by the advice and consent of his own Proctor, it must be presumed that such appearance or production was necessary and proper. Whereas the opposite Proctor, with the best intentions, may be mistaken in supposing that he has a right to call upon the adverse party for the purpose proposed, at the particular stage of the case in question. And though, as already observed, the party so called upon might decline the summons, still he would often, from deference to the Proctor, or from imagining that the latter really had a right so to call upon him, comply with it. Such attendance might turn out to be mistimed or useless, or, if his own Proctor were not present, the party might make admissions, or produce documents, to the reception of which his Proctor might have objected. The rule on this subject may briefly be stated thus: If mere *notice* of an intended motion or step in the suit be necessary, such notice should be served by the Proctor or his clerk on the opposite Proctor, if one be engaged, otherwise, on the party himself: But the *order* for attendance or for any other act to be done by the opposite party, can only be issued by the court; and if issued by the Proctor, or from any other sources, is a mere nullity. The order of court, however, is frequently and most properly rendered unnecessary by the opposite Proctor, not the client, undertaking that the thing required shall be done without a formal application to the court." Letter Book 5 17 December 1835.

15. With respect to the admissibility of a Proctor to give evidence for or against his client, see Title "Evidence" p. 139.

16. On a prosecution for a breach of the peace, two of the Proctors of the D. C. became sureties for the defendant. The S. C. expressed its disapproval of this practice; observing "that though the

Proctor was bound to exert his utmost zeal, industry, and talents, in support of his client's interests, as far as was consistent with good faith and honorable feelings, still he ought to do nothing which in any degree identified him with his client, as regarded interest in the suit or prosecution; because, the moment he became so identified, he ceased to be the free and independent character, which could alone ensure the proper and unsuspected discharge of his duty." No. 52 Caltura [Criminal] 28th October 1835. So where a Proctor became surety in appeal, in a civil case, for his client, the S. C. expressed its doubts of the propriety of such a course. No. 197-521 Matura, 20th March 1835, on circuit. In England, an attorney is not admitted as bail, in civil cases; but there is an authority for his being received in that capacity, in criminal cases.—Douglas, 466.

17. The impropriety of a Proctor acting at the same time in that capacity, and as Secretary of the D. C., has been noticed under Title "Officer of Court." And where one of the grounds on which a defendant endeavoured, in appeal, to set aside a sale in execution, was that the Plaintiff's Proctor was the person who executed the sale on behalf of the Fiscal; the S. C. observed that, though there was nothing illegal in a Proctor acting as a Fiscal's Deputy, still it would be well that he should not act in that double capacity, in a case in which he had been concerned for one of the parties; No. 14. 136. Caltura, 11 June 1834.

18. It has already been observed under the Title "Costs" p. 10 that any agreement, by which the payment of the Proctor's fees is made to depend on the success of the suit is highly reprehensible, and has never failed to be strongly animadverted upon by the S. C., whenever such an arrangement has been brought to its notice, see also par. 3. of this Title. It would be going too far to say that such a contract is absolutely illegal; indeed there is a case, if the writer be not mistaken, in 3 Starkie, in which Lord Tenterdon admitted evidence of some such agreement: But that it is mischievous as regards the public, and highly disreputable in the Proctor, there can be no doubt. Nor

is this to be considered as a mere fastidious nicety, laid down by the profession in England. The commentator, to whom such frequent reference has been made in these notes; in speaking of Dutch practice in this respect, says, "every agreement between Advocate and Client for a share of the object in dispute is corrupt. For though a plaintiff and defendant may be permitted to compromise, as putting a speedier end to litigation, such contracts between client and counsel have no such tendency, but rather increase the disposition to chicanery and unjust contention; and therefore such partnerships in the hoped-for gain have most properly been condemned: And Advocates are now bound by a solemn oath not to engage in such compacts; *and they are especially prohibited in Holland from stipulating with their clients, that they shall receive their fees, only in the event of success.*" Voet, lib. 2. tit 14. par: 18. The next paragraph of Voet relates to the medical profession, as to which we have already seen one case, in which this point came under consideration. Title "Obligation", par. 10. As regards costs in general, see that Title p. 70 and seq.

19. A Proctor of one of the D. C., having applied to the Chief Justice for instructions on a matter of practice, was informed "that if a judge were to comply with his request in one instance, he could scarcely refuse to answer similar questions from Proctors, on all occasions, and besides, that an opinion, so conveyed, might bring the S. C. into unseemly collision with the D. C., since the latter might not consider itself bound to adopt an opinion, thus extrajudicially given, not to the Court itself under the 47th Rule, but to one of the practitioners of the Court." Letter Book 13 16. June 1834. See also "Pleadings," "Practice," "Motion," and other Titles.

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### PROMISSORY NOTES, BILLS &c.

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1. The only case which appears to have been decided on this subject by the S. C. is one which, from the peculiarity of its circumstances, is not likely to serve as a frequent prece-

dent for other cases. It was an action brought by the Government Agent of the Central Province against the Shroff of his Cutcherry, for the balance of their private accounts, which was claimed by the Plaintiff, but which the Defendant alleged would be found to be in his favor. After mutual examination and admissions made by the parties, the only questions for the decision of the D. C. were 1st as to a sum of £80 which the Defendant alleged he had paid to the Plaintiff, but which the latter said he had never received; 2ndly as to whether the Defendant was entitled to charge commission. The decision as regards this latter point will be found under Title "Commission," *suprà* 56 and seq.

The instrument, on which the Defendant claimed credit for £80 and which he produced, was as follows.

**"PRIVATE ACCOUNTS."**

" SHROFF;

I want eighty pounds in ten pound notes."

" £10

G. TURNOUR."

" Kandy 3d April 1835."

The D. C. rejected the claim of the Defendant, and the case being brought in appeal before the S. C., and having been very fully argued on both sides, the following judgment, as regards the first point, was pronounced as the unanimous decision of the Court. The facts of the case will appear from the judgment itself. The only point bearing on this question, [which it seems necessary to advert to, is the absence from the Cutcherry of any notes of £10 on the 3d April, and for some months before, which circumstance was proved by the Plaintiff.

2. "The body of this instrument, it is admitted, is in the handwriting of the Defendant, the signature, it is equally admitted, is the real signature of the Plaintiff, who however denies that he ever signed the paper for this purpose, or that he ever received the amount. And he, therefore, calls upon the Defendant to prove that fact. The Defendant admits that he is unable to prove payment, but he contends, 1st that this instrument is, of itself, and more especially considering the course of

dealing between the parties, [by which it appears that other sums of money have actually been received by the plaintiff on similar documents] *prima facie* evidence of this sum having been also received by the Plaintiff, and that it lay on the Plaintiff, therefore, to shew that he had not received it. And it is further contended, secondly, that the evidence which has been adduced by the Plaintiff does not go to that extent. The previous question is the one of most importance, both as a general question of Law, [as to the validity of such an instrument, and as affecting this case. Because, if the instrument be declared insufficient for a party to recover upon, it will be unnecessary to consider, whether the evidence brought forward by the Defendant be sufficient to justify the D. C. in its opinion that, in point of fact, the money has never been paid.

3. As to the legal validity, then, of this Instrument, without proof of payment. The instrument in commercial use in England to which this would most naturally be compared, though the comparison is rather more favorable to the document before the Court than its tenor strictly warrants; is a check on a Banker, drawn payable to "self" or bearer; a form which is frequently adopted when the customer draws upon the Banker for money for his own immediate use. But allowing this comparison to be justifiable by the terms of the present instrument, there is this difference between the two cases; That there is no intermediate party between the Plaintiff and Defendant, by whom any light could be expected to be thrown on the subject. The transaction, if it ever took place at all, was between the Plaintiff and Defendant, and them alone. Whereas the business of a Bankinghouse. being conducted not by the Principals, but by their clerks, may be deposed to by witnesses, perfectly competent and disinterested. In looking through the cases, which have been decided in England on the subject of Banker's checks, it is remarkable that the question—whether the bare production of the check by the Banker, with no proof of payment except the signature of the customer, and the possession of the check by the Banker, shall be sufficient to entitle the Banker to re-

cover the amount,—never appears to have arisen. Whether it is to be accounted for by the Law being too clear, on general principles, to admit of a doubt, or from that extreme regularity of transacting business, which would enable the Banker's clerk to say at once, by reference to Books and private marks, whether such a draft had been paid or not, and thus prevent, the necessity of trusting to the bare production of the check, it is not necessary to inquire. It has, however, been decided that the bare production of a check, by the lender of money, is no proof of the alleged borrower having received the amount; unless endorsed by the borrower, as having been received; so, by analogy to decisions on Bills of Exchange, to which the law of Promissory Notes and Banker's checks is always referred, as deducible from the same principles, the indorsor of a Bill of Exchange cannot recover against the acceptor, by the mere production of the Bill, without the receipt of the endorsor, or some other proof of payment. And many other decisions are to be found in which the same principle is recognized. If, then, the bare production of a check by a Banker would not be sufficient to entitle him to recover upon it, if his customer denied the payment, a fortiori is the instrument before the Court insufficient for that purpose, without some proof of its having been paid. For, unlike the Banker's check in this respect, that the latter instrument would seldom, if ever, according to the course of the banking business, remain in the Banker's hands, unless it had been satisfied, and the production of which is therefore strong presumption, though not conclusive evidence of payment, this is, as the D. C. has styled it, a mere requisition, not transferable, which may or may not have been complied with, and which indeed was to be complied with in a particular way viz. by payment in notes of a certain amount. It is, indeed, somewhat in the nature of a Bill of Exchange payable to the drawer, but of which there is no proof of acceptance or payment. And though the permitting such a requisition to remain in the hands of the Defendant, if not complied with, would have been an act of the most gross and culpable negligence, still the bare

possession of it cannot be said to raise any thing like so strong a presumption of payment, as that of a Banker's check which, according to the course of that business, would be returned, on refusal of payment, to the person presenting it. Such being the opinion of the Court as to the legal validity of this instrument it may be unnecessary to consider whether the evidence of the Plaintiff be sufficient to sustain the opinion of the D. C., that the amount has never been paid; because if the Defendant could not demand judgment on the instrument, without proof of payment, it was in truth unnecessary to call on the Plaintiff to rebut the supposed presumption of payment.

4. The opinion of the Court upon this point having been explained to the Assessors, two of them state their opinion that the Defendant ought to have credit for the sum of £80, and being asked whether they found that opinion on the Law of the case, or on the circumstances as they appeared in evidence, they answer on the latter. This makes it right that the S. C. should express its concurrence in the opinion of the D. C. on the evidence adduced, that this amount has never been paid. The Court would gladly have avoided entering into this part of the case, because whatever view is taken of the circumstances must be a painful one. It is clear, from a single glance at the proceedings, either that the Plaintiff's memory is most lamentably defective, or that he has denied the payment most wickedly and dishonestly; or that the instrument is a forgery, that is, that the body of it has been added to a signature obtained for some other purpose. But of these three alternatives the first, which is that to which the Court would gladly incline if it were tenable, becomes almost impossible, if the circumstances under which the instrument is alleged to have been executed are considered. The instrument is dated the 3rd of April, and the money is stated to have been paid to the plaintiff on the same day. On the 8th of July the Plaintiff disclaims in Court all knowledge or recollection of it. Is it possible then, as indeed he himself asks, that this Draft, being for a much larger sum than he was accustomed to draw for, should have been drawn and paid, and yet have entirely faded from

his memory, in the short space of three months? The circumstances under which it was drawn must have been somewhat peculiar to require the payment in £10 notes, and must, therefore, have impressed the transaction on his recollection: and it must again have been forced upon the plaintiff's notice, if it ever took place, by the defendant paying him, as the defendant states, only partly in notes of that amount; a circumstance which it is to be presumed the defendant would have observed upon and accounted for at the time of payment. It is in vain, therefore, to attempt to ascribe this difference between the parties to defective recollection: and the Court is, therefore, compelled to make the best election it can between the two painful alternatives which remain. It frequently becomes the duty of Courts of Justice to distinguish between moral conviction, arising from knowledge of character, or other extrinsic causes, and that which is produced by the evidence in the case. It is especially the duty of the Court to make that distinction in the present instance, lest it should be unduly influenced by the reputation for high honor which the plaintiff is so well known to enjoy. But the Court considers that the defendant, though not so well known, stands before it without a taint upon his character; and is entitled to all the consideration due to an honest man, as far as all his former actions are concerned. For though he appears to have been removed from his situation of Shroff, the ground of that removal, as far as appears, may have been one not at all affecting his character for integrity. Taking the parties, therefore, to be before the Court on a perfectly equal footing, the question is whether from the circumstances as they appear, either proved or admitted, the probability is that this draft or order was really drawn by and paid to the plaintiff or that it was not. There are two circumstances, which mainly induce this Court to adopt the latter opinion. First, it appears in the highest degree improbable that, at the time when the defendant's conduct had become subject to suspicion, either party, plaintiff or defendant, would have contented himself with a document, so loose in its terms, and implying such perfect mutual confidence, as that before the Court. That these suspicions had been entertained, at least as

early as the 3d of April, is not merely stated; it is almost evident from the circumstance that the defendant was actually removed or suspended on the 6th or 7th of that month. Secondly, the absence of any notes of £10 in the Cutcherry at the time, and for some months previously, though not perhaps so absolutely conclusive as the District Court seems to have considered it, certainly adds great weight to the improbability of this payment having been made. It has been argued for the defendant, that he was not necessarily obliged to have recourse to the Cutcherry chest; and he has instructed his Counsel that in fact he took the notes from his own house. Now as far as the Court can understand the nature of a Shroff's situation, it appears both an act of extraordinary carelessness, as regards his own interests, and a dereliction of duty towards his employer, to keep so large a sum in his own house, where it would be comparatively unprotected, instead of availing himself of the security afforded by the Cutcherry,—a security which must be supposed to form the chief object of the plaintiff, in entrusting his Shroff with his private money. For though the government disclaims all responsibility for private property, still it seems that the bolts and bars may be made available for private as well as public money. But it seems scarcely conceivable, if the payment had been made in this way, that the defendant, when examined with so much particularity as to the details of that payment; should not have mentioned the circumstance of there being no £10 notes in the Cutcherry, and of his having consequently fetched the amount from his own house. Then again, when the evidence was given at the trial as to the absence of notes of that amount, it might naturally be expected that the defendant would have offered this explanation, in order to shew the inconclusiveness of the evidence; and would also have asked to call witnesses to shew that he was in possession of notes of that value at the time in question. For unless it be supposed that the defendant had kept this sum of £80 in his house, in notes of £10 and £5, during the whole period in which notes to that amount were not to be found in the Cutcherry; he surely could have proved the receipt of some of them by one or more persons. This Court feels satisfied that such an explanation,

or such application to adduce evidence, would have been received and recorded, if it had been made in the Court below; yet it is not till this day, that the payment seems to have been attempted to be accounted for in this manner. There are some minor circumstances, on which some stress has been laid, as tending to shew that this payment could not have been made, but which do not seem to demand much consideration. The absence of Colonel Lindsay at the time in question is not entitled to much weight, because the defendant only states his supposition that the money might have been required for the use of that gentleman; he by no means states it as a fact. So with respect to the largeness of the sum, and the inconvenience of notes of so high an amount for personal use;—these circumstances as has been previously stated, could scarcely have failed to leave a strong impression on the plaintiff's memory; but it is difficult to say what degree of improbability might attach to a requisition couched in those terms, if the transactions were impeached on no other ground. The entry of so large a sum in the Account Book, "hastily in pencil," certainly does appear singular and even suspicious; but here again the Court is not sufficiently informed as to the degree of accuracy and precision required generally by the plaintiff in the accounts kept for him, to be enabled to judge how far this loose entry may be at variance with, or consonant to, the mode of dealing usually adopted between these parties: principally, therefore, on the two grounds first stated, the Court, with the exception of two of the Assessors, is of opinion that this draft or order was never paid by the defendant to the plaintiff. Considering, therefore, first, that the bare production of this instrument was not sufficient to entitle the defendant to credit for the amount, without proof of payment: and, secondly, that there is no proof of that payment having taken place, the decree of the District Court as regards this claim of the defendant, is affirmed." No. 7184, Kandy, 2d December 1835.

5. As to demanding Nantissement on Promissory Notes, or Bills of Exchange, see title "Nantissement," paragraphs 10 & 11

## PROSECUTION.

Civil rights not to be tried in the Criminal Jurisdiction. Paragraph 2.—Nor prosecutions for offences, or for the recovery of penalties in the Civil, 3 & 4.—Should proceedings under Colombo Police Ordinance § 24 & 25 be Civil or Criminal? 5.—Distinction between confiscation and fine, 6.—Pleadings: charge should be distinctly explained: different Offences or Laws not to be mixed: clause of Regulation relied on should be pointed out: charge must not be shifted, to meet the evidence, 7 to 10.—Plea of Guilty, if qualified, must be taken altogether, 11.—Defendant under No. 3 of 1834 § 17 called on to admit or deny contract, 12.—Sale of Sequestered property, 13.—Case referred by King's Advocate to District Court for decision, presumed to be one of minor importance, 14.—Transfer to another District Court, 15.—Defence before District Court, 16.—Conduct of Complainants: Motive in prosecuting: Collusion for penalties, 17, 18.—False or frivolous prosecutions, 19.—Complainant's conduct received in extenuation of defendant's: Mutual security for the peace, 20, 21.—Nominal punishment for false imprisonment, complainant's conduct being unjustifiable, 22.—Compromising and withdrawing prosecutions to be allowed with caution, 23.—Convictions for the theft set aside, owners not appearing. 24.—Dismissal for want of evidence does not amount to acquittal, 25.—Convictions for higher offences set aside, 26 & 27.—Appeal against dismissal referred to King's Advocate, 28.—Nolle prosequi by King's Advocate in District Court, 29.—Defendant discharged and received as a witness, 30.—Security sometimes required, though specific offence not proved, 31.—Course of proceeding on nuisances, and similar prosecutions, 32.—Supreme Court generally relies on District Court as to credit due to witnesses: two cases on this subject, 33.—Courts cannot convict on a mere local order, passed without legislative authority, 35.—Nor on rent conditions, whether as against renter, or third parties, 36.—Indecent exposure of person punishable, independent of any express law, 37.—Persuading a girl of mature age to marry without consent of parents, held not to be a criminal offence, 38.—Prosecution for an alleged fraud on the Post-office; several points touched upon, 39.—Toll Regulation, No. 3 of 1831 questioning the demand in a doubtful case, not "an attempt to pass" &c. within the 2d clause, 40.—Toll properly payable at the place, where Toll-house is erected, 41.—Customs Regulation No. 9 of 1825: Landing or shipping goods at an unlicensed place makes them liable to confiscation, but does not bring parties within section 63, so as to subject them to the penalties thereby imposed for obstructing the officers: Such obstruction punishable at common law, which, however, cannot be resorted to on a prosecution on the Regulation: to which the defendant has pleaded and made admissions, 42.

43.—*Intention* to land goods not an *attempt* within the 60th and 62d clauses, 44.—Delay in revenue prosecutions should be satisfactorily explained: witnesses for defence to be always heard, 45.—Want of receipt or permit not, of itself, sufficient to condemn goods seized at a distance of time and place from those of importation, 46.—Arrack Ordinance, No. 5 of 1834: Clauses 1 and 5, License to distil in a garden protects Arrack found therein, though not with the Still, 47, 48.—Clause 11: positive proof of drawing toddy necessary; leaving the trees coupled, and chatties in them, not sufficient, 49, 50, 51.—Clause 14; Actual sale must be proved, intention not sufficient, 52.—Clause 19; Is a purchaser above two quarts, without certificate, liable to penalty? At all events, it must be positively proved above that quantity, 53.—Clause 25; Person removing arrack not liable, because the renter exceeds his authority in granting permit: otherwise, if permit itself be defective: Prosecution for removal from one division to another, not supported by evidence of removal from one place to another in the same division, par. 54 to 61.—Clause 27, Act of removal not sufficient to convict *as owner*, 62.—Clause 31, Term of imprisonment for fine unpaid under £1, par. 63.—Cinnamon Regulation No. 5 of 1833 Clause 6; Removal protected by Permit from Government Agent, of the Province, to which the removal is to be made: Removal of less quantity protected by a permit for larger quantity, distinction between Cinnamon and Arrack in this respect, 64 and 65.—House and Cart Tax, Ordinance No. 4 of 1834, Clause 8, Cart coming into Colombo from the country, not a *plying*, so as to make a license &c. necessary, 66.—Penal regulations to be strictly construed, 67.—Reference to other Titles, 68.

1. In laying before the public the somewhat numerous decisions, which have been pronounced by the Supreme Court on the subject of prosecutions, the most convenient arrangement will be to mention first those which apply to the course of criminal proceedings in general; and afterwards those by which the legality of certain convictions and acquittals for particular offences was examined and determined.

2. The Courts are frequently called on to prevent parties availing themselves of the Criminal jurisdiction for the assertion of mere civil rights; an attempt, to which the exemption of criminal proceedings from stamps offers no doubt a strong temptation. We had occasion under title "Proctor" par. 10, to observe on the disposition among the natives to turn private grievances into

public wrongs; for the purpose of making the Criminal Jurisdiction subservient to their private interests; and it was suggested that any disposition on the part of Proctors to encourage this perversion of authority ought to be animadverted upon and defeated. In one or two cases which have come before the Supreme Court, the real ground of complaint has obviously been of a civil nature, as, to establish the right to land or trees; but which the complainant has endeavoured to veil, by an account purely fictitious, of violence actually committed or threatened, in order to get the case entertained on the criminal side of the District Court. Where prosecutions of this nature have been dismissed, the story of the violence being disbelieved by the District Court, the dismissals have been affirmed in appeal without hesitation. No. 537, Amblangodde, 21st October 1835. No. 30, Amblangodde, 20th January, 1836.

3. On the other hand, if the District Judge feels satisfied that a breach of the peace has been committed, or is even to be apprehended, he does right to treat the case criminally, if it be brought before him in that light, even though the original subject of dispute between the parties may have related to civil rights. Thus, on a conviction for taking by force the produce of a field which had lately been adjudged to the complainant by a decree in a civil case, the defendant appealed against the conviction, on the ground that the subject of complaint, if any existed, was a civil injury, and should have been so treated. But the Supreme Court affirmed the conviction, observing "That there could be no doubt from the evidence that the defendant had taken the produce from the field adjudged to the complainant, and that he so took it by means of violence and intimidation—that whether his object in so doing was to appropriate the grain to his own use, or to injure the complainant, was of little importance on the present enquiry; for whether his intention were theft or malice, the means he employed for effecting his object rendered him equally liable to a criminal prosecution, and that the Supreme Court could not have approved of such an outrage, which, if resisted, would probably have led to murder, being treated as a mere civil trespass." —No. 30, Calcutta, 7th October, 1835.

4. On the question, therefore, to which branch of jurisdiction a case should be referred, the District Courts must exercise their discretion, which may, in most instances, be done, after hearing the respective statements of the parties. In a case which will be mentioned presently more fully, where a civil action was brought for a trespass, as being in contravention of a District order, by which a penalty was imposed on trespassers, the District Court convicted and fined the defendants. No damages, in the civil sense of the word, were claimed or proved. The Supreme Court set aside the conviction as illegal; but the judgment of reversal observed: "That if the penalty could legally have been enforced, the course of proceeding ought to have been on the criminal side of the Court, by which the defendants would not have been put to the expense of stamps; that as they had been incurred, and as it was not just that the defendants should bear any portion of costs to which they had been put in defending an action, which could not legally be supported, it was ordered that the plaintiff should pay the costs of both defendants." No. 2578, Ruanwelle, 15th July 1835. There are some offences which, we have seen, *supra* title "Judgment" 247-S and title "Nuisance," furnish ground both for civil action and criminal prosecution. And see No. 176 Caltura *infra* par. 37, where the indecent exposure of the person is so considered.

5. The question was submitted to the Supreme Court by one of the District Judges of Colombo, whether in cases of encroachments and other infractions of the 24th and 25th clauses of the Colombo Police Ordinance No. 3 of 1834 recourse should be had to action or prosecution;—the latter course having been adopted, in order to relieve parties from the expense of stamps. The following answer was returned by the Chief and Second Puisne Justice, the Senior Puisne Justice being absent from Colombo: "The concluding terms of both the clauses in question obviously contemplate, *either* a criminal prosecution, or a civil action: but the former mode of proceeding is that which is more distinctly pointed out as the course to be pursued under the Ordinance. For each clause directs that every person offending against its provisions,

shall, on due conviction thereof, be punishable by fine and imprisonment. The words of reservation "over and above any civil damages, to which such persons may be liable," would seem to be a precautionary clause to prevent the supposition of the civil remedy being taken away by the Ordinance, rather than a mode of redress specifically pointed out by it. The distinction between the two modes of proceeding, by which the propriety of the course adopted in any case would best be tried, appears to the Judges to depend on the question, whether the encroachment, or other wrong complained of, be one affecting the public, or whether it be an injury, alleged to have been done to the person or property of one or more individuals, in the redress of which the community would have no interest." [Vide *supra*, title "Nuisance," par. 4 and 5.] "In the former class of cases, a criminal prosecution under the Ordinance, in the latter a civil action, without reference to the Ordinance, would be the proper remedy." The opinion thus conveyed has been formed on a very general view of the subject, and chiefly with reference to the 24th and 25th clauses to which the District Judge more particularly alluded: and if any doubts should be entertained as to the legality of the mode of proceeding in any particular instance, it would be desirable that the question should be brought before the full Court by appeal." Letter Book 9 16 March 1835.

6. The distinction between confiscation and fine,—the former being properly the subject of a civil action, the latter of criminal prosecution, and the question, whether the revenue jurisdiction of the District Courts should be taken to be on the civil or criminal side of the Courts, were considered at some length under title "Jurisdiction," par. 272 and sequ. We may also refer here to what was said above p. 35-6 of the inexpediency of referring criminal prosecutions to arbitration.

7. With respect to the pleadings in criminal matters; no nicety or technicality of language has ever been considered necessary, any more than in civil proceedings. But thus much it is obviously essential for the purposes of justice should be required, namely, that the specific offence, with which it is intended to charge the

defendant, should be clearly and distinctly pointed out to him, and that he should be called upon to plead Guilty or not Guilty to that charge. And this is especially necessary, where there is more than one law upon which the charge intended to be brought against a defendant may be founded. Thus, on a prosecution against several defendants respecting stolen cattle, no specific charge appeared from the proceedings to have been explained to them, nor were they called on to plead; but ultimately one of them was found guilty of an infraction of certain Police Regulations for the Town of Kandy, and the rest were convicted of a mixed offence, partaking partly of cattle-stealing, partly of the breach of Regulations No. 3 of 1814 and 4 of 1815. On appeal to the Supreme Court, the conviction and sentence were set aside, and the proceedings were referred to the King's Advocate. The Supreme Court observed on the necessity of all defendants being distinctly told the specific offence with which they were charged, and being called on to plead to it: in the present instance, it was impossible for them to know, whether they were to be charged with cattle-stealing, or with a breach of local regulations; of which indeed the two above specified never were in force in Kandy at all. No. 415 Kandy [criminal] 23d December 1835. See also the case from Kandy, for an alleged fraud on the Post Office, *infra*, par. 39.

8. So, where on a prosecution for an infringement of the Salt Regulations, it appeared that certain buffaloes, laden with Salt, had been seized under circumstances of strong suspicion, and the drivers not having been apprehended, the District Court condemned "the buffaloes, and the Salt they were carrying, as confiscated on behalf of the Crown, by virtue of the Regulations No. 21 of 1813 and No. 2 of 1818." On appeal to the Supreme Court, the proceedings which had been begun and completed the same day, were referred back to the District Court, partly on the ground that the decision should have awaited the apprehension of the buffalo drivers, against whom warrants had issued;—partly to give the claimant of this property an opportunity of asserting his claim;—but also on account of the terms, in which the conviction was framed. "These two regulations," the judgment observed "though

relating to the same object, are very different in their nature, in their provisions, and in their effects. No. 21 of 1813 is for the prevention of *stealing* Government salt, and declares that "all cattle and carriages, employed in stealing or carrying stolen salt, shall be forfeited to H. M. use." To bring the case within this Regulation, therefore, it should have been shewn, either by positive proof, or on fair presumption, that the salt had been stolen; and the District Court should have expressed its conviction of that fact. The Regulation, No. 2 of 1818, is for the protection of the salt revenue, and directs, among other things, that salt, above one parrah, *removed without license*, shall be forfeited. If the conviction were under this Regulation, the buffaloes would not be liable to confiscation at all. It is quite irregular to declare a conviction to be founded on two distinct laws, unless their object and penalties are identical. And this suggests another reason why the enquiry would have been better postponed: for when the claimant appeared, or the drivers had been taken, he or they should have been told on which of the two Regulations the prosecutor intended to proceed; and the defendants would then have been enabled to shape their defence accordingly." No. 205, Chilaw & Putlam [criminal] 25th October 1835.

9. On the same principle, the Supreme Court has decided that a prosecutor on a penal Regulation or Ordinance is bound to point out the particular clause on which he intends to proceed. Thus on a prosecution on the Customs Regulation, No. 9 of 1825, against a person for having cloths in his possession not stamped, and on which the duty had not been paid, the District Court asked the Proctor for the prosecution on which clause he intended to rely: to which the Proctor replied that he was unable to say, not being acquainted with the Colonial regulations; and that he left that point to the Court. The District Judge naturally felt a difficulty upon this subject; and observed that if the Court were compelled to select the clause applicable to each charge which might be preferred, such selection might be objected to by the prosecutor, as not coinciding with the spirit and intention of the prosecution. The Proctor, however, still declining to specify any clause

of the Regulation, the District Court at length dismissed the complaint on that ground: and the Supreme Court affirmed the dismissal. "The District Court was perfectly right," the judgment observed, "in calling on the complainant to point out the clause of the Regulation, on which he asked for a conviction, not only with reference to the Court itself, but in justice to the defendant, who had a right to this information. A defendant is never allowed to plead ignorance or misconception of the law in vindication of his own acts; and it would be the height of injustice to allow the prosecutor to excuse himself, on the ground of an alleged "want of knowledge of the colonial regulations, and incapacity of applying the special clause" on which he intends to rely, from pointing out to a defendant what part of the law he is accused of having violated. Such an avowal, indeed, of "want of knowledge of the colonial regulations" could never have been expected from a Proctor, entrusted by Government with the important charge of supporting and protecting the public interests before the District Court. The question, whether the goods would have been liable to confiscation, is one which could not be decided without hearing the evidence, and considering how far the circumstances, under which the property was found in the defendant's possession, would have brought the case within the purview of the clause on which the prosecution should have been declared to be founded. The decree is therefore affirmed, on the ground of the plaintiff's refusal to point out the clause on which he intended to rely." No. 1281 Trincomalie 20th February 1835.

10. So, where a Regulation points out two distinct offences, and a prosecution is instituted for one of those offences, the prosecutor must not be allowed at the trial to abandon that charge, and offer evidence of the other offence, even though both offences are pointed out by the same clause. An information was laid against persons for removing one gallon and upwards of arrack from one rent division to another, contrary the 25th clause of Ordinance No. 5 of 1834. No evidence was adduced of the removal *from one rent division to another*; but several witnesses proved the removal, *from one place to another within the same*

*division*, of arrack exceeding two quarts without permit, which is also declared to be illegal by the 25th clause, and for which offence certain penalties are imposed by the 27th clause. The question was submitted to the Supreme Court by the District Judge as a point of general practice, whether the defendants could legally be convicted of the latter offence, which was equally prohibited by the 25th clause, but which was not specifically charged in the information laid against them by the prosecutor. The following answer was returned by direction of the Judges: "The information on any penal law should always specify the offence charged against the defendant, and intended to be proved. The Courts in Ceylon have not been very rigid in requiring the use of exact technical expressions, as is necessary in English practice; but at least the libel or information should point out the precise charge, so that the defendant may come prepared to answer it, and may not be misled as to the nature of the defence, necessary for his vindication. In the present instance, the defendants may have been prepared to repel the charge actually made against them, of having removed arrack from one rent division to another, but they may not have thought it necessary to have ready the permit, which, if produced, would have contradicted the witnesses, and would have justified the removal from one place to another within the same division. They may, therefore, have been taken by surprise, in finding the accusation, founded on the second prohibition of the 25th clause, converted at the trial into a charge founded on the first prohibition. The two prohibitions, it is true, are contained in the same clause of the same Ordinance: but this juxta-position in the Ordinance produces no affinity in their nature. The two offences are as separate and distinct, as if they had been created by two separate Ordinances. The first consists in removing arrack, above two quarts and under 15 gallons, from one place to another within the same rent division, without a permit from the retailer: the second consists in removing arrack in any quantity under fifteen gallons, beyond the limits of the division in which it is purchased, with or without permit, except from the Government Agent of the Province." Letter Book 26th

28th September 1835. See also *The King vrs. Ackland*, *infra*. par. 42 & 43, where it was decided that, after defendants have pleaded and made admissions to a prosecution on a Regulation, they ought not to be convicted of the offence at common law, the facts not bringing it within the Regulation. Still less ought a conviction to take place incidentally in the progress of a civil suit, and without the defendant having an opportunity of making his defence. *Supra.*, title "Land," par. 20, at the end.

11. As regards pleas by defendants in criminal prosecutions, it is to be observed that a plea of "Guilty" must be taken altogether, that is, with any terms of qualification, which the defendant may add to the general admission of his guilt. This is but common justice on all occasions, but in prosecutions on penal enactments, it is peculiarly necessary: for a defendant may put a wrong construction on the law; and believing himself to have been guilty of an 'infracton of it may think it best to confess himself guilty, though his conduct may have been accompanied by circumstances, which take the case out of the regulation: thus, a woman who was prosecuted under the Salt Regulation, No. 2 of 1818 pleaded guilty of a breach of the 3d clause (against the unauthorized manufacture of Salt) but added, "I bought the Salt from unknown persons at two pice the measure." The District Court, on this admission, convicted and fined the defendant under the 3d clause. But the Supreme Court held that the conviction could not be supported. For the plea must be taken altogether, and the latter part of it was inconsistent with the former. If the defendant could have been convicted at all on this plea, it would have been on the 7th clause, for buying Salt of unlicensed persons: but even that conviction could scarcely have been supported without evidence, on the bare plea. For a licensed person might go from door to door, selling Salt, and yet be unknown to the purchaser. No. 187, *Chavagacherry* (criminal) 5th July 1834 on circuit.

12. We have seen under title "Pleadings," par. 19, that in a prosecution for breach of a contract of service under Ordinance No. 3 of 1834 s. 17; the Supreme Court expressed an opinion

that there would be no impropriety in calling on defendants, on their pleading not guilty, to admit or deny the contract in question. With respect to the examination of defendants in criminal prosecutions in general, see title "Examination," p. 157-8. No other points present themselves as having been decided on criminal pleadings.

13. As regards the sale of property, sequestered under the 17th Rule of the second section, see title "Sequestration," par. 7.

14. The question was proposed to the Supreme Court by a District Judge, whether a prosecution for forcible obstruction and assault of Custom-house Officers, which had been remanded to the District Court for trial and decision, ought to be proceeded with in the name of the King's Advocate by information, in pursuance of the provisions of the first part of the 41st clause of the Charter; or whether the charge should be considered a minor offence, and be prosecuted in the way directed by the 10th Rule of the 2d section. The Supreme Court returned for answer "That as the case had been referred back for further hearing and decision before the District Court, on the motion of the King's Advocate, it must be presumed that the case was considered by the Crown Officer to fall within that class of offences contemplated by the 10th Rule: and consequently that, unless the King's Advocate should exhibit an information in his name, which he had authority to do in any case under the 41st clause of the Charter, it was open to the District Court to proceed in the present instance, as in other cases cognizable before that Court. Letter Book 30th 31st October, 19th 20th November 1835.

15. With respect to transferring a prosecution from one District to another, on the application of the complainant, see title "Jurisdiction," p. 286.

16. We have seen under title "Evidence," p. 149, 150, that every defendant in a criminal prosecution has a right to go into his defence before the District Court, even in cases which might require to be tried before the Supreme Court. See also No. 2,547, Chilaw, *infra*. par. 45, where it is said that a defendant's

witnesses should always be heard, though their evidence did not afford a full defence. And as to filing list of witnesses in criminal cases, see "Evidence," p. 121.

17. It frequently becomes necessary for the Courts to take into consideration the conduct of prosecutors (or *complainants*, as they should more properly be called, since the Crown is in truth the *prosecutor*) as regards their motives in complaining, their own conduct in the transaction out of which the complaint arises, and the course pursued by them in the prosecution of their complaints. That a prosecutor cannot be refused the assistance of a Proctor, if he wish to employ one, see title "Proctor," par. 10.

18. With respect to *motive*. It has long been a matter of complaint and regret in Ceylon, that the numerous Regulations, by which penalties are awarded to the informer on conviction of the offences therein declared, and more especially those which secure the payment of the informer's share of the penalty by Government, in cases in which the amount cannot be recovered from the offender, hold out a strong temptation to the institution both of unfounded and collusive prosecutions. With respect to those which are simply unfounded, it is to be hoped that they are rarely successful, because if a defendant be really innocent, and be in earnest in endeavouring to establish his innocence, he must generally succeed, whether the charge be founded on a penal enactment or on any other law. But it is generally believed that many prosecutions of the latter class, viz: by collusion between the informer and defendant, have been instituted and carried successfully through. Thus—A. accuses B. by a previously concerted agreement, of the breach of some penal regulation, by which the penalty is secured to the informer, in case of conviction. B. makes no defence, or only enough to blind the Court as to the concert of the parties; he is convicted, the penalty is awarded, which he is unable to pay; he goes to prison for the period pointed out by the Regulation as equivalent to the amount of fine, and A. receives the penalty which he divides with

B. who it may be supposed, claims a larger share, in consideration of his imprisonment. One of the D. J. having referred a case of this description to the S. C., for instructions how to act, he was informed, "That the best course to be adopted, where the Court suspected the prosecution to be got up collusively, for the purpose of securing and sharing the penalty, would be simply to dismiss the complaint. If, however, it should happen in any case, that the fact of collusion did not rest upon mere suspicion, but there should be positive evidence to support such suspicion, as well as to convict the defendant, the D. C. would be warranted in finding him guilty, and in refusing to allow the informer his share of the penalty; or where that refusal did not rest immediately with the Court, in sending an intimation to the proper quarters to prevent the success of the conspiracy, if possible. For the defendant would still be guilty of the offence charged, supposing it to be satisfactorily proved, though the main object was, not the infraction of the law, but the share of the penalty. And on the other hand, the defendant could not avail himself of his own fraud, by demanding a penalty which had only been incurred through his own collusion and knavery. "Letter Book 23d August 10 September 1834. see also Petition Book of 1834, p: 163, as to the informer claiming his share of the penalty in a case of suspected collusion: And Petition Book of 1833 p: 56., where the S. C. intimates its opinion that the informer is not entitled to his share, when the conviction is appealed from, till after the final decision of the S. C. affirming the decision.

19. With respect to prosecutions instituted on false, frivolous, or vexatious grounds, we have seen under title "Evidence," p: 132; that one of the modes by which the S. C. has endeavoured to check such proceedings, as far as the District of Colombo is concerned, is by obliging the complainant to pay batta to the witnesses on both sides: Where a D. C. dismissed a complaint, as wholly unfounded and malicious, and called on the complainant to give security to keep the peace, the S. C. modified the decree, by directing that instead of giving security, the complainant

should be summoned before the D. C., and admonished for his misconduct, and be then discharged. "The more proper punishment for a false complaint would have been a moderate fine [see title "False claim" p: 187.] For however malicious the complainant's conduct may have been, there has been no breach of the peace on his part, or any attempt at that species of offence, which is usually considered to require the precaution of security to keep the peace. The S. C., however, is unwilling to substitute for the order made by the Court below, a punishment which would be more severe than that already awarded" No. 106, *Wademorachy* 20th August 1835.

20. The conduct of complainants in the transactions out of which the prosecutions arise is often a very necessary point to be considered, especially in apportioning the punishment on conviction for offences against the person: For though the ground of prosecution is the disturbance of the public peace, and not the damage sustained by the complainant, still the degree of the offence may be a good deal affected by the provocation received by the defendant, and by other circumstances arising out of the complainant's conduct.

21. Thus, on a prosecution for an assault, the defendant admitted the fact, but offered evidence of insulting language and demeanour used by the complainant towards the defendant's wife when they met at church, immediately before the commission of the assault. And he also proposed to prove former insults of a similar description, for a considerable time previously. The D. C. having decided that it should be received, the complainant appealed, contending that the defendant was not entitled to offer proof of any former affronts. The S. C., however, affirmed the interlocutory decision of the D. C., in the following terms. "With respect to the alleged insult, offered to the defendant's wife on the evening in question, it is admitted on the part of the complainant that all that took place on that occasion must be received in evidence. Nor, indeed, would it be possible to entertain a doubt on the subject, considering that, on the degree of provocation given to the defendant on that occasion, must very

much depend the extenuation of the offence, of which it would appear the defendant has been guilty. And it must be recollected that the place in which the insult is alleged to have been offered precluded the possibility of the immediate expression of indignation and resentment, which every man of spirit would naturally feel on such an occasion; But further, this Court would not feel itself justified in fettering the discretion of the D. C., as to the reception of evidence of previous acts of the same description. It is said that there has been a continued series of insult of this nature for the last twelve months; one isolated act of aggression, committed at the distance of a year, for instance, from the present time, ought not perhaps to be admitted; but if the defendant is able to shew a continuous chain of insults, offered to him through the person of his wife, it cannot be doubted that this last act of provocation must naturally have incensed him to a much higher degree, than if this had been the first occasion on which the complainant had excited his resentment. The D. C. will no doubt perfectly understand that this evidence can only be received in extenuation, not as a perfect justification of the breach of the public peace which has been committed." The evidence was accordingly received; and the previous insults being proved, as alleged by the defendant, the D. C. decided the case by calling on both parties to enter into security to keep the peace. The complainant appealed also from this decision, on the grounds which will appear from the following judgment of the S. C., affirming the decree. "It has been urged on the part of the complainant, First, that the different station, which he holds in society, from that filled by the defendant, renders it more humiliating to him to be compelled to enter into security for his good conduct; and secondly, that the evidence is not such as to render such a precautionary measure necessary as regards the complainant, who is not proved to have been guilty of any violence, or even resistance, on the evening when the assault was committed upon him. The first objection, however, is answered by the conduct of the complainant himself, for after placing himself on an equality with the defendant, by

frequenting his house, and indulging in familiarities with the defendant's wife, as detailed in the evidence, he has little right to claim any distinction on the score of rank. With respect to the second ground of objection, this Court cannot agree in thinking that the evidence was insufficient to justify the measure adopted: for though the complainant was the party assaulted on the evening in question, it is clear, from the evidence, that he had been in the habit of going to the defendant's house, at times and under circumstances which shew plainly that he was considered a very unwelcome visitor by some of the family, especially by the mother of the defendant's wife who states that she has more than once driven him away: and it also appears that the defendant himself has warned the complainant not to come to his house. Under these circumstances, and considering the ill blood which evidently exists between these parties, the S. C. would be taking upon itself a very heavy responsibility, in relieving the complainant from the necessity of entering into recognizance, and one which it could scarcely justify, if another affray were to take place, in consequence of further provocation given by the complainant." No. 746. Colombo, 23d February & April 1835.

22. The following case was decided on the same principle. A Toll-keeper was prosecuted, with several other persons, for an assault and false imprisonment. It appeared that the complainant, an English gentleman, had passed the Toll-gate, and having no small money and refusing to receive copper coin in change for what he offered, the Toll-keeper stopped his Hackery, on which the complainant, struck him with his whip, and then proceeded on his way;—that the Toll-keeper then procured assistance, but no warrant, and having, pursued the complainant, stopped him at some distance from the Toll-gate, and obliged him to return to Caltura. The D. C. convicted the defendants and sentenced them to pay a fine of no large amount, but which the writer is unable to state with precision. On appeal by the defendant, the conviction of the D. C. was affirmed; but the sentence was modified, by reducing the fine imposed on the defendants to one shilling and the term of imprisonment in default of payment to one

day, for the following reasons "The S. C. has considered this case with great attention, with a view, on the one hand, to the protection of the Toll-keeper in the exercise of his duties and the enforcement of his just rights; and on the other hand, to the protection of the public against acts of violence and oppression. The ground, on which the sentence of the D. C. is now reduced below even the moderate punishment imposed by that Court, is that throughout the whole transaction, each party has been alternately in the wrong. In the first instance the complainant was to blame, in passing the toll gate without paying the toll, and again, having passed, in refusing either to give a smaller coin in payment, or to receive the only species of change which it appears the Toll-keeper was able to offer. For the Toll-keeper was certainly not bound to wait for payment, till the driver of the complainant's hakkery should return to pay him. In the second instance, the first defendant, the Toll-keeper, was to blame in endeavouring to stop the complainant in his progress. He would have had a right to keep his gate or barrier closed, and thus to have prevented the complainant from passing until he had paid; but having once passed, the law would have given the Toll-keeper a full and specific remedy, if the complainant had refused payment; and there was, therefore, neither necessity nor justification for that attempt at detention. But then, thirdly, the degree of violence which it appears was used by the complainant was equally unjustifiable, because it very much exceeded what the nature of the restraint, endeavoured to be imposed on him, required. The only resistance made by the defendant to the progress of the hakkery was his going to the head of the bullocks which were drawing it; an obstacle which might have been overcome by urging the animals forward, without the aid of blows inflicted on the Toll-keeper. The use of the whip, therefore, and still more the blow in the mouth, were both unnecessary, and wholly unjustifiable. But this again, though a breach of the peace, for which the complainant would have been liable, either civilly or criminally, was at an end when the complainant proceeded on his journey; and the

defendants; therefore, were not justified in ultimately stopping and obliging him to return to Caltura. Any person may arrest another when in the actual commission of a breach of the peace, from the necessity of the case, and to prevent further violence. But after the act of violence has been actually committed, and peace is restored, no such necessity exists, and the party seeking redress should arm himself with the necessary warrant, before he presumes to arrest the person whom he intends to accuse. On this last occasion, therefore, the defendants were acting illegally, and have been properly convicted. But considering the great provocation which the complainant had given, by the violent assault so lately committed on the first defendant, the case appears to be one which calls for the lightest punishment." No. Caltura, 13th June 1825.

23. The conduct of complainants in the prosecution of their charges often becomes the subject of suspicion and animadversion. Unfounded prosecutions and false defences being both so frequent in Ceylon, Courts will naturally listen with some distrust to the application, whether of complainants or defendants, to be allowed to compromise: and it was observed under title "Arbitration" p. 36, that compromises should only take place with the express sanction of the Court, or of the Crown Officer. Complainants not unfrequently ask permission to *withdraw* their prosecutions, when they find that conviction is hopeless. But these applications also should be granted with great caution, especially after evidence has been gone into; because the withdrawal of the prosecution is then insufficient as regards the defendant, who is entitled, if the proof against him fails, to a full acquittal at the hands of the Court, and ought to owe nothing to the affected moderation of his accuser. A Police Vidahn prosecuted a person for an assault, and obtained a conviction. The defendant appealed, when contradictions appearing in the evidence, though scarcely sufficient to justify a reversal of the conviction, the case was referred back for further evidence on both sides. On the day of trial, the witnesses for the prosecution did not appear, and the complainant begged

to be allowed to withdraw his complaint, this however, the D. J. refused to permit, and the proceedings were returned to the S. C., which agreed with the D. J. that the complainant ought not, at that stage of the case, to be allowed to withdraw his complaint. The only course, therefore, was to reverse the conviction, which after the complainant's conduct on the second endeavour of the D. C. to get at the truth, there could not be a moment's hesitation in doing. The defendant, if able to prove his innocence, would have his remedy, either by civil or criminal proceeding. And the question was suggested, whether the complainant could any longer be considered a fit person to be continued in the Office of Police Vidahn. No. 29, Galle, 4th June 1834. [criminal.]

24. In several instances, where the owners of stolen property have failed to appear on the day of hearing, without very satisfactory reasons for their absence, the S. C. has set aside convictions for theft, as incomplete, though other witnesses attended to prove the ownership of the goods. See case from Trincomalié, [criminal] 24th September 1834.

25. When a D. C. dismisses, for want of sufficient evidence, a complaint of that graver class which would require to be ultimately tried [if at all] before the S. C., the word *acquittal* should not be used. For in the first place, the D. C. would not regularly be competent either to acquit or convict for one of the higher offences, unless under a special order from the S. C. And secondly, it sometimes happens that though a complaint is dismissed in the first instance for want of sufficient proof, evidence is subsequently adduced, on which the party accused is committed for trial. No. 700, Amblangodde [criminal] 20th August 1834. Such supplementary evidence, however, ought always to be received with considerable caution, unless the absence of it on the first enquiry be satisfactorily accounted for. Where the complainant proved that his witnesses were for a time absent from the Island; the S. C. qualified a decree of dismissal of a charge of one of the minor offences, by declaring that it was only to be considered a temporary dismissal for want

of evidence, and not a final acquittal: for the complainant ought to be allowed to institute proceedings afresh, if he should think proper, on the return of his witnesses. No. 41, Amblangodde, 2d December 1835.

26. On the other hand, where D. C. have tried and convicted prisoners for the higher class of offences, which are considered cognizable only before the higher tribunal, the S. C. has sometimes set aside such convictions, even though the D. C. have not exceeded the limit of punishment prescribed by the 25th clause of the Charter: as in a serious case of robbery alleged to have been committed by six persons. No. 527. Negombo, [criminal] 23d September 1835. In that case the S. C. observed that supposing the robbery to have been really committed, the offence was of too serious a nature to be disposed of by the D. C., especially considering how near Colombo both parties and witnesses resided. There were besides some strong improbabilities in the story told by the complainant and his witnesses, which made it desirable, on that account, that the prisoners should be tried by a jury. In this and similar cases, the proceedings were referred to the King's Advocate for his decision, whether the parties accused should be committed for trial before the S. C. But such reference, it is scarcely necessary to say, was only made when no corporal punishment had been already inflicted.

27. In like manner, where a case of Perjury, of a somewhat complicated nature, was tried before a D. C., and the Defendant was convicted of that offence, the S. C., on appeal, ordered "that the conviction be set aside, and the proceedings be sent to the King's Advocate, in order that if further proceedings should be considered desirable, they may be instituted before the S. C. There certainly appears to have been no want of zeal or diligence on the part of the District Judge, in pursuing this investigation; but this Court by no means considers the present to be of that class of cases, which the 20th Rule of the 2d section contemplates. The deposition, recited at the commencement of the proceedings, contains a variety

of allegations, such as require legal habits and experience to found a charge of Perjury upon, and still more to prosecute satisfactorily to decision. Independently, however, of this case not being of that simple nature, which would make it a fit subject of enquiry before the D. C., there is a defect in the evidence, which makes it impossible to support this conviction. The deposition by which the Perjury is alleged to have been committed, or rather the substance of it, is only entered in the proceedings as the foundation of the charge. But it should have been not only produced in Court from the record in the Civil Suit, and have been proved to be the statement made by the Defendant on oath, but a copy of the deposition should have accompanied the proceedings, before this Court could be satisfied that the charge had been substantiated." No. 350 Pantura, 24th September 1834.

28. An appeal being instituted by a complainant against the dismissal by a D. C. of a complaint which, if not dismissed, would have been sent before the S. C. for trial, the latter Court, for the reasons stated in the following order, directed that the proceedings be referred to the King's Advocate, in order that he may take such steps in the case as he may think proper, "By entering into the consideration of the propriety of the decision of the D. C. in dismissing this complaint, the S. C. might find itself in this situation: It might consider that there was evidence to go to a jury, and might direct the parties to be bound over accordingly: The Crown Officer might take a different view of the subject, and might think that no libel ought to be allowed. In that case, there would either be a recorded opinion of the S. C., rendered nugatory by the act of the King's Advocate, or which would be still worse, in point of principle, that officer might possibly, from deference to the opinion of the Court, or from mere feelings of courtesy, give up his own opinion, and prosecute against his own judgment. Another objection to this Court directing a prosecution before itself, unless where it cannot be avoided, [as where the subject of the prosecution arises before the Court itself] is that such a direction must be considered as

the declaration of an opinion, that a *primâ facie* case, at least, is made out for a conviction. As, therefore, the point is not pressed to a decision by the Proctor for the prosecutor, a reference to the King's Advocate appears to be the preferable course." No. 966 Colombo 23d September 1835.

29. In conformity with the view taken in the foregoing case, of the controlling power vested by the charter in the Queen's Advocate over all prosecutions, the S. C. affirmed at once a decree of dismissal by a District Judge, who it appeared, had acted on the authority of a letter from that officer, recommending the dismissal: For that letter was to be considered in the nature of a *Nolle prosequi*;—a mode of terminating criminal proceedings, which must be considered as vested in the Queen's Advocate. No. Amblangodde [criminal] 24th June 1835.

30. Where several defendants are included in the same prosecution, if, when the evidence in support of the prosecution is concluded, the proof appear insufficient against one or more of the defendants, it is a common and very proper practice to discharge them at once; and they then become competent witnesses for the other defendants, subject of course to any doubt which their connexion with each other may give rise to. This indeed is a right, which could not be denied without great injustice, to those defendants, against whom any case has been made out. For otherwise, a complainant might deprive the parties accused of the evidence of every witness material for their defence, by including all such witnesses in the accusation. And if a complainant be dissatisfied with the acquittal of any such defendants, he should appeal against the order of acquittal, before their evidence is received. And so also, if any of the defendants are discharged from the prosecution, before the evidence for the Crown is gone into. For where a complaint waited till the whole case was decided, and then appealed, praying that the persons who had been discharged, and whose evidence had been received, should be put upon their trial, the S. C. rejected the application: It observed, "that the objection ought to have been made in the first instance, when the names of those persons were struck out of the proceedings, as defendants;

that having been discharged from prosecution on that occasion, and admitted as witnesses for the principal defendant, they would labor under this disadvantage, if they were now prosecuted, that the testimony which they then gave might now be given in evidence against themselves—and that the prosecutor should, therefore, have appealed against their being excluded from the former prosecution.” No. Caltura, 7th October 1835. [Criminal] see also the case of a prosecution for an alleged fraud on the Post Office at Kandy, *infra par.* 39.

31. A case has been mentioned above, *par.* 21. in which both complainant and defendant in a prosecution for an assault were called upon to find security for their good behaviour. This precautionary measure, of calling on a party to give security, may sometimes be beneficially resorted to, where the evidence is not sufficiently certain to justify a conviction of the act of violence charged against him, though his conduct shews it to be unsafe to discharge him without putting some restraint on his conduct. In a prosecution for an affray and assault, where the evidence was of this description, the D. C. sentenced the defendants to four months' hard labour, and to find securities for their good behaviour for 12 months. The S. C. affirmed the latter part of the sentence, but remitted the imprisonment, observing, “That as the D. C. had recorded that there was nothing to shew who the aggressor was, it was going too far to impose actual and inevitable punishment on any of the defendants, but that as there had evidently been a breach of the peace, and as all the defendants were stated to be persons of bad character [this must have been *after* conviction, see title “Evidence” p. 108] it was proper that they should find security for their future good behaviour, on doing which they would be entitled to their discharge, No. 123 [Criminal] Wadimorachy, 14th October 1835. It may be observed here that the obliging a person to give security to keep the peace, who has made use of threats, evincing a disposition to break it, is in consonance with the rules of the civil law in this respect. see Voet, lib: 4 sect: 2. *par.* 13.

32. Questions frequently arise between the public and indivi

viduals, which though they are rather of a civil nature, as regards the latter, assume the shape of criminal proceeding in their investigation, on account of the public health, or convenience being interested in the decision of them. see title "Nuisance," par: 4. and 5. In such cases, the private individual complained of is entitled to full hearing and consideration, before the object of controversy, which he claims as a right, can be condemned as a public injury or nuisance. Thus, we have seen under title "Police," paragraph 5, that a defendant under the 29th clause of the Colombo Police Ordinance must be allowed an opportunity of shewing that the building &c. complained of is no encroachment. And the same course must be adopted on prosecutions for resisting or objecting to any public work, which the defendant considers to be prejudicial to him, and which he has a right to oppose. Thus, the public authorities having judged it necessary to open a drain or water-course, one of the persons, through whose land it was proposed that it should run, objected to it and stated her reasons for the objection. The Constable reported that the course proposed was the proper one, and that the public road would be injured, if the drain were made as suggested by the opponent. The D. J. then visited the spot, and agreeing with the Constable in opinion, the drain was ordered to be opened accordingly. The Defendant [for the case has assumed the form of a prosecution] appealed against the order, and the S. C. decreed as follows:—"that the case be referred back to the D. C., in order that the defendant may have an opportunity of adducing any evidence in her power, to shew that the water-course ought not to be carried through her ground; and any counter evidence of the neighbours or others should be heard on the part of the crown. Among others, the Constable should be called on to repeat *vivâ voce* in Court the statement contained in his report, in order that he may be subject to cross-examination, if required. The first consideration, no doubt, is the public health, and the public convenience. But the defendant should be allowed to give evidence, if she can, not only on this point, but also as to whether the drain proposed would

be injurious to her land; further, as to the period, during which the water has hitherto been carried off through her ground, and also whether there be any other course, equally convenient to the public, without being injurious to herself. The question can only be satisfactorily decided by hearing all the evidence on both sides." No. 260, Negombo, 11th June 1834.

33. In cases, in which the question is one of mere fact, and turns upon the credit due to the respective witnesses, the S. C. has naturally leaned to the adoption of the view taken by the Court below, before whom the evidence has been given. This indeed is no more than a recognition of the vast advantage of hearing and seeing a witness give his evidence *vivâ voce*, watching his demeanour and noting any hesitations or contradictions, over a bare perusal of his evidence as recorded. In a case, where the evidence of the complainant for an assault not only stood alone, but was contradicted by that of his own witnesses, but yet the defendant was convicted, the proceedings were referred back to the D. C., to state on what grounds the conviction, so much at variance with the body of the evidence, had proceeded. The D. J. accounted for the conviction, by stating that both himself and the Assessors had given credit to the complainant, and believed that the other witnesses had been tampered with, or for some other reason had refused to state the truth. The conviction was thereupon affirmed; the S. C. refusing to "interfere with the decision of the Court below, thus deliberately expressed; on a question of the credibility due to a witness, though the case rested on the testimony of the complainant alone." No. 149: Wadimorachy, 11 November. 2d December 1835. Where, however, a D. J., in recording his conviction of a prisoner on circumstantial evidence, stated that the conviction was contrary to the opinion of the Assessors, and that his own judgment might possibly have been influenced by knowing that the prisoner was a man of bad character, the S. C. observed, "That the circumstances of suspicion were certainly very strong, and sufficient to justify the conclusion to which the D. J. had arrived: But considering that the proof was not absolutely conclusive—that the opinion of the Assessors was in favor of the defendant's inno-

ence,—and that the D. J. entertained some degree of distrust of his own opinion, on account of his previous knowledge of the defendant's character, had recorded that distrust with so much humane consideration towards him,—it seemed safer to set aside this conviction. No. Utuankandy, 20th May 1835. The S. C., we have seen under title "Jurisdiction", 280. 1., has no power to remit punishment, except by reversing or modifying the sentence.

34. The foregoing decisions relate principally to the course of proceeding on criminal prosecutions: The following cases turn chiefly on the legality of the convictions or acquittals occurring in them; whether as regards the law on which the respective prosecutions may have been founded, or the evidence on which the decisions proceeded.

35. In every case in which a conviction is asked, on a criminal prosecution, the D. J. should be quite certain that the act complained of is to be viewed in the light of a criminal offence, either by the General law of the Island, or by some legislative provision, either of the Imperial or the Colonial legislature, before he ventures to convict; or still more, to inflict punishment on such conviction. And if he entertains the slightest doubt on the subject, the means of satisfying himself are easy and immediate, by a reference to the Queen's Advocate. Proceedings were instituted in the D. C. of Ruanwelle, against the owners of certain cattle, which had been found trespassing on land attached to the fort of that place, and the fact of the trespass being proved, the defendants were fined 8 Rds., being so much for each head of cattle. On appeal to the S. C., the proceedings were referred back to the D. C., "in order that it might be stated by what law the fine had been decreed. No evidence had been offered of damage; and it was, therefore, to be presumed that some law existed, by which a specific penalty was imposed on the owners of cattle found trespassing" The D. J. returned for answer "That the fine was awarded, according to a District order, which had been in existence ever since Ruanwelle had been a Military post, by which a specific penalty was imposed on the

owners of all cattle found trespassing on the Government works and esplanade. And moreover that the Regulation of 1833 had been acted upon by former D. J. and was still acted upon in the District of Ruanwelle." On this return, the S. C. ordered, that the decree be set aside, and the fines thereby imposed be remitted "If it were possible," the judgment observed "for this Court to recognize any authority, except that of the legislature, by which specific penalties could be imposed on specific offences, it would have been necessary to send for the District order alluded to: But no such authority can be recognized as vested any where, except in the legislative power of the Island. And if any such law had emanated from that quarter, it would be to be found, as regards Ruanwelle, among the Proclamations relating to the Kandyan Provinces. No such enactment, however, is to be found. If by "District order" be meant an order issuing from any local authority of the Province or District, whether Civil or Military, such order can be considered of no force, whatever, at least in legalizing the infliction of penalties. As regards the Regulation of Government No. 9 of 1833, the S. C. is found to observe that any conviction under that Regulation is wholly illegal, except for offences committed within the gravets of the towns therein enumerated. Where there is no law on the subject in force in the place in question, the owner of cattle found trespassing can only be sued civilly for the damage which may have been done, including any expense or reasonable charge for trouble, which may be incurred in securing the animals, and preventing their doing further mischief. And to this demand, therefore, the present action should have been limited. If it be necessary to protect the public works at Ruanwelle or else where by positive law, recourse must be had to the proper quarter for that purpose. Another irregularity appears on the face of the present proceeding. If the penalty could legally be enforced, the course of proceeding, according to the practice of the Courts in this Island, would be on the criminal side of the Court; by which the defendant would not have been put to the expense of Stamps: vide supra: p. 279. As they have been incurred, and as

it is not just that the defendants should bear any portion of costs, to which they have been put in defending an action which cannot legally be supported, it is further ordered that the Plaintiff do pay the costs of both Defendants." No. 2578. Ruanwelle, 15th July 1845.

36. There is one class of criminal prosecutions which must not be omitted to be mentioned, as resting on no legal foundation. It was long the practice, now probably abolished, to introduce into the contracts [or conditions, as they are usually called] between Government and the Renters of the various duties or taxes, certain penalties for the breach of any of the conditions; which penalties were to be enforced, according to the terms of these instruments, not only against the Renters, but against all the world. Many prosecutions, and, it is to be feared, convictions also have taken place on the penal clauses, both against Renters and against third parties in former times, though the S. C., as well that sitting under the present Charter as that previously existing, never failed to declare its decided opinion of their illegality whenever an opportunity presented itself. see No. 393 Colombo, *infra*: par: 55. The practice had grown up, and the inferior Courts followed it, without entertaining any doubts as to its being legal. As regards third parties, a moment's consideration is sufficient to shew the absurdity of supposing that any thing contained in these conditions can have the effect of converting any act, innocent in itself, into a punishable offence, merely because it is not in accordance with the rules laid down in the conditions. In the first place, as we have seen in the last paragraph, no penalty can be imposed for an act not in itself criminal, unless by a law duly passed by legislative authority;—a character which it is impossible to assign to these conditions: But secondly, the conditions can at most only effect the two parties to them, namely the Government on the one hand, and the renter on the other. The public are no parties to them; and though it has been said that they are notorious in the immediate neighbourhood where they are entered into, the law would not require or presume any one to be

acquainted with them, except those who actually subscribe them. A renter has his remedy for an infringement of his just rights, as we shall see under title "Renter" par. 3 and 4. But whenever he has endeavoured to enforce the *penalties*; which the conditions professed to give, against third persons, the Supreme Court has always, it is believed, refused to recognize any such right, see No. 128 Chavagacherry 4th June 1834, *infra.*, title "Renter" par. 3. But even as regards the renter himself, there is no ground for treating him as a criminal offender, for the mere breach of the conditions to which he is a party. Any penalty which may be inserted in the conditions, as the consequence of the renter's breach of them, should be sued for by civil action, as in the case of an ordinary bond or obligation, [see p. 280, as to the distinction between a penalty of this description, and that imposed by law in the shape of a fine]. On one occasion, a D. J., entertaining doubts on the subject, very properly applied to the S. C. for information "whether he should be justified in punishing criminally for a breach of a renter's conditions" observing that he could find no law authorizing such proceeding. The Judges, as may be supposed, answered the question in the negative, adding "that the conditions constituted a mere civil contract between the Government and the renter, any breach of which must be sued upon by a civil action. The Judges presumed that the question applied to the renter only, but added, as regarded third parties, that as they were not parties to the contract, they could not legally be affected by it, whether civilly or criminally." Letter Book 9th., 28th January 1834.

37. If no positive Law exists by which a particular act is declared to be criminal, it then becomes necessary for the Court to consider whether such act be an offence by the common law of the Island; that is, independently of any positive law. Thus Murder, Robbery, Theft, &c. are offences which exist independently of, though the prosecution of them may in some instances be regulated by positive enactment. In cases of less frequent recurrence, the D. J. must decide according to his own knowledge,

whether the act be criminal or not in itself; and if he be in doubt, should apply for instructions to the Crown officers. The following case falls within that class above referred to par: 247. 8; and under this title par: 4. which may be made the subject either of a criminal prosecution or a civil action. A defendant, having been convicted by the D. C. of an indecent exposure of his person, committed in a boat at a short distance from the shore, appealed against the conviction, on the ground that the action in question ought to have formed the subject of civil rather than of criminal proceedings. It appeared indeed that the immediate object of the defendant was to insult the complainant, the S. C., however, affirmed the conviction, observing "That the D. C. had made a very proper distinction between the reparation due to the insulted feelings of the complainant, and the punishment for the offence towards the public; that if the former had been the object, a civil action would have been resorted to, but that considering the filthy act of the defendant in a criminal point of view, the complaint was properly received as a prosecution on behalf of the public, as in the case of an assault, or of any other act, by which the public peace is offended, as well as an injury done to the individual; that there could be no doubt that this act of indecent exposure was rightly considered as a criminal offence, without calling in the aid of any express law, for though it was committed in the sea, it was done in the presence and in sight of a sufficient number of persons, to make it a public exposure, and as such, punishable by the common law of every civilized and decent community." No. 176 Cultura, 27th January 1836.

38. A conviction took place in the D. C. of Jaffna against several defendants, for having enticed a Girl away from her mother's house, without the mother's consent, for the purpose of marrying her to one of the defendants. It appeared that the Girl was of an age considerably more advanced than that, at which females are often married in the Northern districts, and it was recorded by the D. C., "That no violence had been used towards the complainant's daughter, but that she went volunta-

rily, under promise of receiving some jewels." The defendants having appealed, the S. C. consulted Assessors of the heathen chitty cast, to which class the parties belonged; and the Assessors, who professed themselves well acquainted with the law of their tribe which should govern the case, gave it as their opinion that the blame must rest with the daughter, for accompanying the defendants, without her mother's consent; but that the defendants had been guilty of no offence. On this opinion being given, the S. C. observed "that though it felt reluctant to interfere with a decision which, it was to be presumed, had proceeded on the view taken by the D. C. of the customary law of the Northern districts, still the opinion pronounced by the Assessors at Colombo was so completely consonant to English law, and to natural justice, especially considering the mature age of the complainant's daughter, that the Court could not hesitate to adopt it, and to set aside the conviction." No. 1569. Jaffna 1st April 1835.

39. The judgment in the following case touches upon a variety of points connected with criminal proceedings: the nature of a conspiracy; the necessity of explaining the charge; the mode in which an accomplice should be received as a witness; the necessity of supporting his evidence by other less exceptionable testimony; inciting another to an offence; the completion of an offence necessary to conviction, and the evidence necessary for a conviction of fraud. The defendant, holding, it is believed, the office of shroff at Kandy, was convicted of "conspiracy with a certain Drum-major to defraud the Post Office Revenue" It appeared from the evidence of the Drum-major, that the defendant had asked him to get a letter franked which he gave him, and which the Drum-major accordingly presented to the Commanding Officer at Kandy, addressed in such a manner as to induce a supposition that it was a soldier's letter. The deception, however was discovered, after the letter was signed; and it never was sent to its destination. The rest of the evidence as far as is necessary to state it, will appear from the judgment of the S. C. The defendant appealed, and the S. C., after hearing the Deputy King's Advocate in support of the conviction, was of opinion, for the following reasons, that

it could not be supported, and it was accordingly set aside, and the fine imposed on the defendant remitted. "Several objections present themselves to the validity of this conviction. The finding of the Assessors is, that the defendant is guilty of conspiring with the Drum-major to defraud the Post Office revenue; and this finding is recognized by the judgment itself. Now the very essence of the offence of conspiracy is that two persons, at least, must be combined. But here, the defendant's confederate appears in the person of the principal witness against him. There is nothing, it is true, to prevent one conspirator being received as a witness against another; any more than an offender of any other description, against the partners of his guilt. But in such case, both parties ought to be distinctly made acquainted with the charge, as implicating both; and the person, whose evidence is sought, should be told the object in receiving him as a witness, and the possible consequences to himself of telling his story, as well as to his partner; vide supra: par: 30. This does not appear from the proceedings to have been done; nor indeed does any specific charge as to the nature of the offence, appear to have been made till the judgment was pronounced. It is usual in the D. Cs., after hearing the original complaint, to state to the party accused, and to record in the proceedings, the precise offence with which he is charged. And this is absolutely necessary, in order that the defendant, or his legal adviser may know how to shape his defence. In the present instance, the evidence necessary to repel a charge of conspiracy might have been very different from that which would be necessary against an accusation of simple fraud, or an attempt or an instigation to defraud. But supposing the Drum-major to have been regularly received as an accomplice, giving evidence for the Crown, that evidence ought to have been supported in every possible way by less exceptionable testimony. Yet the person, whose evidence would have been most material in this case, the Commanding Officer, namely, who signed the letter, was not called. The evidence of that Gentleman would have been of great importance, in shewing the degree of misrepresentation used by one of the conspirators, the Drum-major; more especially when the

evidence given by that person on the second occasion is considered. For he then says that the defendant "did not ask him "to get the letter franked, as a soldier's letter, but he [the "witness] could not have got it done in any other manner." This indeed, coupled with his statement in answer to the defendant's questions, that "the Shroff asked him to get the letter franked" would really look as if the deception was conceived by the Drum-major, and by him only. For though his previous deposition is much more pointed as affecting the defendant; still where the principal witness for a prosecution gives two versions of the same transaction, the Court is bound to adopt that which is most favourable to the party accused. And if, from the testimony of the Officer Commanding, it had appeared, as it probably would have done, that the letter was presented for signature and signed with a number of others, without any special representation as to this one in particular, the presumption would have been very much strengthened, that the defendant made his request for a frank in general terms, and that the request was acceded to, without any thing being said as to the particular kind of frank, or the mode in which it was to be obtained. And it is to be observed that the evidence of Mr. Hogg is much too loose to shew that the address was written at the immediate desire of the defendant. It has been urged by the Deputy King's Advocate, who admitted with great candour the difficulty he felt in supporting the conviction for a conspiracy, that the defendant had, at all events, been guilty of inciting the Drum-major to the commission of an unlawful act. It might be sufficient to say, in answer to that argument, First, that the defendant has not been *convicted* of that offence; and secondly, that adopting the last statement made by the Drum-major, and that made on his cross examination by the defendant, it would appear that the defendant had simply "asked him to get the letter franked." But this Court feels bound to state that it entertains strong doubts, whether a conviction could have been supported for a simple fraud, even if the defendant had been shewn to have taken a prominent part in procuring the signature of the Commanding Officer. It is not usual, or in general

desirable, to enter into matters not immediately before the Court for decision; but an exception is made on the present occasion in order that other more effectual measures may be resorted to, if deemed advisable, to prevent the abuse of this indulgence and also on account of a position laid down in the judgment, which may, perhaps, be carried a little too far. The general principle laid down by the D. J. is perfectly well founded, on authority: "all deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence." vide supra: title "Fraud." The expression "or endeavouring to defraud" &c. must, however, be taken with great qualifications. The general rule, indeed, is that success is necessary to complete the offence, unless the means used constitute an offence in themselves, as forgery for instance. Thus, a man may be convicted of obtaining money or goods under false pretences; but not, if he have only attempted and failed. In the present instance, the attempt has been unsuccessful, for the letter has never reached its destination. But even if it had, the deception would have been rather on the Commanding Officer, than on the Revenue. No loss would have been proved to have been sustained by the Revenue; for it does not follow that if the signature could not have been obtained the letter would have been sent at all. Again the Regulation No. 3 of 1812, not only imposes no penalty on this species of deception, but does not even declare that it shall be unlawful. And the 8th clause of the advertisement cited by the D. C. [supposing that it could be received as law] only directs that no letters from Soldiers &c. shall pass free of postage, unless signed by the Commanding Officer. It is for those Officers, therefore, to whom that privilege, if it may be so called, is entrusted, to guard against deception, on the part of those, to whom the indulgence is granted" No. Kandy 2d May 1835.

40. The Regulation No. 3 of 1831, confirming the tolls established on Roads, Bridges &c., enacts that any one who shall

pass, or attempt to pass over such Roads, Bridges, &c. without paying the established toll, or shall aid and abet &c., or shall molest or obstruct the toll collectors in the execution of their duty, shall be punished by fine or imprisonment. We have already mentioned under this title par: 22. a case in which the rights and duties of toll collectors were incidentally touched upon; though as the principal point was the relative conduct of complainant and defendant it was thought more convenient to mention it in that place. The two following cases arose on prosecutions by toll collectors, for alleged breaches of the Regulation, though in both instances, they failed in bringing the defendant's within its provisions. In the first of these cases, the defendant had passed the toll-gate with his cart, paying full toll; and on his return the same day, the toll gatherer demanded half that amount, which the defendant refused to pay, but offered to abide by a reference to the Assistant Agent, who was also the D. J. The reference was made, and the Agent gave his opinion against the claim, the toll gatherer, however, prosecuted the defendant "for attempting to pass without paying the toll, and on the D. C. dismissing the complaint, he appealed to the S. C., alleging that the opinion expressed by the Assistant Agent was not conclusive, and that though the conditions under which he held the right to collect the toll did not expressly give this half toll on carts returning, still he was entitled to it as matter of usage, of which he could produce evidence. The decree of dismissal was however affirmed in the following terms:" it would have been impossible, by any evidence which could have been adduced, in support this proceeding in the shape of a criminal prosecution. The complainant admits that "the conditions do not lay down the rule contended for, but contends that custom entitles him to it" that is, to demand half the full toll on a cart returning after having once passed and paid the *full*. It is much to be lamented that any right to demand toll should be left to rest on mere custom, and should not even have found a place in the conditions or contract, entered into between Government and the toll collector. But as such is the case, it would be in the highest

degree unjust to convict a man of a criminal offence, because he questioned the right of the toll collector, not altogether to any toll, but as to the precise amount. Such a doubt was perfectly justifiable under the circumstances, and could never be construed into an "attempt to pass without paying the established toll," within the meaning of the Regulation. The opinion of the Assistant Agent, it is true, is not binding on the D. C. and where the office of the Agent and that of D. J. are united in the same person such opinion ought not to preclude the right of a party to urge his claim before a D. C., any more than if those offices were held separately. But at least the reference to the Agent; and the willingness expressed by the defendant to abide by the decision made, go very far to shew that the defendant had no intention to evade the payment of the toll, as soon as the proper amount was duly established. The S. C. affirms the decree, not in consequence of the decision of the Assistant Agent, but because the complainant's own statement is subversive of all grounds on which the prosecution could rest. No. Caltura [criminal] 14th October 1835.

41. In the other case on the toll Regulation, which was from the same Court, and in which the complaint was also dismissed, the facts will appear from the following judgment of the S. C., affirming the dismissal. "It appears that in this case, the complainant is authorized by his contract with Government, to levy tolls at *Vitanegywalte*; but that, for certain reasons of advantage to the toll collector, the toll is actually taken at *Toenman Handy*, about two hundred fathoms distant from *Vitanegywalte*. That the defendant, with a log of wood in his cart, passed *Vitanegywalte*, but before arriving at *Toen-man Handy*, where the toll house is placed, he discharged his load into the canal, which must be situated between those two places. The complainant urges that his predecessors have been in the habit of collecting the toll at *Toen-man-Handy* in order to prevent evasion of it; and he contends that, as his contract authorizes him to levy it at *Vitanegywalte*, all carriages passing that spot are liable to pay, and that it is of little consequence whether it be paid on

the exact spot, or at a little distance from it. But by shifting the place of the toll house, the public may have naturally been led to suppose that the liability to pay only arises on passing the spot where it actually stands. In the present instance, for example, the defendant may have concluded that, if he stopped short of the toll house, he should not be called upon to pay, any more than a person who goes to the foot of a Bridge, without passing over it. And it is very probable that, if he had been aware that the toll could be demanded of him for merely passing *Vitanegeywalle*, he would have conveyed his outrigger in some other way to the canal, which it is plain can be but a very short distance from *Vitanegeywalle*. If it be intended that the toll should be taken at two different places, this should be duly "established," according to the terms of the Regulation, and notified to the public." No. Caltura, 14th October 1835.

42. The four following cases arose out of prosecutions instituted on the Customs Regulation, No. 9 of 1825. That Regulation has, perhaps, been since repealed; but these decisions may be found not inapplicable, in point of principle, to any other Ordinance passed in its place. The case which is about to be mentioned may appear to occupy more space than the immediate object of the prosecution would seem to call for: But if the decision be correct, its authority will not be lessened by the trifling value of the subject matter of it; if it be incorrect, it cannot be over-ruled too soon, or, for that purpose too widely published. The prosecution was instituted against a Merchant of Colombo and a native, and after some doubt whether it should be tried in the Supreme or the District Court, it was at length agreed that it should be argued before the former Court, on the admissions of the defendants. It was accordingly argued by the King's Advocate in support of the prosecution, and Mr. John Staples for the Defendants; and the Chief Justice pronounced the following judgment, in which the facts, as admitted, are stated.

43. "This case comes before the Court on certain admitted facts on which the public prosecutor and the defendants are

desirous of obtaining the opinion of the Court, whether the facts so admitted bring the defendants under the penalty imposed by Regulation No. 9 of 1825 for the obstructions of Officers of the Customs. The Libel charges the defendants with having, on the 20th September last, unlawfully landed and received from the Barque *Eliza Ann*, then lying in the port of Colombo, in an unlicensed boat belonging to the said barque, six Turkeys, at a place not assigned for the landing of goods: And also with having obstructed and molested certain Custom House Officers in the execution of their duty, against the Regulation &c. On this charge, the defendants admit that six Turkeys were landed and received in the manner and at the place charged; but contend that the landing was not illegal, and that the obstruction offered to the Custom House peons was justifiable. It appears from the statements of the King's Advocate on the one side, and of the defendants counsel on the other, that the defendants were charged, in the first instance, with having also received on shore goods liable to duty, and with having used personal violence towards the peons. It is highly satisfactory to the Court to find the first defendant anxious to repel these two charges; and to hear from the King's Advocate that the evidence would not be such as to justify his asking for a conviction on those grounds. Such conduct, improper as it would be in any one, would be censurable in a much higher degree in a person appearing before the Court as a British Merchant. It is admitted, then, that the act of the defendants was limited to the receiving the goods at a place not assigned, and to the ordering the boat back to the ship, against the wishes of the peons; but without the exercise of any force, or personal violence. It remains for the Court to decide whether, under these facts so admitted, the defendants have rendered themselves liable to the penalty imposed by the Regulation for obstruction of the officers. And if I felt any doubt on the subject, I should feel it my duty to take the opinion of the learned Puisne Judges, before I expressed my own. But on reference to the different clauses of the Regulation which have been cited, and more es-

pecially to the 63rd, which has been principally relied on, as applicable to this case, it appears impossible to hesitate in declaring that the defendants have not rendered themselves liable to the penalties thereby imposed. The 43rd & 49th clauses direct that no ship shall land or take on board goods of any description, except at the places assigned for that purpose: And the 46th clause requires that all goods, landed or to be exported, shall go through the Custom House: But the penalty for the infraction of these clauses is declared to be, not a fine, on the person receiving or shipping the goods contrary to these provisions, but confiscation of the goods, and of the ship and cargo: And there can be no doubt that the articles which were landed on this occasion would have been liable to confiscation. The 47th clause has been alluded to, as rendering illegal the landing goods in an unlicensed boat; but that clause allows the boats belonging to the ship herself, to be used for that purpose at all ports of the Island. It only directs that, at the Ports of Colombo, Galle, and Trincomalie, no boats, *other* than the ship's boats, shall be used, unless duly licensed. The 63rd clause of the Regulation, on which the arguments at the bar have chiefly turned, enacts, "That any person, shipping or landing any goods *hereby prohibited, or on which the duties shall not have been paid*, or receiving the same on board or on shore, or, in either situation, obstructing or molesting any Custom House Officer in the execution of his duty, or bribing or attempting to bribe, shall on conviction, be fined not exceeding £100 or imprisoned not exceeding six months."—Now in the present instance the articles landed were neither "prohibited goods," nor do they fall under the description of "goods on which the duties had not been paid" for they were not liable to duty at all. The case of landing goods, at a place not assigned for that purpose, does not appear to have been in contemplation in framing this clause; at all events it is not expressed, and it cannot be brought within the enactment by implication. The 60th clause, indeed, directs that "any articles which may be legally imported, but which shall have been landed at an unlicensed place &c., shall be li-

able to confiscation: And the 62d clause enacts "that every  
 " commander of a ship, or owner, or consignee, of goods, who,  
 " shall be proved to have been privy to any act which, by  
 " any of the foregoing clauses, subjects goods fraudulently im-  
 " ported or exported to confiscation, shall be subject to pay a  
 " fine equal to the value of the confiscated goods." But as  
 regards the 60th clause, this proceeding is not for the confisca-  
 tion of the goods: And with respect to the 62nd clause; it can  
 scarcely be said, that goods, not liable to duty, and the impor-  
 tation of which is permitted, have been "fraudulently imported,"  
 because landed at a place not pointed out for that purpose, to  
 say nothing of the incongruity of applying the term "consignee"  
 to a person receiving six Turkeys from a ship. Where a law im-  
 poses certain penalties on certain acts, as being fraudulent, a  
 Court of Justice must be satisfied, with reference to the terms  
 used by the law, and the applicability of those terms to the  
 subject matter in question, that fraud has been practised or in-  
 tended, before it can impose the penalty. But though the Court  
 entertains no doubt that the defendants are not brought within  
 the penalties imposed by the Regulation, I feel bound to declare  
 my equally decided opinion that the Custom House peons were  
 in the execution of their duty, and therefore that any obstruction  
 of them in the performance of that duty was an offence at com-  
 mon law, and punishable as such, according to the nature of the  
 offence. I feel anxious to express my opinion on this point, be-  
 cause it would be in the highest degree mischievous that it should  
 go forth to the world that any public officers, whether their func-  
 tions relate to the administration of Justice, the preservation of the  
 public peace, or the collection of the Revenue, may be molested  
 in the execution of their respective duties by any person what-  
 soever. The example to the native population of any British  
 born subject, still more if he was in the rank of a gentleman,  
 above all if he also appeared in the character of a merchant,  
 being allowed to offer real and serious obstruction to Revenue  
 officers with impunity, would be most injurious. For with what  
 justice, the native would ask, can I be punished for smuggling.

or any similar offence, if an english gentleman is declared to be free to resort to such practices without inquiry, or punishment; if he be found guilty. As far as my individual opinion is of weight, I should always feel inclined to visit any person falling under that description, who should be proved so to have mis-conducted himself, with threefold severity. As regards the case now before the Court, since both the libel of accusation and the arguments at the bar have proceeded entirely on the Regulation it might be sufficient to add that, as the defendants have not been brought within that Regulation, no sentence can be passed upon them. But I should not feel satisfied, without adding that even if the defendants had been, or were now to be, indicted for this obstruction without reference to the Regulation, the penalty which the Court would feel called upon to impose, and which indeed the King's Advocate seems to ask for, would be a very light one; no more indeed than would be sufficient to enforce the opinion already expressed. It is admitted that the obstruction complained of was confined to ordering the boatmen to return to the ship against the wishes, and the remonstrances, it must be presumed, of the Peons. But it is also stated to be in evidence before the D. C., that bad weather was to be apprehended at the time, that the boat's crew were therefore much wanted on board the ship, and that the first defendant offered to give the peons a note to the Collector of Customs, engaging to be responsible for any act done by himself or by the crew. Although, therefore, the peons were fully justified in searching the boat, and even in detaining it, if they had good ground for supposing it to have been engaged in illicit importation, and though it was the duty of the first defendant, if time and circumstances permitted it, to apply for an order or license from the Collector, instead of taking upon himself to order the boat off, still it must be confessed that the absence of all fraud as regards the object in view, and of violence in the execution of it, the state of the weather, and the offer of written responsibility to the Collector,—all of which circumstances are stated on the one side, and either admitted or not denied

on the other,—do reduce this offence to one of minor importance, except as regards the effect which such an example might produce on the public mind. “The King vs. Ackland and another, Colombo, 3d November 1835. In consequence of some doubts which were expressed, whether the defendants ought not to have been declared guilty at common law of the obstruction of the peons, the Chief Justice subsequently stated still more in detail the grounds on which he considered such conviction, on the present prosecution, impossible. That statement is recorded in the S. C. It will be sufficient on the present occasion to say that the substance of it was that as the defendants had been called upon to plead to a libel of accusation founded avowedly on a Regulation, and not in any way on the common law, as they had made certain admissions, leaving it to the Court to say whether the facts so admitted brought them within the Regulation, it would be obviously unfair to take up a new ground, and to contend that, though the admissions did not bring them within the Regulation, they still would be sufficient to convict them at common law. And that this distinction was founded, not on any technicality of pleading, but on absolute necessity, as a measure of strict justice to the defendants;—We have seen above, par: 9, No. 1281. Trincomalie, that even the particular clause in a Regulation, on which it is intended to ask for a conviction, ought to be pointed out.

44. As a general rule, an offence must be completed in order to render the person committing it liable to punishment. And if the law declares that an *attempt* to do a particular act shall be punishable offence, such attempt must be proved to have been actually made; and a bare *intention* to commit the act cannot be construed into an attempt [see paragraph 52 *infra*, on prosecutions on the Arrack Ordinance]. A prosecution was instituted in the D. C. of Jaffna on the 60 and 62 clauses of Regulation No. 9 of 1825, for the confiscation of certain articles, alleged to have been attempted to be landed from a Dhoney at an unlicensed place, namely, at Colombogam, instead of at the usual place near the Custom House. It appeared that the Dhoney had anchored at Colombo.

gain, and that the defendant, the master, who was also sued for the penalty imposed by the 62d clause, had expressed his *intention* to land his cargo there, but that the Ferry renter *prevented him*, as the witness stated. The renter was not called as a witness. There was some conflicting evidence, as to the usual place of landing, one witness stating that it was usual to land at Colombogam, when arriving from Illepikarave, but not when coming from Manar. The D. C. considered the evidence insufficient, and dismissed the prosecution, and on Appeal, the S. C. affirmed the dismissal. For the mere *intention* to land the goods at Colombogam was not an *attempt* to do so; the defendant might have thought better of it, and relinquished his intention. Then the evidence was defective, from the Ferry-renter not having been called, to prove what it was he prevented; for the defendant might have yielded to his verbal representations. No. 2106, Jaffna, 3d May 1834.

45. All proceedings on Revenue Laws, whether in the shape of civil actions for confiscations, or of criminal prosecutions for fines or other penalties, should be instituted with as little delay as circumstances will admit. An action was brought on the 57th clause of this Regulation, No. 9 of 1825 to obtain the confiscation of certain cloths, brought in a Dhoney from Manar to Calpentyn, and not included in the Manar portclearance. The answer of the defendant was not very relevant to the point in issue, except as complaining that thirteen months had been allowed to elapse, between the commission of the alleged offence, and the institution of the action; to which the plaintiff replied that he had been waiting till he could obtain the portclearance. On the day of trial, the D. C., considering that the defence set up would be no answer to the action; gave judgment for the confiscation, without hearing the witnesses for the defence. On appeal to the S. C., the proceedings were referred back, in order that the defendant's witnesses might be heard. "It is possible," the S. C., observed, "that the evidence which he may have to adduce may be such as, if not furnishing an entire answer to the action, might shew strong grounds for re-

commending a remission of the confiscation, or at least for not giving costs against him: In cases partaking so much of the nature of criminal prosecutions, the defendant's witnesses should always be heard. It is also to be observed that the plaintiff has given in his replication a very unsatisfactory reason for the delay which has occurred in bringing this action. The Dhoney arrived at Calpentyu on the 29th of September 1834, and the action was not brought till October 1835: And the only excuse for this most extraordinary delay is, that the plaintiff waited till he was furnished with a copy of the Manar portclearance. The S. C. can scarcely suppose that the plaintiff was serious in assigning as a reason for twelve months' delay in the execution of his duty, the want of a document, which it must be presumed might have been procured with the greatest ease in a week. The Crown, it is true, is not bound by the ordinary rules of prescription: But it is the duty of Courts of Justice to inquire into any apparent neglect of duty on the part of the officers of Government, by which hardship or injustice may be done to those who are prosecuted for breaches of the Revenue Laws. And both hardship and injustice must be inflicted by any unnecessary delay in the institution of such prosecutions: Unless, therefore, it can be shewn that the plaintiff was prevented by some cause, over which he had no control, from procuring the portclearance within a reasonable time, the S. C. will feel it to be its duty to recommend to the Government a remission of the confiscation, even if the defendant should fail in establishing a good ground of defence" No. 2547. Chilaw and Putlam, 3d February 1836. The result of this inquiry could not have been communicated to the S. C., till after the writer of these notes had left Ceylon.

46. A quantity of opium was seized and condemned, as having been illegally imported, on the ground that the person, in whose possession it was found, produced a receipt for the import duty, in which the quantity specified differed, in point of weight, from that seized: It appeared that the seizure was made at a considerable distance from the place of import, and

after sometime had elapsed [the opium had been imported, it is believed, at Galle, and the seizure was made in the district of Caltura]. The S. C. held, that, under these circumstances, the want of an import receipt, or the production of an insufficient one, was not, of itself, a sufficient ground of condemnation. "It had been proved [by an officer of the Customs examined by the S. C. to this point] that it was not usual to affix any mark at the Custom Houses on vessels containing opium, as having been regularly imported: Unless, therefore, the possessor of this article were constantly to keep it protected by the receipt or permit, it might be considered liable to seizure at any time, or at any place, however remote from the time and place of import. And this protection it might be impossible to continue; especially where, as in the present instance, the receipt covered a variety of different articles. For as it could not be expected that all these articles should for ever remain in the possession of the same person, some of them must, on a separation, be left unprotected." No. 43, Caltura [civil] 17th May 1834.

47. The following decisions on the Arrack and Toddy Ordinance, No. 5 of 1834 will be arranged according to the order of the clauses, to which they respectively refer. One or two of the judgments run to considerable length; but it is considered better to insert them entire, than, by curtailing them, to leave any doubt as to the grounds on which they proceeded, or diminish the means of contesting their soundness.

48. The second clause of the Ordinance requires that a License must be obtained for distillation, specifying, among other particulars, the place in which the Still is to be worked; and the 5th clause authorizes the seizure of all liquor distilled without such license, or deposited in any place contrary to the Ordinance. On these clauses, the S. C. held that a license to distill in a certain garden protected arrack found in a shed in that garden, though the still itself was in another building within the garden. No. 206 Amblangodde, 9th December 1835.

49. The two following cases were prosecutions on the 11th

clause of the Ordinance, for drawing Toddy without the certificate thereby required. The question in each case was as to the sufficiency of the evidence to shew that the defendant had actually drawn toddy, when unprotected by a certificate, and in each case, the conviction was set aside, as not being sufficiently proved. The nature and amount of the evidence will be seen from the respective judgments which follow :

50. "The 11th clause of the Ordinance, on which this judgment is founded, enacts that "every Owner or Renter of any tree from which Toddy shall be drawn without certificate, shall, on conviction, be sentenced to pay a fine for every tree," *from which toddy shall be proved to have been so drawn.*" In order, therefore, to bring the defendant within this clause, there should be direct and positive proof of his having drawn toddy. Now, not one of the witnesses swears to this fact, with that degree of certainty which is necessary before the defendant can be pronounced guilty of this offence. The prosecutor states, "*We discovered* that the defendant was drawing toddy from fifteen trees without certificate." The Police Vidahn says, "*I found* that the defendant drew toddy from fifteen trees," but this appears to have been mere inference from the facts of the trees being coupled together, and of the chatties having been left in them, and from the admission drawn from the defendant by the questions which were put to him. But with respect to the coupling and the chatties, these facts amount at most to a suspicion that toddy had been, or was intended to be drawn. And it must be recollected that this was on the second day of the new year, and that the defendant would appear to have been drawing up to the end of the past year, it must be presumed with certificate, or the vigilance of these persons would scarcely have failed to detect the illegality before the year had concluded. There is nothing in the Ordinance to make it illegal for a man to leave his trees united, and his chatties in the trees, after his certificate has expired, and if, as the defendant alleges, it was his intention to apply for a fresh certificate, it was perfectly natural that he should do so, and it is remarkable that when the de-

defendant said in Court "I pointed out pots, but there was nothing in them," he was not contradicted in that assertion. Then the admission drawn from him is by no means sufficient to warrant the conviction. He was asked, generally, from how many trees he was drawing toddy; and he appears to have at once answered. But there was nothing in the question, put in these general terms, to make the defendant suppose that it referred to that particular day, or to the day before. The same answer might have been given to the same question, if the defendant had continued to draw toddy to the last day of 1835, and intended to renew his drawing as soon he should have provided himself with a fresh certificate. No enquiry appears to have been made, as to the fact of his having had a certificate for the last year. It seems clear that the defendant considered himself protected up to the end of the year, for he says that he "removed every toddy pot but three from his trees before the 1st of January." This was a point on which the Court might very easily have satisfied itself; and it was a material point." No. 154, *Cultura*, 3d February 1836.

51. The following is the judgment pronounced in the other case on the 11th clause: "there is absolutely no evidence whatever in this case to shew that the defendant has been guilty of drawing toddy, in contravention of the 11th clause of the Ordinance. The conviction rests on the admission of the defendant, that he removed his toddy pots on the 2d of January. The judgment of the D. C. would appear to consider the leaving these chatties in the trees for a single hour, after the certificate had expired, was a punishable offence: This is not so. The fact of trees being in the condition in which trees generally are for the purpose of drawing toddy, is no doubt a circumstance from which it may be inferred that toddy either has been drawn, or is intended to be drawn; but it does not form that direct or positive proof, without which no man can be found guilty of a criminal offence. The defendant, it seems, did draw toddy to the end of 1835; and this must be presumed to have been done legally. There was nothing extraordinary, therefore, certainly

nothing illegal, in his allowing the chatties to remain in his trees till it suited his convenience to remove them. The S. C. cannot feel the apprehension, expressed by the D. C. of the evils likely to ensue from an acquittal in this case. It is a complete fallacy to say that "every man would plead the same excuse, for an infringement of the Ordinance." It will be quite time enough to inquire into the sufficiency of a plea or excuse, after the Ordinance has been shewn to have been infringed. Until that is shewn, no excuse is necessary; and the infringement has not been shown in the present instance. The operation of drawing toddy is not one which can be performed in a moment, or in secrecy, or without furnishing ample opportunities for those, whose duty or interest it is to detect and prosecute illegal drawing, to obtain direct and ocular proof of the fact." No. 150 Calura, 3d February 1836.

52. The 14th clause of the Ordinance prohibits the sale, by retail, of arrack, without license, under penalty of £5 for every offence. A person was found in the fort of Trincomalie carrying about arrack in a way which could leave little doubt it was his intention to sell it to any one who would purchase it; But there was no proof of his having actually sold any. The D. C. having convicted him under the 14th clause, and without hearing his witnesses, the S. C., on appeal referred the proceedings back to the D. C. for further evidence. "The defendant is in all cases entitled to have his witnesses examined, especially on criminal prosecutions; and though the points which he urges in his defence, and which he proposes to prove, may not appear strictly relevant to the offence charged, it still is better that they should be heard. But there is another point, to which it is necessary to draw the attention of the D. C. The offence charged is a violation of the 14th clause of the Ordinance, which is directed against the retail sale of arrack, without license. Now there is no proof whatever, of the defendant having sold any arrack at all. His *intention* probably was to do so; but the actual sale must be proved, before a defendant can be convicted of this offence. The S. C. concurs entirely with the sentiments

expressed by the D. J., as to the necessity of preventing this pernicious practice of selling arrack to the ships' crews, *provided* the prevention can be effected by means strictly warranted by law. And as there seems to be no doubt, from the evidence, that the defendant was really in possession of the arrack, and under circumstances too of great suspicion, there appears to be no objection to calling upon him to shew that he was lawfully possessed of it, under one of the six exceptions specified in the 17th clause of the Ordinance, against the unlawful possession of arrack. If he cannot bring himself within one of those exceptions, the possession was illegal: but it is impossible to support the conviction on the 14th clause for illegal sale." No.

Trincomalie, 30th December 1835. see also No. Ratnapoora, 1st July 1835, where it was held that exposing the arrack for sale, without any actual sale, was not sufficient to warrant a conviction.

53. The next case which presents itself is a conviction, founded on the 19th clause, for having purchased a quantity of arrack, exceeding two quarts, from a retailer, without the certificate of sale, which that clause requires the retailer to furnish. The S. C., in setting aside this conviction, expressed doubts, "whether the omission by the renter to grant the certificate, though it might subject such renter to a penalty, would render the possession of arrack by the purchaser illegal. But it became unnecessary to decide that point, because the proof did not appear sufficient to shew that the quantity found in the defendant's possession exceeded two quarts. It appeared that two flasks [meaning, it was to be presumed, two bottles] were produced in Court, as found in the defendant's possession: But this would not be above the quantity allowed to be sold without certificate. It was true that the retailer stated he sold two bottles and four drams to the defendant; but the four drams might have been consumed before removal. This Ordinance being one of extreme severity, Courts must be quite satisfied that parties were brought within the spirit as well as the letter of it, before they should be convicted of having infringed it." No. Four Kories 3d February 1835.

54. The 25th clause of the Ordinance enacts that no arrack, exceeding two quarts and under fifteen gallons, shall be removed without a permit, to be granted by the licensed retailer of the rent division of the district in which the removal shall take place, which shall specify date, names, quantity, period, and places. The principal decision which has occurred on this subject arose out of the former Regulation, No. 22 of 1820, section 11, which had for its object the enforcement of a similar permit. The point, however, in that case is one which may arise, and has indeed arisen, on the 25th clause of the Ordinance; namely whether the party removing the arrack is responsible for the fraud or negligence of the retailer, in granting a permit, regular on the face of it, but which it exceeded the powers of the retailer to grant: An important question as regards the public, and one which was warmly contested. The judgment affirming the decree of dismissal, is therefore given as it was pronounced, and will disclose the facts, as far as they are material.

55. "This case has been brought in appeal before the S. C., as the King's Advocate has stated, for the purpose of giving him an opportunity of stating those reasons and arguments which he considers ought to induce the Court to reverse the decree of the Court below, and to declare the defendant guilty of a breach of the 11th clause of Regulation No. 22 of 1820. The facts of the present case are admitted to be precisely similar to those of the former case No. 251, already decided by the same D. C., and affirmed by this Court. That is to say, the defendant was found removing arrack, exceeding two quarts, in open day, and under no circumstances of concealment or suspicion, which would, in themselves, imply anything like a consciousness of being engaged in an unlawful act: And in justification of this removal, he produces a permit, granted to him by the renter, from whose tavern he was removing the arrack. But then it appears that the place, at which the arrack was seized, is beyond the jurisdiction of the renter; that is, beyond the limits within which that person, by his contract with Government, is authorized to sell arrack. And this is the

ground, and the only ground, on which it is urged that a conviction in the present case ought to be pronounced. For the decision of this point, it is sufficient to consider the six first lines of the 11th clause; and the Court is relieved from the necessity of endeavouring, as in the former case, in which other grounds of conviction were urged, to make sense and discover the meaning of the bad English and unintelligible language which follows. The words, then, which the Court has to consider; are these: "No arrack exceeding two quarts &c. &c., shall be removed, except upon a permit from the Collector, or other Revenue officer, or renter acting under his authority." This Court concurs with the King's Advocate that the words "acting under his authority" must have been intended to have reference to the authority, with which such officer or renter would be invested by the Collector. And if the renter has taken upon himself to overstep the bounds of such delegated authority, he may possibly be liable to be sued or prosecuted, either under the terms of his contract, or under those of the Regulation. But when it is contended that this excess of authority, if indeed any such has been committed, is to be visited on the defendant, and that *he* is to be treated as a criminal, and as having been guilty of a breach of the Revenue Laws, because he has trusted to, and considered himself protected by the act of this recognized sub-agent of Government, the Court cannot too publicly express its decided, unequivocal, and matured dissent from such a proposition. In order to convict the defendant of this offence, the Regulation should either have expressed the extent of authority, with which a renter should be considered clothed; or the most clear and explicit instructions should, not only have been issued from the Collector to the renter but should have been promulgated to the world by some authoritative instrument, and in so public a manner as to preclude the right of any person to plead ignorance of them. If this were otherwise, the Regulation, as the Court expressed itself on the former occasion, would be a mere trap to ensnare the public. The Law announces that arrack may lawfully be

removed on a permit from the renter, acting under the Collector's authority: The renter issues a permit to a person buying from his tavern. What then must the legal inference be, still more the inference of an uninformed person, but that the renter, the servant of Government, [for such he is, as regards the granting permits] was strictly pursuing the authority delegated to him? Even, therefore, if it had been proved that the powers of the renter had been clearly and explicitly defined to him by instructions from the Collector, the defendant would still not be brought within the terms or spirit of the penal part of this clause, unless it could have been shewn, further, that he was cognizant of such limitation of the renter's powers, and must, therefore, have known that the removal of the arrack was not covered by the permit. But the King's Advocate has frankly admitted that no instructions whatever, printed, written, or even verbal, have hitherto been given to the renter, except such as are to be inferred from the conditions on which the farm of the arrack has been sold to him. The necessity has been but too frequently forced upon this Court, of declaring that it never can and never will look upon those conditions as any thing but a contract, and the proof of a contract, between the Government and the other contracting party. But even supposing the instrument to be binding on the whole world, it would require the most ingenious subtlety to discover any passage which could be bent or twisted to the inference of any such limitation of authority. The 10th condition applies only to the renter, and would, therefore, on the principle of "*expressio unius exclusio alterius*," rather furnish an argument against a conviction in the present case. The 13th and 14th conditions, again, are confined to wholesale removals; and even with respect to them, it is not declared that a permit from each renter, through whose limits the arrack is to pass, shall be necessary. Not one of the other conditions has the remotest reference or allusion to the removal of arrack. As far as appears, therefore, the Renters have been left wholly without instructions of any kind, as to the extent of their authority in granting permits:

36. "But it is next urged by the King's Advocate that the limitation contended for is matter of general notoriety, and, therefore, that the defendant must have known that he was acting illegally. If this ground had been intended to be relied upon, it should have been legally and regularly established as evidence. It is not sufficient for the Crown Officer to state that such notoriety exists: it should be proved by respectable and disinterested inhabitants of the District. But even if it had been proved in the fullest manner, a Court of Justice would have been bound to pause and reflect very maturely before it found the defendant guilty on such a ground. That which may be considered established usage in one district may be viewed in a doubtful light in the adjoining one, and may, perhaps, be directly contradicted by the constant practice of the next. The Renter, too, is constantly changing: the Renter of to day may consider himself restricted to licensing removal within his own limits; his successor of to morrow may imagine himself authorized to issue permits throughout the whole Collectorship. And this absolute uncertainty and absence of all fixed limitation may have led the D. C. to the opinion, expressed in its first Judgment, that the power of the Renter in granting Permits was coextensive with that of the Collector. But even supposing that such an understanding had been proved to exist, notoriously and universally throughout the Island; this would still only amount to a notoriety of public opinion founded on no tangible or substantial ground whatever; and, as far as the evidence goes, without even the verbal order of an Officer of Government to support it. A penal law should have something much more distinct and palpable to mark those acts the commission of which is to bring the person performing them within its penalties.

57. "It has been stated that many convictions have heretofore occurred in the Revenue Courts for this offence, and under the same circumstances. But as this is purely a question of law, it is obvious that such decisions would not be entitled to any great weight, unless one of them at least had been confirmed by the late High Court of Appeal. No such confirmation appears to

have taken place, nor indeed has any one such decision been cited, as having occurred even in the Courts below, within the recollection of the bar. It is, therefore, to be hoped that the King's Advocate has been misinformed on this point, and that no such decisions have really been made. But admitting that a thousand such convictions had been passed and acquiesced in, is it to be presumed that this Court, when this point is for the first time brought to its notice will shrink from declaring that every one of such convictions were illegal, and that the view now taken of the Regulation by the D. C., though taken for the first time, is the correct one?

58. "It has been suggested by the King's Advocate that, though the defendant has brought himself within the letter of the Regulation, and therefore, ought to be convicted of a breach of it, still it would be a proper case for the merciful interference of the Governor; and he has even offered himself to recommend it in that light to His Excellency. It is not very easy to reconcile that suggestion with the expediency of again pressing this point to a decision; more especially as it is intimated that such instructions have been given by the Officers of Government, as will effectually prevent any doubt on the subject hereafter. But as the point has thus a second time been brought up in appeal for Judgment, it must be decided according to what the Court considers to be law, without reference to possible consequences. If the defendant had been shewn to have infringed the Regulation, the Court would have been bound to impose the penalty upon him, nor would it have had any right, or probably any wish, to inquire whether that penalty had been enforced or remitted. But holding the opinion which the Court does, it would be a strange perversion of its high authority, if it were to send the defendant as a supplicant at the feet of Government for a remission of punishment awarded against him for an offence of which the law declares him to have been innocent.

59. "The Court cannot conclude its Judgment without referring to a case, in which a defendant has been convicted on the late Cinnamon Regulation No. 5. of 1833, sect: 6. and which

conviction is about to be set aside: vide infra par. 64. The facts of that case bear a strong analogy to those now before the Court: Two persons were found carrying cinnamon, exceeding ten pounds, within the district of Caltura; and, on being asked for their authority, produced a permit, granted and signed by the Government Agent of the Southern Province, authorizing the first defendant (by name) to convey 100 lbs. from some place in the Caltura district, to the Government store at Galle. The D. C. of Caltura considered that the Government Agent had no right to grant a permit for removal from beyond the boundary of his Province, and the defendants were therefore convicted. With the exception of the difference of rank of the Officer granting the Permit, the two cases appear to be extremely similar. The 6th clause of the Cinnamon Regulation directs "that no cinnamon above ten pounds weight shall be removed &c., without the written permit of the Collector of the district or Province, in which the place, from which the cinnamon is intended to be removed, shall be situate, or of any other person duly authorized in that behalf." Now the Officer who granted this cinnamon permit is certainly not the Government Agent "of the Province, in which the place from which &c. is situate." But is it not to be presumed that he is duly authorized to grant permits beyond the limits of his own Province? Does not this presumption arise from the very fact of his having granted it, and from the improbability of his so acting without due authority? Or if he *have* exceeded his powers, can it be contended that the defendant should be punished, for having relied on the assurance conveyed to him by this Permit, that he would be safe in removing the cinnamon from the Caltura district to Galle? The office of Government Agent, the immediate organ of Government, it is true, would give additional weight to the guarantee afforded by him, and to the security into which the defendant must have been lulled by his signature. But in point of principle, the two cases are as nearly analogous as possible. In each instance, the law declares that certain acts may be sanctioned by certain Officers of Government, duly authorized thereto; in each instance, a

Officer of Government [for again the Renter must be so considered *quoad hoc*] has taken upon himself to act as if he were duly authorized?" No. 393. Colombo, 20th August 1834.

60. In the foregoing cases it will be observed that the permits were not defective, on the face of them, in any of those requisites which the law had declared should be essential to their validity. Where, however, a defendant was convicted on the 25th clause, on the ground that the permit omitted to state either place or period, the S. C., affirmed the conviction. The Judgment observed, "This decision is in no way at variance with those which have lately been pronounced on the 11th clause of the Regulation. The ground on which convictions were sought for in those cases was, that the renter, by the terms of the permit, had exceeded the authority granted to him by the Collector or Government Agent. But of that authority, no definition or limitation is to be found in the Regulation, or elsewhere. It appeared, indeed, by the admission of the King's Advocate, that no instructions had ever been issued to the renters by which they themselves could know the extent of their authority in this respect. In the present case, the permit is defective in one of those points of information which the Regulation has declared, specifically, shall be one of the requisites of the instrument. It is indeed defective in two of the required qualifications; for it neither states the place to which the arrack is to be removed, nor the period, during which the permit is to be in force, either of which defects would be fatal to the validity of the permit; This Court is very much inclined to agree with the defendant and appellant, that the omission ought to be attributed to the fault of the renter, whose duty it was to insert every thing that was necessary, rather than to that of the defendant. But the question before the Court is, not which of these two persons was most to blame, but whether, under the Regulation, the defendant has or has not incurred the penalties of confiscation and fine. And as no body can be allowed to plead ignorance of the Law, and as this conviction is clearly sup

ported by Law, it is the duty of this Court to affirm it. Any remedy, which the appellant may have, must be sought for either by mitigation from the Government, or by action against the renter, if the appellant should be advised that he has good ground for such proceeding." No. 493, Colombo 17th September 1834.

61. We have seen that where a prosecution was laid on this 25th clause, for removing one gallon and upwards of arrack from one rent division to another, but the removal proved was from one place to another within the same division, without permit, the defendant could not be convicted on that prosecution; supra: par: 10:

62. The 27th clause, after directing the confiscation of all arrack exceeding two quarts, removed without permit correctly stating the quantity, enacts that the owner of such arrack shall be liable to a fine of 30 shillings for every gallon so removed; and every other person, employed or concerned in such removal, who shall not give up the name and abode of his employer, shall pay a fine not exceeding £10 for each offence. In one or two instances, persons who were found in the act of removing arrack, without a sufficient permit were convicted on this clause, and fined as owners, without further proof of ownership than the being found in possession of the arrack. The S. C., however, considered that some further proof was necessary to convict them as owners; and that where no such proof existed against a defendant, and he had not refused to give up the name of the person by whom he was employed, he did not fall within the terms of either branch of the 27th clause. No. 882, Colombo, South, 20th May 1835, see also No. 795 from the same Court.

63. The 31st clause of the Ordinance directs that in default of payment of fines, defendants shall be liable to be imprisoned for two months for every pound of fine unsatisfied. A D. J. inquired of the S. C. whether he should be justified in imprisoning a defendant for one month, till a fine of ten shillings were paid, being at the rate of two months for every pound

which shall remain unsatisfied." An answer was returned "That as the 31st clause did not expressly provide for the duration of imprisonment which should be considered equivalent to the fine imposed, where the fine was under £1, the best course appeared to be to direct simple imprisonment, without hard labor, till such fine be paid, limiting however the term to one month, not by direct operation of the 31st clause, but by the exercise of the discretionary power of the D. J., taking the 31st clause as his guide: That this opinion, which was only that of the Chief Justice individually, was sent, in order that the defendant might not sustain any additional imprisonment or inconvenience by the delay; and that the matter must still therefore be considered perfectly open to appeal by either party." L. B. 4, 5, December 1835.

64. Of the two cases which present themselves on the Cinnamon Regulation No. 5 of 1833 one has already been mentioned, as bearing a strong analogy to those which were decided on the Arrack Ordinance, on the subject of the permit for removal; supra: par: 59. The 6th clause of this Regulation makes it unlawful to remove Cinnamon, exceeding 10 lbs. "without the written permit of the Collector of the District or Province, in which the place from which the Cinnamon is intended to be removed shall be situate, or of any other person duly authorized in that behalf." The two defendants were carrying Cinnamon, exceeding 10 lbs, within the District of Caltura, on the authority of a permit, granted and signed by the Government Agent of the Southern Province, authorizing one of the defendant by name, to convey 100 lbs. from the Caltura District to the Government store at Galle. The defendants were convicted by the D. C. of Caltura, as not being furnished with a valid permit, within the terms of the 6th clause. The S. C., however, set aside the conviction, on the following grounds:—"The conviction in the present case rests, as appears from a marginal note of the D. J., on the ground. "That the Government Agent of the Southern Province had no right, under the Regulation, to give a passport for the

removal of Cinnamon from beyond the boundary of his Province." If the power had been limited to the Collector, as described by the clause above recited, the proposition of the D. J. would have been incontrovertible; though still it might be doubted whether the defendant, having acted under authority which, ostensibly, might so safely be relied upon, could fairly be said to come within the spirit of this penal enactment. But may not the Government Agent fall within the second class of persons authorized? May he not have been "duly authorized" to grant permits beyond the limits of his own Province? Is it not the presumption, which the Law must necessarily raise, that he has been so authorized; and that if he had not, he never would have granted the permit in the terms in which it is couched? Or, if he has exceeded his authority, can the defendant be punished for having trusted to the protection held out to him by the immediate officer of Government who, he was bound to presume, would not exceed the limits of his power? If this were otherwise, the Regulation would in truth become a snare, from which the public, who have no means of ascertaining what persons are or are not authorized, or to what extent, would find it difficult to escape, whenever it became necessary to remove Cinnamon from one District into another." No. 191 Calcutta, 20th August 1834.

65. Another question arose on the validity of the permit required by the 6th and 7th clauses. On a prosecution before the S. C., for removing Cinnamon with an insufficient permit, the objection to that instrument appeared to be that the quantity removed was less than the quantity specified in the permit. The jury, under the direction of the Court, found a verdict of guilty, subject to the following objection, taken by the defendant's proctor: "That although the quantity of Cinnamon removed was less than that specified in the permit, yet the requisites of the Regulation had been substantially complied with, and no fraud on the part of the defendant had been shewn." The Supreme Court, having taken this objection into consideration, was of opinion that sentence ought to be

arrested; and the defendant was accordingly discharged. Colombo, fourth session of 1834, 15th November. It may be useful to point out a distinction which appears between the Cinnamon Regulation and the Arrack Ordinance, on the subject of the quantity specified in the permit not agreeing with the quantity of the article actually removed. The 7th clause of the Cinnamon Regulation, after directing that "the officer of Government, thereto authorized, at any place from, through, and to which Cinnamon is removed, shall ascertain whether the quantity removed corresponds with the quantity in the permit" goes on to enact more explicitly that "if it be attempted to remove above 10 lbs. without permit, or a greater quantity than the quantity specified in the permit," without saying any thing about a less quantity, then confiscation and fine are to follow. The 27th clause of the arrack Ordinance goes farther, and enacts that all arrack exceeding two quarts, removed without permit, or exceeding in quantity, or *falling short of*, the number of gallons specified in the permit &c., shall be confiscated. It would, therefore, seem that, with respect to arrack, any material difference as to quantity, whether an excess or a deficiency, would be fatal; but that as regards Cinnamon, the excess only would be a ground of conviction, and that a permit for the larger quantity, according to the case just cited, protects the removal of the smaller quantity.

66. One case only occurs as having been decided on the Ordinance No. 4 of 1834. The 8th clause of that Ordinance enacts "That no bullock cart shall ply for hire, or for the conveyance of goods, within the towns &c. of Colombo and Galle" unless licensed and numbered, as therein directed. On a prosecution for a breach of this clause, it appeared from the informer's own statement, "that the defendant was driving a cart loaded with three empty casks from Kandy to Colombo," and he was stopped within the gravets of Colombo, on account of his cart having no number. The D. C. convicted the defendant, but the S. C., on appeal, set aside the conviction." This was not a "plying" within the four gravets; it was only

the prosecution of a journey from Kandy to Colombo. To ply within given limits means an offer of one's services, to seek employment, within those limits. In the present case, the hiring, and, therefore, the plying, had taken place at Kandy. If this conviction could be supported, no cart could venture into the four gravets without a number, though coming, as in this instance, from a place where no such license was required. No. 1,023, Colombo, 23d September 1835.

67. As to the strictness of construction, to be put upon all penal enactments, see title "Land," par: 20.

68. See also titles "Appeal," par: 20. 1; "Arbitration" 35, 6; "Assessors," 42, 3; "Bail," 54, 5; "Contempt;" "Copies," 65; "Escape;" "Evidence;" "Gaming;" "Imprisonment;" "Jurisdiction;" "Libel;" "Nuisance;" "Police;" "Stamp."

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### PROSECUTION—MALICIOUS.

Requisites to support action for this injury: Falsehood; want of probable cause; malice, express or implied; damage sustained, which may be aggravated by the profession or situation of life of the plaintiff. Acquittal not a sufficient reparation. See title "Libel," par: 9, 10 and 11, No. Chilaw and Putlam, 11th November 1835 and No. 949 Amblangodde, 11th September 1835.

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### QUANTUM MERUIT—QUANTUM VALEBANT.

For explanation of these terms, see title "Commission," par: 57, (note) see also title "Obligation," par: 9, et sequ:

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### RAJEKARIA.

How far performance of, proof of right in the person performing it, see titles "Kandy," par: 3 and 151, "Land," par: 15, and "Temple" par: 2.

Abolition of this service, by order in Council of 12th April 1832, with certain reservations; see title "Kandy," par: 22.

## RECOGNIZANCE.

Requires no stamp : Letter Book 14, 21st November 1833, infra: title "Stamp," par: 24, 25

May be sued upon civilly, Letter Book, 1st, 6th, 16th August 1834 : And is not to be confounded with fine or other penalty in the shape of *punishment* : supra: par: 280.

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## REGISTRATION.

Of Marriages, see title "Husband and Wife," par: 214, 5, 6, Of instruments &c., authority of persons to certify, as duly registered; see title "Nantissement," par: 3.

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## RENTER.

"Conditions" not binding on third parties, as to any penalty &c., paragraphs 1 and 2—except a party adopt and consent to be bound by them, par: 3.—Renter stands in the place of Government as to the right to the dues, par: 4.—No claim for Land left uncultivated, par: 5.—Receipts of Renter, where land is sown with different grain, par: 6.—Amount of crop rather for the grower to prove, than the renter, par: 7.—Renter held liable for damage to crop, by his not coming to fix his share, par: 8.—Between Government and Renter, Courts cannot interfere on matters resting on indulgence par: 9 and 10.

1. We have already had occasion to observe that the "Conditions" subscribed by renters are contracts between Government and the renters, and between them only; and that these contracts are not binding upon third parties, unless the latter have made themselves responsible to the renters, or except in so far as the rights which Government might have enforced against the public, have been transferred, by the conditions, from the Government to the renter: see title "Prosecution" par: 36 and par: 55, where this principle is laid down, and is shewn to apply with two-fold force to the attempt to enforce by means of Criminal prosecutions, any penalties inserted in the conditions, not only as against the public, but against the renter himself.

2. The following case is a further exemplification of this

principle, as regards Civil claims, arising out of the conditions. It was an action by a paddy renter for 40 Rixdollars, viz: 20 as the sum regularly due from the defendant's field, and the other 20, as a penalty for having reaped the field, without due notice to the renter. It appeared that the defendant had tendered 20 Rixdollars, but that the plaintiff refused the offer, on the ground that he was also entitled to the penalty. The Assessors were of opinion that the plaintiff was entitled to the full sum of 40 Rixdollars: The D. J. considered that his claim should have been limited to the 20 Rixdollars, and accordingly decreed that the defendant should pay that sum, and that the plaintiff should pay the costs. On appeal by the plaintiff, the S. C. affirmed the decree in the following terms "No right whatever has been shewn on the part of the plaintiff to more than 20 Rixdollars. If the claim for the double sum be founded on any thing contained in the renter's conditions, this Court can only repeat what it has often been compelled to declare, that those conditions form a mere contract between Government and the renter; and are not binding on third parties, further than such parties may, by their own acts, have made themselves responsible to Government, or to the renters. As, therefore, the defendant has been proved to have tendered all that was due from him to the plaintiff, the D. J. has exercised a very proper discretion, in directing that the plaintiff should pay the costs." No. 2587, Ruanwelle, 20th January 1836.

3. But if a cultivator, or any other private person, adopt or recognize the conditions, by any act of his, he becomes in truth a party to them, and must be held civilly liable for any breach of them. Thus a paddy renter sued for one parrah and six measures of paddy, founding his claim on a note of hand dated 5th March 1833, by which the defendant agreed to "pay his 1-10th share, according to Government condition." The conditions, as recited by the plaintiff, gave the renter the right to demand the tenth at the highest rate at which paddy should have been sold at the place in question, between the time of harvest and the time of actual payment. The D. C. gave judgment;

for the plaintiff for the tenth, at the then value of paddy in the district. On the plaintiff appealing, the S. C. referred the case back for rehearing and reconsideration, on the following points: "The defendant's note or acknowledgement is dated 5th March 1833; so that upwards of 15 months will have elapsed since that date and the final decision; and the defendant agrees to pay "according to Government conditions." Although, therefore, this Court does not consider that the defendant is liable to the fine, which the conditions of the rent purport to impose (inasmuch as those conditions, of themselves, form a contract between Government and the renter only, to which third persons are not parties) yet he has so far adopted the terms of the conditions, that he has bound himself to pay his share, or the value thereof, in the manner prescribed by those conditions. If, therefore, the appellant has correctly recited the conditions, as far as they relate to such payment, he is entitled to compensation, not merely according to the present value of paddy, as directed by the decree, but at the highest rate &c., as stipulated in the conditions. The question of interest [which the plaintiff claimed] ought also to be considered; for though the sum in this instance may appear very insignificant, this decision may be of no small importance, both to the plaintiff and to others, as a matter of principle and precedent." No. 128. Chavacherry 4th June 1834.

4. The position so often laid down by the S. C., and which has been several times repeated in these notes, that the conditions are a contract between the Government and renter alone; has been carried too far by one or two D. J. who have imagined that, as the public were no parties to the conditions, the renters had no legal right to claim the tenth or other dues sold to them by Government. The subject was brought to the notice of the S. C. on the claims of certain Dry Grain renters for which they brought their actions, but which claims the D. J. considered illegal, as being founded only on the bond entered into by the renter with the Government Agent. The Judges of the S. C. directed an answer to be returned to the following purport "The view taken by the D. J. of this subject goes further

than the opinion which the S. C. has at different times expressed on this point would warrant. It by no means follows from that opinion, that "the renters *solely* ground their right on the bond they have entered into with the Agent of the district." The true foundation of their right is the sale or transfer to them by Government of a certain proportion of produce to which the Government is entitled. That sale or transfer being established, the renter stands in the place of Government, and is entitled to whatever proportion of the produce the Government might have claimed; and to the same redress, by action at law, independently of the conditions of sale, if such proportion be withheld from him. As far as regards any extraordinary mode of procuring payment to the renter, such as would not be afforded by the common course of proceeding, and especially if it be by means of any penalty, to be imposed upon the grower in case of non-payment, the Judges are certainly of opinion that the conditions of sale, being a contract between the Government and the renter only, would be inoperative; though they might properly be received as evidence of the bare sale or transfer of the right of Government to the renter. The fallacy in the reasoning of the D. J. consists in supposing that the renter must necessarily rest his claim on the conditions, which he subscribes on becoming the purchaser of the tax." Letter Book 30th April, 8th May 1834.

5. In disputes, therefore between the renters and cultivators, the best course would seem to be to lay the conditions out of consideration, except as establishing the fact that the renter has been declared the purchaser of the rent in question; and then to decide, as if the point in contest were between Government and the cultivator. An action was brought by a paddy renter for one fifth of the produce which ought, as he contended, to have sprung from the defendant's fields; but which fields, the renter complained, had been either left wholly uncultivated or at least had been unproductive. The D. C. dismissed the action and the dismissal was affirmed by the S. C. No law or custom had been cited, by which the holder of land was bound to cultivate it, and as the Government could have had no right to complain,

as far as appeared, of this inactivity on the part of the defendant, the renter could claim no compensation for his alleged loss. No. 6026 Matura, 15th March 1834. [circuit.]

6. The following opinion was that of the Chief Justice alone, and was given, not as a judicial decision but merely to assist the D. J. in forming his own conclusions. The question arose in one of the Northern districts, the inhabitants of which, it appeared, had been in the habit of purchasing back or redeeming from Government the tithe paddy, to which their fields were liable. In the case in question the defendants had done so; but instead of paddy, they had sown dry grain, with a small quantity of paddy mixed with it. The dry grain renter then made *his* claim, and the question was, whether that claim could be supported. The following answer was sent to the D. J. "The question must depend in a great measure on the terms in which the tithe rents were granted; or, if the terms be doubtful, on the construction which custom and reason would put upon them. If the renter purchase of Government the tithe of all dry grain, grown in a certain season within certain limits, without reference to the particular lands on which it may be grown, it would seem that the defendants are liable; because the dry grain which he has reaped is not less dry grain from being partially mixed with paddy. If this were otherwise, a cultivator might, by thus mixing his crops, evade the payment of either tithe: For he might insist on its being considered a paddy crop by the dry grain renter, and a dry grain crop by the paddy renter. But if the tithe purchased by the plaintiff have reference to certain lands, whether enumerated in the contract, or pointed out by custom, as dry grain lands, his demand ought to be limited to such lands. Again it may be necessary to inquire the extent, to which the land in question is estimated as paddy land, in the agreement entered into by the defendants with Government for the redemption of the paddy tithe. If it be only rated for the extent actually sown with paddy, there can be little doubt of the defendants being liable to the plaintiff; because otherwise, the agreement with Government might be a mere colour, by which the real object, the evasion of the dry,

grain tax, was concealed. If it be rated as paddy land for the whole of its extent, then the question would arise, whether a cultivator, having once declared his choice of crop and settled for the payment of tithe on that crop is at liberty to change his mind, sow seed of another description, and claim exemption from the tithe on the substituted crop, on the ground of his having agreed for the payment on the crop originally intended. If there should be the slightest fraud imputable to the cultivator, in any part of the transaction, he ought not to be allowed to benefit by it." Letter Book, 24th June, 3d July 1835. It will be understood that this opinion was by no means intended to invest the conditions or contract with any further authority than to define the extent to which the right to the tax might have been transferred to the renter.

7. In an action by a dry grain renter for his share; the plaintiff's right was not denied, but the question was as to the amount of the defendant's crop which was estimated higher by the plaintiff than by the defendant. The plaintiff having failed to prove his estimate to be correct, the D. C. considered it unnecessary to hear the defendant's witnesses, and limited the decree to half a parrah, being the amount which the defendant had tendered. The S. C., however, on appeal, referred the case back, in order that the defendant might be called on to go into evidence, "It is true," the Judgment observed, "the plaintiff has not proved the amount of the crop, as estimated by himself, and the D. C. did right in putting that estimate out of consideration. But according to the evidence of the first witness, the land would yield at least 15 parrahs, which would entitle the plaintiff to one parrah and a half. It is difficult for the plaintiff to prove with precision the crop of every field within his rent; whereas the defendant ought to be able to shew satisfactorily the exact amount: and if he fails so to do, the evidence of the plaintiff's first witness, if the D. C. sees no reason to disbelieve him, ought to prevail." No. 1091, Jaffna, 2d May 1835. This case was also mentioned shortly under title "Evidence", par: 110.

8. It sometimes becomes necessary to protect cultivators and others from the over exercise of the authority, which renters are apt to fancy themselves invested with, when enforcing the rights which the Government has temporarily transferred to them. The "Government renter," indeed, seems to be often mentioned among the natives as a public officer, rather than a mere farmer of taxes or duties: An action was brought by a grower of tobacco against the renter of the tobacco duty, for damage sustained by the plaintiff, in consequence of the renter neglecting to come and receive his share of the crop. It appeared that the plaintiff had invited the defendant to come and inspect the crop, and receive his share, which the defendant, after some dispute as to the proportion to which he was entitled, promised to do. He never came, however, and the crop remained in consequence on the ground for a year, by which it was seriously damaged. The D. C. was of opinion that the plaintiff should not have kept his crop so long, but ought to have sold it before witnesses, and accordingly dismissed the action. The S. C., however, considering the authority with which the opinion of the natives invests the renters, and the fear which they consequently entertain of appearing to act in defiance of that authority; and considering also the promise made by the defendant to come and settle with the plaintiff which may naturally have induced the plaintiff to delay carrying his crop, directed Judgment to be entered for the plaintiff, for the amount of the loss proved to have been sustained in the value, deducting the share to which the defendant was entitled as renter. No. 10,440, Negombo, 4th October 1833.

9. As between the Renter and Government it may be observed, that the only safe rule of proceeding for Courts of Justice is to deal with all cases alike, whether between private persons, or between Government on the one side, and any individual on the other. A Court has no more power to deviate from the rules of law, on account of the supposed hardship of a particular case, than it has to strain them for the purposes of oppression. As regards the *object* in view there would be,

It is true, all the difference between the cases supposed, which exists between white and black; but the *illega'ity* is the same.

An action was brought by Government for arrears due by the defendant, as renter of the privilege of sifting the sand for pearls, for the year 1831. It appeared that the defendant did not avail himself of his privilege for the month of December of that year; and both the D. J. and his assessors considered that he was entitled to a remission of his rent for that month: And it was so decreed accordingly. The C. J., however, before whom the case was heard in appeal on circuit, was of opinion, "That this remission was not justified, either on principle, or by the conditions;—that if this had been a case between two private persons, it would have been no ground for questioning the right of the seller of the privilege to recover the price, that the purchaser had not thought it expedient to exercise the right, [for there was not a hint of the defendant having been *prevented* from the exercise of his privilege during the month in question],—and therefore, that the defendant must seek any relief, to which he considered himself entitled, from the Government with which he had contracted," No. 41, Manar, 8th July 1834, on circuit.

10. We have already had occasion to observe, under title "Jurisdiction," p: 280, 1, that the S. C. cannot interfere with legal convictions, by way of remission, though it might sometimes recommend cases to the favorable consideration of Government: And so with respect to civil actions. Thus, where a ferry renter, being sued for two instalments of his rent, claimed exemptions on various grounds; viz: diminution in the number of passengers, heavy rains, and the Collector having been in the habit of crossing the ferry with his people without paying; the S. C. considered that all these matters were for the consideration of Government, to which quarter the defendant was accordingly referred. No. 66, Manar, 31st May 1834, see also to the same point, No. 115, Manar, which was an action against a salt renter.

## RES-JUDICATA.

See titles "Evidence," p: 115, "Judgment" p: 243 et sequ :

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## RESTITUTIO IN INTEGRUM.

See titles "Execution" (parate): "Fraud," p: 197, 8, "Judgment," p: 250.

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## REVENUE LAWS.

See titles "Jurisdiction," p: 266, 272, et sequ:—"Prosecution;" "Renter."

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## SECURITY.

See title "Bail;"—and as to Security by Executors and Administrators, see "Administration," p: 5 et sequ:

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## SEQUESTRATION.

When it issues: Rule 15 and following ones: May issue independently of rules, paragraph 1.—But not necessary for going to trial ex parte, par: 2.—Nor where defendant in prison on criminal charge, id.—Cannot issue into another district. to compel appearance: But it seems it might to prevent fraud &c. par: 3.—Sequestration of property sold under erroneous decree; query? par: 4.—At the suit of Government, set aside under circumstances of negligence and long delay par: 5.—Property to be sequestered should be pointed out or specified; but proof not required, par: 6.—Property of criminals absconding, sequestered under R. 17 of sect. 2, how to be disposed of 7.—Reference to other titles, 8.

1. The 15th and four following Rules of the first section provide for the issuing process of sequestration for the purpose of compelling appearance, or preventing the fraudulent alienation of property: But the power of D. C. to issue sequestration is not confined to these two cases; for we have seen under title "Injunction" p: 230, that sequestration of land, pending action, was sanctioned by the S. C., having indeed the effect of an injunction to restrain the plaintiff from making away with the crop before the case was decided.

2. In a case in which the pleadings of the parties were completed, and which was ripe for trial, a D. C., on the ground of numerous defaults made by the defendant as to filing his list of witnesses, granted a sequestration against his property, and ordered him to find security for his appearance. The S. C., on appeal, directed the sequestration to be taken off, without requiring security from the defendant. "Process of sequestration" it is observed; "was not necessary in this instance, either under the Rules of Practice, or independently of them. It could not issue under the 15th Rule, because the defendant had already appeared, and answered: Nor could it issue under the 19th Rule, because no proof was offered, as required by that rule, that the defendant was fraudulently alienating his property. But neither does there appear to have been any necessity for instituting this proceeding, or for the continuance of the sequestration at present. The parties having arrived at issue, that is, having terminated their pleadings, it was and is open for the plaintiff to proceed to trial *ex parte*; and after the numerous defaults made by the defendant, the D. C. would be perfectly justified in proceeding to hear the case with the least possible delay, giving notice of the different steps taken [Rule 21] by personal service on the defendant, if he be to be found, or else by leaving the notices at his last place of abode" No. 11969, Ruanwelle, 2d December 1835. Where actions were brought against certain persons, who were in prison, under a charge of treason, the S. C. had occasion to observe, "That it would be hard upon the defendants to issue sequestration against their property under the 15th Rule, as applied for by the plaintiff. Indeed the Fiscal's return was, not that the defendants had not been found; it was only that they had been arrested by warrant of the Governor &c. Letter Book 22d; 27th August 1834.

3. Process of sequestration having issued from the D. C. of Jaffna, for the seizure of a defendant's property in the district of Galle, the D. J. of Galle inquired of the S. C. whether he could regularly enforce the writ of sequestration which had been so transmitted to him, under the 15th Rule. The D. J. had

endorsed the writ for execution by the Southern Fiscal in order to avoid any loss being sustained by the delay, till his own doubts were cleared up. The S. C. returned for answer, "That the doubts entertained by the D. J. were perfectly well founded; that the 15th Rule of the first section limited the sequestration to property within the district of the Fiscal to whom it was directed, which, of itself, would be a sufficient reason, why this species of process could not be carried into another district [or at all events into the Province of another Fiscal, see title "Process," par: 3]; but that other reasons would suggest themselves, arising out of the subsequent Rules of section 1; because the subsequent proceedings, such as calling on the defendant by Proclamation to appear, the dissolution of the sequestration in case of his appearance, the entertaining the claims of third parties, and the staying the original proceedings pending such claims, would all be very difficult of execution, in a district foreign to that in which the action was brought. That *execution* might indeed issue into other districts, by the express provision of the 36th Rule, but the same objections did not present themselves in that stage of the proceedings." And in answer to a further question, whether the D. C. of Galle, having endorsed the sequestration as the authority for the Fiscal to act upon, would now be justified in ordering it to be dissolved; or whether the writ should be returned to the Court out of which it originally issued for an order dissolving it; the S. C. expressed its opinion; "That the sequestration should be at once taken off, by order of the D. J. of Galle: For as the rules of practice did not authorize the issuing of this process into the district of Galle, no time ought to be lost in placing matters in the same situation in which they were before it issued. And as the D. C. of Jaffna had no power to direct the sequestration to be put in force out of its own district, so any order from that Court to dissolve the sequestration would be equally nugatory." Letter Book 13, 16, 19. and 23d June 1834. It may be well to observe upon this case, that the question, as put by the D. J. of Galle, referred to sequestration under the 15th

Rule, to compel appearance. If the object of the plaintiff were to prevent the property being fraudulently made away with, as would appear from the terms of the writ issued from the D. C. of Jaffna to have been the case, there would seem to have been no objection to the plaintiff obtaining a sequestration or injunction independently of the rules of practice, as suggested in the first paragraph, and under title "Injunction," p: 230. The more regular course, by which to obtain this latter precautionary assistance, would perhaps be by application to the Court of the district in which the property is situated, supported by the plaintiff's affirmation, or an affidavit by a third party as to the circumstances, and a certificate from the D. C. in which the action is brought, that the measure is called for by the justice of the case.

4. Where property had been sold in execution under a decree erroneously drawn up, and the D. J., in his anxiety to do substantial justice, ordered the property to be sequestered, and applied to the S. C. for instructions as to the mode of rectifying the error; the Judges observed that this act of sequestration was scarcely perhaps within the scope of authority of the D. C.: But as the defendant was let in to appeal [as to which see title "Appeal" p: 24] there seemed to be no objection to the sequestration being continued, under the 7th Rule of section 8, till the final decision by the S. C.; Letter Book, 9. 28th September 1835.

5. The Regulation, No. 7, of 1809, prescribed a summary course of proceeding by sequestration for the recovery of debts due to the Crown. A case came before the S. C. in appeal from the district of Batticaloa, under the following circumstances. On 28th November 1828 certain property of one Cadaramen Minny, an arrack renter, was sequestered in the late Provincial Court, at the suit of Government, and among other things a bazar or shop. On 9th November 1831 Cadiramen Minny being dead, administration of his estate was granted, and on 24th August 1832, the administrator sold the shop to the plaintiff by a notarial deed of sale. On 30th August 1832,

(no steps, as far as appeared, having been taken in the Government suit since the sequestration in November 1828) publication was made of the intended sale of the deceased's property to satisfy the claim of the Crown. The plaintiff opposed the sale of the shop in question, as having become the purchaser on a *bonâ fide* sale. The Government, as defendant, contended that the fact of the sequestration was well known; that the administrator had no right to transfer property under sequestration; and it was also imputed to him that he had sold the shop to the plaintiff, in combination with him, for one third of what it was valued at in the Fiscal's books. The D. C. being of opinion that the administrator had no power to sell the property, dismissed the plaintiff's claim. The plaintiff appealed, stating, among other grounds, that the very Notary, who prepared the deed of sale to him, was head clerk of the Cutcherry, and had been secretary of the late Provincial Court, that he, of all persons, therefore, ought to have known of the sequestration, if it had been matter of such notoriety;—that if the shop had been really and effectually sequestered, the keys and title-deeds would have been seized, whereas they had been transferred to him, the plaintiff, at the time of the sale; that the value of the property was much lessened by remaining so long unoccupied, which might account for the difference between the Fiscal's books and the price paid. The S. C. considered that some explanation was necessary, as to the time which had been allowed to elapse, as to the muniments of the property having been allowed to remain with the original debtor; and also as to the officer of the Court and of the Government having passed this very property in his character of Notary. The proceedings were accordingly referred back to the D. C.: And the explanation given on these points not being satisfactory, the S. C. reversed the decree, and gave Judgment for the plaintiff. It considered that the long delay which had been allowed to elapse, without taking any step to prosecute the claim of the Crown, and the circumstances of negligence which characterized the original sequestration, might have misled the plaintiff, and induced him to believe, either

that the property had never been sequestered, or that the sequestration had been abandoned; more especially taking into account the opportunities of knowledge which the Notary possessed, and the reliance which the plaintiff must be presumed to have reposed in that officer. No. 2696, Batticaloa, 20th February, 2d May 1835.

6. With respect to the information which the party obtaining sequestration ought to give to the Fiscal of the persons in whose possession property is to be found: A Fiscal applied for instructions to the S. C., whether he could be called upon to serve a notice of sequestration on a third party, on the mere assertion of the plaintiff that such third party possessed property belonging to the defendant, without either pointing out the property, or producing any proof to that effect. The S. C. returned for answer: "That the plaintiff should point out, or at least specify the property which he alleged to be in the possession of third parties, belonging to the defendant; that this appeared to be necessary, both to enable the Fiscal to give proper notice to the party in possession, and also to make his return to the Mandate, as required; that with respect to *proof* of property belonging to the defendant, this could scarcely be in all cases expected, and, if required, might defeat the object of this precautionary process of sequestration; for if the ownership were disputed, the person in possession would demand to offer counter proof, and thus a preliminary trial would become necessary, to establish to whom the property really belonged; that a plaintiff, in pointing out property, as belonging to defendant, did so at his own peril and on his own responsibility, as under writs of execution." [vide supra 73] Letter Book 3, 5, December 1835.

7. Application was made to the S. C. on two occasions by D. J., for instructions as to the disposal of property belonging to criminals who had fled from justice, and which property had been sequestered under the 17th Rule of section 2. The result of the answers returned on those two occasions was "That there was nothing in the 17th Rule, which would authorize the sale of the property sequestered; that such property was only

to be safely kept until the party absconding should surrender himself, or be apprehended; the sequestration being intended as a mode of inducing the offender to give himself up to justice, rather than as a punishment for the act of absconding; that neither would the S. C. feel authorized to make a specific order as to the disposal of property so sequestered; that if however, the prolonged absence of the party accused should make it necessary to dispose of the property, on account of the expense of the detention, or for other reasons, application should be made on the subject to Government from which quarter, rather than from the S. C., would more properly come the necessary instructions for proceeding against the property: And in one of the cases, the Government having declined giving any instructions, and there appearing a necessity for the speedy disposal of the property [consisting of an Elephant] the S. C. recommended the D. J. to "give notice in the Gazette that such an animal was in his possession, describing it, stating the mode in which it came into his possession, and calling on any person having claims upon it to come forward; otherwise, that it would be sold, after a period to be stated in the notice, to defray the expenses which had been incurred" Letter Book 30th March, 7th April, and 2, 5, September 1835.

8. See also titles "Administrators," p: 10;—"Costs," p: 73. Debtor and "Creditor," p: 90.

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#### SERVANTS.

See titles Pleading, par. 19. Police par. 3.

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#### SHIPPING.

The only case which appears as having been decided on this extensive subject by the S. C. has already been shortly mentioned under title "Debtor and Creditor," p: 95. It was an action brought in the D. C. of Galle, by the Master of the Brig *Tanze*, to compel two of his crew to return to the vessel: It appeared that the men had been hired at Bombay, for a voyage to Madras and Calcutta. The Brig, being dismasted, put into Galle, where

The defendants, who had received two months' wages in advance, quitted the vessel, the two months being expired, and refused to return to her. No written agreement had been entered into between the Master and his crew, though the defendants admitted they had verbally agreed for the whole voyage; and the D. C., considering that it had no power to compel the men to return, dismissed the action. The plaintiff having appealed, the S. C. affirmed the decree of dismissal as follows: "The contract entered into by the defendants is not absolutely, and to all intents and purposes, void, on account of its not having been reduced to writing; though, by the English Acts of Parliament, the Master might be liable to a penalty for not having reduced it to writing. By that contract, the defendants, according to their own admission, agreed for the whole voyage from Bombay to Madras or Calcutta; and this the law considers to include detention for necessary repairs. In refusing to remain with the vessel during such detention, and to proceed with her afterwards, the defendants are therefore guilty of a breach of the engagement, for which they would be liable in damages for any loss really sustained by the Master in consequence of their desertion. But the object of the present action appears to have been to compel the defendants, by the authority of the Court, to return to the vessel. This object might have been obtained, if the Master had complied with the Act of Parliament which permits the exercise of such authority, by having had his contract with his men reduced to writing, Not having done so, he can only avail himself of the ordinary remedy which the law affords him,—that of an action for damages." Brig *Tanze*, Galle, 31 December 1834.

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#### SHROFF.

See titles "Commission," "Promissory Notes."

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#### SOLDIER.

Cannot be arrested for a debt under £30, see title "Debtor and Creditor," p: 95. et sequ:

## STAMPS.

Regulation No. 4. of 1827, sale of Boutique without the ground, not within the 5th clause—Paragraph 1.—Deed of Land not invalidated by witnesses stating casually that the Land was worth more at the date of the deed, 13 years ago, than the stamp would cover, par: 2.—If the original instrument be admitted in evidence without stamp, no stamped copy can be necessary [Cadotam.] par: 3.—Cadotam containing reciprocal contracts, with a stamp sufficient to cover one but not both amounts, received in evidence of that one, par: 4.—Regulation does not require contracts to be reduced to writing, par: 5.—Amount of stamp to be decided by the substantial effect of instrument, par: 6 and 12.—Marriage contracts need no stamp, but penalty void par: 7.—Receipt for *goods*, not within clause 10. of Regulation. If receipt for money unstamped, other evidence of payment may be given, par: 8 and 11.—Unstamped papers received in evidence for collateral purposes, par: 9.—Late English decision on that subject, par: 10.—Convictions on Stamp Regulation:—For taking unstamped receipt for *goods*, set aside par: 11.—What is a “bond of indemnity” par: 12.—Conviction on 5th clause set aside, no fraud appearing; par: 13.—So where the error arose from mistranslation of stamp-table, par: 14.—Conviction for unstamped agreement, no defence, that witnesses had not signed, par: 15.—Stamps on legal proceedings: Government suits governed by Table of 1st October 1833, par: 16.—Temples not exempted from stamps, par: 17.—Suits for land, how classed, par: 18.—Copy of will should be on stamp: But not oath by sureties par: 19.—Nor pauper execution, nor proxy for Supreme Court; nor bonds to Fiscals; nor any criminal proceedings 20, & sequ: But appeals from interlocutory orders require stamp, 26.

1. In arranging the various decisions which had occurred upon this subject up to March 1836, those which relate to instruments requiring stamps under the Stamp Regulations will be first presented; and afterwards, those points which have arisen on the subject of stamps on legal proceedings. The Regulation, on which all or nearly all the questions relating to instruments have arisen, is No. 4 of 1827. The 5th clause of that Regulation relates to conveyances of immoveable property. We have seen, when discussing the Ordinance against frauds, supra: 207. 8. that a verbal sale of a boutique, not including the ground on which it stood, was neither void by that Ordinance, which only required conveyances of land itself to be in writing, nor by

the Stamp Regulation, which only required that such conveyances should be on stamp; whereas the present transfer was not of land, but of a mere boutique erected on land belonging to Government: And besides, the 9th clause provided that no contracts need be reduced to writing except such as were then, by law, required to be in writing. No. 964, Jaffna 25th July 1835. supra 207. 8.

2. In an action for certain lands in one of the Northern districts, the defendants claimed partly by prescription, and partly in virtue of written documents, one of which was a dowry deed, executed in favor of one of the defendants on 13th May 1831. The witnesses stated that the lands enumerated in this deed would have been worth, at the time it was passed, upwards of 200 Rixdollars. No value was mentioned in the deed itself. The District Judge, upon that evidence, was of opinion that under Regulation No. 2 of 1817, by which this instrument was to be governed, a stamp of at least ten Rixdollars was necessary, being at the rate of five per cent; and that as the dowry deed did not bear a stamp of that value, it must be set aside as invalid. Judgment was accordingly given for the plaintiff, for the lands enumerated in the dowry deed, the assessors dissenting. On appeal to the S. C., the decree was varied, and judgment entered for the defendants for the lands in the dowry, as well as for the rest. The S. C. observed, "that the objection taken by the District Judge, as to the insufficiency of stamp on the dowry instrument, is scarcely warranted by the evidence. The witnesses speak in very general terms of the value which they think would have been put upon the lands thirteen years ago: And it is a subject on which they may possibly have formed an erroneous opinion. They were not called for the purpose of giving evidence on that point, and their attention, therefore, in all probability, had not been previously drawn to it. Then the defendants, who could not anticipate this objection, had no opportunity of adducing counter evidence as to the value, "No. 1953, Islands 22nd December 1834 see also No. 206. Jaffna, infra, par: 13. But even if

the objection as to stamp had been fatal this would not have affected the title by prescription, which the defendants established; see title "Prescription," par: 11.

3. The 6th clause of the Regulation relates to conveyances of moveable property, and the 9th to contracts of sales, or for the payment of money &c.—The two following cases relate to the stamping of *Cadotams* or marriage contracts, in the Northern districts: but the principles, on which they were decided, may be applied to any other instruments on which similar questions may arise.—In the case about to be mentioned, the point decided may be stated shortly to be, that where an instrument, from the peculiar circumstances under which it is executed and enregistered, is admitted in evidence without a stamp, it is unnecessary to produce a stamped copy of such instrument. The plaintiff, having recovered judgment in a former action against his debtor who had absconded, sued the father-in-law of his debtor, for the *caycoolly* due from him to his son-in-law, which he considered as a debt due to that person, and therefore, answerable for the debt due to himself, the plaintiff. The only question in the case, necessary to be considered here, was to whether the *Cadotam*, by which the *caycoolly* was secured to the defendant's son-in-law, was sufficiently proved, with reference to the stamp Regulation. The original *Cadotam* was produced in a public book kept by the Government Agent, in which the originals of all these instruments are kept without being stamped. But a moor priest who produced an unstamped copy, stated that the original *Cadotam* book was considered merely an agreement for each marriage, and that though all the property intended to be given was entered therein, still, before that agreement could take effect, a copy should be made on stamp. Some of the witnesses stated that a copy had been taken on stamp, though they could not say the amount, but this copy was in the possession of the defendant or his son-in-law, and was not produced. On this evidence, the D. C, though it felt satisfied that the *caycoolly* in question had been granted by the original *Cadotam*, still considered that as the copy produced was not

stamped, and as moormen were not exempted from the operation of the Regulation, the plaintiff was not entitled to recover; and the action was accordingly dismissed. The S. C., however, both the Chief Justice on circuit, and the three judges at Colombo, were of opinion that the *Cadotam* was sufficiently proved. "It is true," the final judgment observed, "there is nothing in the stamp Regulation which exempts moors from the payment of stamp duties: But this is not a question of personal liability or exemption, but whether a particular instrument which has been produced in evidence, viz: an original *Cadotam* do or do not require a stamp. It appears that it has been the custom to enter the *Cadotams* themselves, the originals, in a public book, kept by the Government Agent for that purpose; and that these entries have never been made on stamps. As regards the original entry, therefore, it would be impossible to declare a stamp to be necessary, without invalidating the whole Registry of these instruments, an injustice which would be so much the greater, that the custodier of them has been the officer, of all others, the most likely to object to the want of requisite stamps, and whose acquiescence in these unstamped entries must, therefore, have been the best assurance to the public that stamps were unnecessary. But then a moor priest states that the original *Cadotam* is a bare agreement for the marriage, and that before that agreement can be carried into effect, a copy must be taken on stamp: On what principle the priest founds his law does not appear. But the recognition of such a doctrine would be subversive of a well known and essentially useful rule of evidence; that a copy shall never be received in evidence, where the original can be procured; supra; III. In the present instance, the original was produced in evidence, and the copy was compared with it in Court; a most superfluous operation, seeing that the original was so much better authority than the copy. Whatever, therefore, the custom may be as to taking copies, and however necessary parties may find it to do so in certain cases, it is sufficient to say that the priest was on this occasion mistaken in his law. In the present case, besides, independently of

the general view which the S. C. entertains on the subject, it would be peculiarly unjust to allow this objection to prevail against the plaintiff. For the defendants in these two actions, the originally contracting parties, are both interested in annulling this contract; and they may not improbably have destroyed the true copy, which the witnesses state was on a stamp, though they cannot fix the amount." Judgment was accordingly entered for the plaintiff. No. 6095. Jaffna, 9th July 1834, [circuit] and 2d May 1835. [at Colombo.]

4. In the other case relating to the stamping of *Cadotams*, the action was brought on an instrument of this description dated 19th March 1823, to recover the *caycooly* and the joys, thereby secured to the plaintiff by the defendant, on the occasion of the plaintiff's marriage with the defendant's niece. The *caycooly* was estimated in the *Cadotam* at 150 Rixdollars, and the joys at a like sum. But the instrument also contained a stipulation for the *Maggur*, which was estimated at 1,125 Rixdollars. The *Maggur* would appear to be the sum stipulated to be paid to the wife by her husband; whereas the *caycooly* is the sum to be paid to the husband by the wife's relations. [see the little compendium of Moorish Laws, appended to Van Leeuen, p: 784, 5.] It was objected on the part of the defendant that the stamp, though it would have been high enough for the 300 Rixdollars, the value of the *caycooly* and joys, was insufficient to cover the whole value of *Maggur*, *caycooly* and joys, which amounted together to 1,425 Rixdollars; and the late Provincial Court of Jaffna, considering the objection to be fatal, dismissed the action. But on the case coming before the present S. C., this decree of dismissal was set aside, on the following grounds: "The instrument on which this action is brought has a two-fold operation. On the one hand it is obligatory on the wife's relations towards the husband as regards the *caycooly* and joys; and on the other it is binding on the husband towards his wife for the *Maggur*: But it is only in the former of these characters, that it is now sought to be put in force. The value, therefore, which is to form the

criterion of the stamp duty, is 300 Rixdollars. Where an instrument has a twofold aspect, and the stamp affixed to it is only sufficient to protect one of the objects which it contemplates, Courts of Justice have frequently permitted such instruments to stand good for so much as is protected by the stamp, putting the remainder out of consideration [see *Powell vrs. Edmunds*, 12 East, 6.] whatever, therefore, might be the decision upon this objection, if the action were for the *Maggur*, it ought not to be of any force in the present suit; since it is agreed on all sides that the stamp is sufficient to cover the amount of the *Caycooly* and joys." No. 6,814, Jaffna, 9. December 1833.

5. An action was brought to recover back money, advanced by the plaintiff to the defendant, on a verbal contract by which the defendant had agreed to deliver certain rafters to the plaintiff, but which he had failed to fulfil. The D. C., however, dismissed the action, without going into evidence, on the ground that no stamped contract had been entered into between the parties, as required by the 9th clause of Regulation No. 4 of 1827. On appeal, it was ordered that the case be referred back to the D. C. for hearing and decision, on the evidence which might be adduced "The D. C. seems to have proceeded on the supposition, that the 9th clause made it incumbent on parties to have all contracts reduced to writing, in order that all might be compelled to pay the stamp duty: whereas that very clause contains a proviso, as a measure of greater caution, which explains that it shall not be necessary, in order to the legal validity of any contract &c., that it should be reduced to writing farther than is made necessary by other laws and regulations; but only that, if reduced to writing, such written contracts &c. shall be stamped," "No. 489, Chavacherry, 23. September 1835.

6. In considering the amount of stamp necessary in any particular case, the instrument should be considered with reference to its substance and effect, and must not be assigned to a class to which it does not properly belong, from the mere occurrence of a particular word in it, which would seem to give it a different character. see No. 192 Chavacherry, *infra*: par: 12.

7. We have seen under title "Obligation" par: 5 that an agreement between parents for the marriage of their children, to which a penalty was annexed, was considered by the S. C. as falling within the third exception at the foot of table E, referred to in the 9th clause of the Regulation "Agreements and contracts to marry." The judgment observed "That though that exception was probably worded with reference to the parties themselves contracting marriage, it must be extended to parents and guardians in those districts in which marriage contracts are always entered into between the parents, on account of the tender age at which the children are betrothed to each other; otherwise, the exception would have scarcely any operation in those districts;—but that the penalty of 300 Rixdollars, by which the parties had mutually bound themselves to the performance of this contract, could not be considered protected by this exception;—that if parties introduced a penal clause into such contracts, they must use the stamp necessary for such obligations; and as the stamp in the present instance [1s. 6d.] was insufficient to cover an obligation to this amount, the penalty could not be recovered, and the instruments must therefore be considered as a contract, without penalty, for the marriage of the children of the respective parties," No. 604, Trincomalie 27th August 1834. The result of the case may be seen supra: "Obligation" paragraph 5.

8. The 10th clause of the Regulation relates to receipts &c., the words of the clause are "Releases, Receipts &c. *for money*; therefore a receipt for *goods* does not fall within it. No. 94. Chavacherry, infra paragraph 11. It may be well to observe here, that where a receipt for money is inadmissible in evidence for want of a proper stamp, there is nothing to prevent the party from proving payment by other evidence; and so it was decided by Mr. Justice Norris on one occasion. And on the same principle it has been decided that if a bill of exchange given for a debt, be inadmissible for want of a stamp, the creditor may still prove his original debt. *Brown vrs. Watts*, 1. Taunton, 353.

9. With respect to the admissibility for collateral purposes of documents insufficiently stamped, we have seen under title

“Debtor and Creditor,” p: 83, that a paper writing, acknowledging a balance to have been due at the time it was written, was admissible for the collateral purpose of shewing what that balance was, though it could not have been received in evidence, if it had been attempted to enforce it as a promissory note: And so a letter, which it was not intended to enforce as an agreement, but as evidence that certain freight, to which the letter alluded, had been earned: No. 4,099, Colombo, 30th December 1835. So an entry in a sales book, though containing “mention concerning the time of payment,” has been received in evidence, unstamped, notwithstanding the 9th clause of the Regulation; the object in producing it not being to enforce the payment at the time specified, or to prove a promise to pay, but merely to shew that such a sale took place on such a day Clark vs. M. Lebbe, Colombo, Novr, 1835; supra title “Nantissement,” paragraph 8, where this point is discussed at some length.

10. The following case was decided very lately in Westminster Hall, and though it is not strictly analogous to the two cases just mentioned, the writer is tempted to insert it, as illustrative, by its high authority, of the same principle. In an action tried at the Maidstone Summer Assize of 1838. on an J. O. U. for £500, Mr. Justice Paterson allowed the defendant to give in evidence an agreement, though not stamped, for the purpose of shewing that the note had been given on an illegal consideration; viz: to induce the defendant to abandon a prosecution for bribery at a late election,—such being the tenor of the agreement, on which the note had been given. The Plaintiff was accordingly nonsuited, and on a motion for a new trial in last Michaelmas term, the Court of Exchequer held that the agreement was properly received in evidence. Lord Abinger observed “That the object of the Stamp Acts, in declaring that unstamped instruments should not be received in evidence, was to prevent parties taking advantage of documents which ought to be stamped, but were not; but that the Acts were not intended to apply to an agreement void in law upon the face of it, and the production of

which was intended to prevent its being carried into effect. Suppose an agreement entered into to commit a burglary, with covenants as to the division of the spoil; could it be said that, if parties were on their trial, such agreement could not be given in evidence against them, because it was not stamped? On the same principle, therefore, the agreement had been properly received in the present case to shew that the promissory note had been given on an illegal consideration. “Coppock vs. Power, Exchequer Mich: Term 1838. The distinction between this case and those just referred to, of the paper admitting the balance and the sales book, is, that in the latter cases the documents were received to *support* the transactions of which they formed parts, whereas in the case from the Exchequer, the agreement was received for the purpose of *destroying* the transaction to which it had given rise: But the principle appears the same in all three; viz: that neither of the three instruments was offered in evidence in the *character*, or for the *object*, in and for which alone the respective stamp laws had declared them inadmissible; but for distinct and collateral objects.

11. The following decisions of the S. C. were upon convictions of the parties under the penal clauses either of No. 4, of 1827 or of former Regulations, for producing instruments not stamped, or insufficiently stamped. In an action against a defendant, for not delivering certain Palmyrah rafters which he had agreed to furnish to the plaintiff, the defendant alleged payment; and in support of that allegation he produced an unstamped receipt for the rafters, purporting to have been granted by a servant of the plaintiff. There appeared strong reasons for believing that this receipt was a forgery, and that the defendant had attempted to suborn witnesses to support it. The D. C., accordingly, gave Judgment for the Plaintiff, and also condemned the defendant to pay a fine of 100 Rds. under the 17th clause of Regulation No. 7, of 1823, [the receipt being dated prior to the operation of the Regulation of 1827] for a breach of the 10th clause. On appeal, the S. C. affirmed the decree in favor of the plaintiff, and directed inquiry to be instituted as to the

forgery and subornation; but set aside the conviction of the defendant for the supposed breach of the stamp Regulation No. 7 of 1823. That Regulation, as well as the more recent one, No. 4 of 1827, made it penal to accept receipts for money without stamp, but not receipts for other things. No. 94; Chavacherry, 23d July 1834.

12. It has already been observed in the course of these notes, that in considering and deciding to what class or description an instrument belongs, regard must be had to its substantial object and effect, rather than to any accidental words or expressions which may occur in them, *supra*: par: 6, or even to the denomination which the parties themselves may give to it. And this, whether with reference to the Ordinance against frauds, the stamp Regulations, or to any other subject. See title "Prescription" par: 14. As regards stamps, indeed, it is very necessary to bear this caution in mind; for it is almost the universal custom among the natives, to call the most simple instruments, as notes of hand or common agreements, by the designation of bond. But it would be hard to make them pay so high a penalty for their ignorance of our legal or commercial terms as the difference in the rate of stamps between table B. and table C. appended to Regulation No. 4 of 1827, still more, to visit such mistakes with the fines imposed as punishments on wilful evasions of the law. A plaintiff sued on a bond by which the defendant, who had cohabited with the plaintiff, but had several times left him, bound herself as principal, and her mother and brother as sureties, in the sum of 50 Rds. [£3 15] to be paid to the plaintiff in case of her again leaving him, which it seemed she had done. The instrument was on a stamp of 6*d*. From the evidence of the plaintiff, it appeared that the parties had been married according to the Malabar custom, though no registry had taken place. The D. C. considered that if the parties had been married, the contract was a nullity, and therefore dismissed the action. But, further, the word "indemnity" appearing in the bond, the D. C., considered that it fell within the last proviso of the 6th clause

of Regulation No. 4 of 1827, and that it required, as a "bond of indemnity," a stamp of 7s. 6d. And the plaintiff and the writer were each sentenced to pay a fine of £5. The D. J., indeed, seemed to view this supposed mistake as to the stamp in a very serious light, for he observed, in his judgment that this fraud on the revenue, as he considered it "shewed the guilt of the plaintiff" as regarded the merits of the case. The plaintiff having appealed, the S. C. affirmed the dismissal, on the ground that, supposing the parties not to be married, [on which supposition the instrument itself was founded] the consideration was one which the law could not admit. But it set aside the conviction of the plaintiff and the writer, observing that the fallacy consisted in considering the instrument to be a "bond of indemnity," merely because the word *indemnity* had been introduced into it: Whereas the substance and effect of the instrument shewed it to be a common penal bond; the stamp for which, under table B. was properly taken at 6d., the penalty being above £2 10 and not above £5 No. 192, Chavacherry, 7th July 1834, on [circuit.] It may be useful to observe here that a bond of indemnity is an undertaking, by which one engages to save another harmless against the consequences of certain acts, usually done at the request of, or as a favor to, the person so undertaking. As for instance, in consideration of A. taking into his employment a relation of B., B. enters into a bond to indemnify A., against any loss he may sustain by the negligence or other misconduct of B's. relation. On such occasions, and in bonds for the performance of trusts &c., as the value cannot be estimated till the damage, for which indemnity is asked, or which has been sustained, the stamp is not regulated by an advalorem table, but a fixed stamp is required for all instruments of that description.

13. An information was exhibited against a person on clauses 5 and 13 of Regulation No. 4 of 1827 for having executed a dowry deed to his daughter of land, as worth £44, whereas it was worth more, and therefore required a stamp above £2. It appeared in evidence that the defendant had given £44, for

the land in 1815 ; but that since then, the value had increased to above the value of £45. To what amount the value had risen, the writer's notes do not enable him to say.] The D. C. sentenced the defendant to a fine of £10 under the 13th clause. On the case coming before the S. C. on circuit, this conviction was set aside. It was considered that, whatever might be the fate of the instrument itself, if the Court were called on to decide upon its validity, the defendant might naturally have supposed that the sum which he had paid for the land was the proper criterion of its value, and might be taken as the amount of "the bonâ fide consideration," upon which the ad valorem duty is directed by the 5th clause to be levied. No. 206, Jaffna, 5th July 1834, on circuit, vide supra: par: 2.

14. A Notary was prosecuted on the 13th clause of Regulation No. 4 of 1827, before the S. C. at Matura, for having written and attested an instrument for the conveyance of immovable property on an insufficient stamp. The value of the property was £6, which under the table annexed to Regulation No. 2 of 1830, [reducing the duty required by No. 4 of 1827 from 5 to 2½ per cent] should have been on a stamp of 3s.; but the instrument was one of 2s. only. It appeared, however, that in the Cingalese translation of this table, the word "to" had been substituted for the words "and under" in the second and all the subsequent lines. The Judges, therefore, considered "that this word might have led parties to suppose that the higher sum was included in each line, and was covered by the stamp required for that line, instead of being excluded from it, as the English table unequivocally directs by the term "and under." And this construction was rendered more probable by another substitution, of the word "from" for "on" in the first line of the table: The latter word would include; the former would rather imply *exclusion*, and consequently, that the lower sum in each line was intended to be included in, and covered by the duty of, the preceding line. It was, therefore, considered impossible to convict the defendant on an instrument which, if the translation of the table had been a

correct version of the original, would have been sufficiently stamped, No. 6, Matura, 30th September 1835. Notice having been immediately sent by the S. C. to Government of this mistranslation, the error has no doubt been long since rectified; but as other cases may arise similarly circumstanced, it has not been considered right to omit the decision. As to the liability of Notaries to their employers, independently of the regulation, for using improper stamps, see title "Notary."

15. A defendant who had been convicted of executing a common agreement insufficiently stamped, appealed against the conviction, on the ground that the witnesses had not signed the instrument. But the S. C. could not allow the objection; for the signature of witnesses was not necessary to the validity of the instrument, which was complete, and might have been recovered upon, without such signature. No. 65, Putlam, 26th June 1834.

16. We now come to the subject of stamps on legal proceedings on which the following are the principal points which have been decided by the S. C. The question was proposed, to the S. C. by a Government Agent, whether in Government cases, the Table of Fees, formerly levied by virtue of Regulation No. 7 of 1809, should still be observed: He was induced to ask this question, from observing the heavy expense entailed in Revenue suits over other cases; not only from the fees being higher, but because a stamped citation was considered necessary to each defendant." The S. C. returned for answer: "That no exception existed, with respect to the application of the table of fees of 1st October 1833, to Government cases, or to those of any other class;—that the forms, prescribed by the Regulation No. 7 of 1809, might be adhered to, but any table of fees, which might have been promulgated by virtue of that Regulation, was virtually superseded by the establishment of that which was now declared to be in force in all the D. C. of the Island." Letter Book 31st July, 11th August 1835.

17. The exemption from stamps on legal proceedings, claimed by Priests suing or defending on behalf of temples in the

Kandyan districts, has been decided by the S. C. no longer to exist. "For the Proclamation of the 25th March 1834, by the 2d clause of which this exemption was granted to the temples, was virtually repealed; at least as regards the six first clauses, by the 56th clause of the Charter, and by the order of the S. C. of 1st October 1833; establishing the table of stamps: And as no exception was made in that order or table in favor of temples, or of those appearing in support of temple rights, this immunity from stamps ought not to be any longer allowed." No. 747, Ratnapoora, 21st January 1836, Letter Book, 21, 26; November 1835.

18. With respect to the class in which suits for Land should be brought, it was attempted to assist the D. J. and practitioners by a few suggestions, conveyed in a circular letter of 29th November 1834, to which the reader is referred. It will be observed that, by the 4th paragraph of the letter relating to that subject, if an action be brought as for produce only, when it is manifest that the title to the land itself is in dispute, the case is to be dismissed, or the plaintiff is to be allowed to supply the deficiency of stamps, according as the D. C. feels satisfied that the wrong selection of class was made fraudulently, or from misconception. The S. C. has, however, in one or two instances allowed plaintiffs to proceed, on furnishing the additional stamps, even though the opinion of the D. C. has been unfavorably expressed towards them; circumstances appearing in the cases, which made it probable that the plaintiffs had acted from misconception. No. 128, Galle, 7th March 1835; circuit. No. 2394, Colombo, North, 22d April 1835. We have seen under title "Practice," par. 22, that where a plaintiff had estimated the land for which he sued higher than the defendant considered to be its real value, the S. C. affirmed an order, by which Commissioners were appointed to inspect the land and report its real value, No. 1982, Caltura, 27th January 1836.

19. A District Judge enquired of the S. C., whether the copy of a Will, attached to the probate, required a stamp:

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He was informed in answer "That there seemed no reason for exempting copies of Wills from the stamp duty, and certainly there was no express exemption in their favor; that the practice in the former S. C. and P. C. always was to levy fees, or require stamps, for copies of Wills, like all other Office copies, and that such still continued to be the practice in the D. C. of Colombo. "The question was asked at the same time, whether the oath by the sureties on administration, as required by the 4th rule of section 4, ought to bear the usual affidavit stamp. To this, an answer was returned in the negative: "For the rule required the sureties to be examined and sworn in open Court, which did not fall within the meaning of an affidavit." Letter Book, 26th August, 1st September 1834.

20. No stamp is necessary for an execution, obtained in formâ pauperis: supra: p: 161.

21. Nor for a proxy to enable a Proctor to appear before the S. C., supra: title "Proctor," par: 9.

22. Nor for bonds, given to the Fiscal under the 26th and 27th clauses of Regulation No. 13 of 1827; for they fall within the provision of the 6th clause of No. 4 of 1827. This was the view taken of the question by the S. C., on the terms of the Regulation; and such had been the practice in Colombo, Letter Book 11, 18th December 1834.

23. Nor for depositions; Letter Book 12, 16th December 1833.

24. Nor for recognizances, Letter Book 14, 21st November 1833.

25. Nor for any Criminal proceedings. Ibid: Ibid: And see title "Prosecution" par: 35, at the end.

26. But stamps are necessary on appeals from interlocutory orders, as well as from final decrees. No. 130, Pantura, 13th August 1834.

As to Edictal Citations being stamped, see that title, supra: p: 103.

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#### SUBPŒNA.

See title "Evidence," p: 125, 6, 7.

## SURVEYS.

For what purpose they may be received in evidence; see "Arbitration," p: 35.

Act of survey, a mode of asserting a claim, see title "Land," paragraph 2.

A difficulty arose in the D. C. of Colombo, on the following point. A survey having been ordered in an action concerning Land, the Surveyor was ready to produce his report, but the defendant, who appeared in formâ pauperis, stated that he had no means of paying his proportion of the fees of survey, and the plaintiff objected to paying more than his own share. The D. J., being at a loss how to proceed, applied to the S. C. for instructions. The Judges recommended that one or more Surveyors should be appointed by the two D. C. of Colombo, with the understanding that where one or more parties to a suit were paupers, no fee for survey should be demanded from such pauper, unless he were ultimately successful, or unless his Costs were awarded to him by the Court, No. 11,929, Colombo North. Letter Book, 4, 9. April 1835.

## TAX ON CARTS.

See title "Prosecution," par: 66.

Voluntary payment of commutation tax will not give title to land; see title "Land," par: 15. Evasion of Land tax, see title "Land," par: 20. 21.

## TEMPLE.

A Priest cannot possess property except in trust for a temple: Case on this subject, paragraph 1. and 2.—But not allowed to plead the illegality of deeds passed in his own name, in order to obtain administration as a pauper, par 3.—Reference to cases on the distinction between *Sisya* and *Sivooroo Paramparava* par: 4.—Case on conflicting claims to the office of Caporale: Conditional appointment revoked by a subsequent one, condition not being performed, par: 5. and 6.—Celebration of religious rites at a new Temple, by which a portion of the offerings is drawn from an ancient one, is not an injury for which an action can be sustained, par: 7. and 8.—Temple oaths 9.—Temples not exempted from stamps, 10.

1. It seems to be one of the tenets of the Buddhist religion that a man, on becoming a Priest, resigns all worldly wealth;

and no longer possesses the right or power of holding property, whether moveable or immovicable, except in trust for his temple, if he be in charge of one. vide supra titles "Kandy," par: 77. and "Land" par: 14. This entire abnegation of earthly possessions, however, seems not less difficult to be put in practice in Ceylon than elsewhere. And accordingly the Courts furnish numerous instances of Priests laying claims to property in their own right, or at least with a very slender colouring of any title, on the part of temples, to veil their own claims.

2. A priest brought an action for two paddy grounds, as having been dedicated to Ellewelle Vihare by Sellegodde Umanse, before his death. The defendant denied that Sellegodde had any right to dispose of the fields; alleging that they were his, the defendant's parveny property; that he had permitted Sellegodde to enjoy the profits of them in consideration of medical aid, and during the defendant's pleasure, but no further; that the defendant had always performed the Rajakaria for them, which would not have been the case, if he had transferred them absolutely to Sellegodde [as to which see titles "Kandy," paragraph 3, and 151. and "Land," par: 15.] and moreover, that the alleged dedication by Sellegodde would have been void, because prohibited by Proclamation of 18th September 1819. The plaintiff, by his replication, undertook to prove that the lands were the actual property of Sellegodde Umanse, and had been transferred to him by the defendant's father and another person by deeds: he accounted for the defendant's performance of the Rajakaria by the ignorance of Sellegodde, in not getting the fields registered for exemption: and with respect to the Proclamation, he contended that the prohibition, as to dedication to temples, only referred to lands of laymen, and did not extend to those of Priests. It appeared from the evidence that Sellegodde Umanse had received the produce of the fields for 35 or 40 years; but that they formed part of the defendant's *pangua*, and that the cultivation had taken place by permission of the defendant, who was considered the parveny owner. The Court of the Judicial Agent was of opinion that the possession of Sellegodde Umanse had been

fully proved, so as to give him a title by prescription; and consequently that he had a right to transfer the land to whomsoever he pleased. Judgment was given for the plaintiff, which was affirmed by the Court of the Judicial Commissioner. On appeal to the Governor, which devolved on the S. C., by operation of the new Charter, this decree was reversed on the following grounds: Several objections present themselves to the validity of this decision. First, no proof whatever was offered of the execution of the Deed of Transfer from Sellegodde Unnanse to the plaintiff. This omission may, however, have proceeded on the supposition that the defendant, by his answer, did not intend to dispute the execution of that instrument, but only the right of Sellegodde to make such a transfer. [see title "Pleadings," par: 14. to this point.] But the difficulty, which the Court feels in affirming the plaintiff's claim, proceeds upon much wider grounds. For, secondly, the possession of Sellegodde appears, from the evidence of nearly all the witnesses, to have been but a qualified one. The defendant continued to perform the Rajakaria, and his permission, it seems, was considered necessary for the cultivation of the land. This, therefore, was not such a possession as would have given Sellegodde Unnanse a prescriptive right, even if he had been a person who could have availed himself of such prescription: [see title "Prescription," par: 8.] but thirdly, even if the defendant or his father had parted with the absolute possession of the land, the Unnanse would have been incapable, on account of his Priesthood, of possessing the land unless in trust for some temple. Now it appears by one of the plaintiff's own witnesses that Sellegodde Unnanse had no Wihare. There was nothing, therefore, to prevent the defendant from resuming possession of this land, even in the life time of Sellegodde Unnanse. Fourthly, still less had this Priest the slightest shadow of right to bequeath the land to any other person, whether Priest or Layman. The Court thinks it unnecessary to take any notice of the Proclamation of 1819, though that would have furnished another objection to the transfer from Sellegodde Unnanse to the plaintiff. The distinction which the plaintiff endeavours to draw

between the lands of Laymen and those of Priests, [supposing that Priests could have any such possession of lands, as would authorize them to make a legal transfer of them to others.] is not to be found in the Proclamation, No. 5950, Ratnapoora, 3d February 1834.

3. In the case mentioned under title "Administration" p: 5, a Priest, seeking to obtain administration to the estate of his predecessor, informâ pauperis, endeavoured to get rid of the objection arising out of certain title deeds for land standing in his own name, by urging that the possession of any property, except in trust for a temple, was illegal; and therefore that the deeds should be considered as nullities. The S. C., however, was of opinion that the Priest could not be allowed thus to avail himself of the illegality of his own act, and to accept deeds one day in his own name, and to repudiate them the next as illegal, according to the convenience of the moment. But the Court also considered, with reference to the necessity for all administrators to give security for the due execution of their office, that nothing could be more at variance with the spirit of that highly salutary provision, than to allow a person to administer an estate, who was avowedly a pauper, and for whom, therefore, especially if he could not legally possess property, no solvent person could reasonably be expected to give security. No. 32 Matura, 9th December 1835.

4. Soon after the establishment of the present S. C., several cases came before it from the Kandyan Courts, especially from that of the seven korles, which had excited considerable interest, and in the investigation of which no pains had been spared, on the part of the kandyen tribunals and authorities. Few of these cases, however, afford any materials for these notes; having for the most part, been decided on facts, rather than on questions of law, involving general principles. There is one case, however, to which it may be useful to refer upon the question of the right of succession to Wiliares. Among the proceedings will be found a diligent and patient discussion of the difference between the *Sisya Paramparave*, or the descent of by pupils,

and the *Siwcoroo Parāmpārave*, or the ordaining and endowment by the original proprietor of one of his lay relations, who in his turn ordains another relation and so on. This is the leading distinction between the *Sisya* and the *Siwooroo*; but the subject is treated at some length by the Priests and Chiefs who were consulted; the explanation given by the Priests of the *Ma'walle Wihare* appearing to be considered by the Kandyan authorities more correct than that of the *Asgire* Priests. No. 366, Seven Korles, Eriminne Unanse vs. Sinabowe and Parakumbere Umanse, finally decided by the S. C. 21st October 1833. see also the case of Wewegedere Unnanse vrs. Kittigamme Umanse, Seven Korles.

5. An action was brought in the District Court of Caltura, by which the plaintiff claimed to be *Caporale* of *Ugabbodde*, Wihare, by a deed of promise, dated 17th August 1825, from the plaintiff's uncle, the late *Caporale*; the substance of which deed will appear from the Judgment. And the plaintiff stated that he had allowed the defendant to perform the duties, on the express agreement of his, the defendants paying the plaintiff a share of the dues. The defendant claimed this office, as grandson of the late *Caporale*, by a daughter, and in virtue of a deed from his Grand-father by deed of 1st October 1829, when that person was on his deathbed. From the evidence, as far as that bears on the points decided, it appeared that the defendant had done the duties of *Caporale* for several years before his grand-father's death, and ever since; that he gave part of the produce of the temple to the plaintiff, who had also repaired the building; and that the plaintiff had never qualified himself to act as *Caporale*. The deed in favor of the defendant was precise and unqualified; and made no mention either of the plaintiff, or of the promissory deed in his favor. The D. C. decreed for the plaintiff; and on appeal to the S. C., it was argued in support of the decree, that the gift to the plaintiff was a *donatio inter vivos*, and irrevocable [Voet Lib. 39. tit. 5. par: 4.] That the defendant, being descended from the *Caporale*, through a female, was incapable of holding the office, though he could perform the duties of it; and that he was a mere servant of the plaintiff, to whom he was bound

to pay over the dues. For the defendant, it was contended that the deed in favor of the plaintiff was no absolute transfer, but a mere will, revocable at pleasure; that the condition of it was that the plaintiff should perform the duties, which he had never qualified himself to execute; that it was probable on this account that the *Caporale*, when near his death, executed the deed in favor of the defendant, and that the defendant did not claim the temple as his property, but only the right to succeed to the office. It was ordered by the S. C. that the decree of the D. C. be set aside, and that the defendant be confirmed in the office of *Caporale* to the temple in question, under the deed of the late Franciscos Alvis, dated the 1st of October 1829, on the following grounds.

6. "The D. C. expressed no doubt of the genuineness of the deed in the defendant's favor; but considers that it is insufficient to invalidate that of the 17th of August 1825, in favor of the plaintiff, inasmuch as the donor reserved to himself no power of revocation in the instrument last mentioned. But when the terms of that deed, and the relative situation of the parties, come to be considered, no such express reservation appears to be necessary. According to the translation filed by the plaintiff, Francisco Caporale "allows the plaintiff the temple at Ugabbodde, and does thereby authorize him to officiate in the temple which he, Francisco, had built, when he, Francisco, should be unable to attend to it, or after his death, taking charge of the said temple, together with things required for the office of *Caporale*." This, then is no transfer of the property of the temple; it merely authorizes the plaintiff to officiate and take charge of the temple, as Francisco's deputy, in case of his illness, or as his successor in case of his death. But to the enjoyment of the privileges hereby conferred, one condition must be considered as annexed, because it was essentially necessary to such enjoyment;—namely, that the plaintiff should qualify himself to perform the duties of his office. This condition remains unperformed to the present moment; for the plaintiff, it appears, has never qualified himself to act as a *Caporale*. And this may very naturally account for the execution of the deed of 1829, in favor of the

defendant; more especially when it is considered that Francisco had at that time been assisted in the performance of his temple duties by the defendant for several years, that he had brought him up and educated him, and that he confided to the defendant, by that very instrument, the charge of providing for the widow of the donor. Even if the deed of 1825 were to be considered, as has been contended, as a *donatio enter vivos*, by which the property in the temple itself was conveyed, the non-fulfilment of this necessarily implied condition would have furnished the donor with a sufficient ground of revocation, as appears by the authority of the author cited on the part of the plaintiff. [a] Another ground, on which the defendant's right is disputed, is that he is descended from a female branch of the family, and, therefore, according to the opinion of some of the witnesses, is incapable of succeeding to this office. The evidence on this point of customary law is somewhat contradictory; but even giving it full force, it cannot avail the plaintiff. The defendant disavows, by the mouth of his Proctor, any claim to the temple itself, as his property. He only asserts his right to be continued in the free and unqualified exercise of the functions of *Caporale*. That there is nothing in his descent which disqualified him from performing those functions is proved, first by the fact of Francisco Caporalle having inducted him into the office, and deputed him to act for himself; but secondly by the statement of the plaintiff himself: for the plaintiff alleges that, not being himself qualified to act as *Caporale*, he had agreed with the defendant that the latter should do the duties, accounting to the plaintiff for part of the profits. After making that avowment, the plaintiff never can be permitted to argue that the defendant was legally disqualified from performing those rites, which the plaintiff asserts he had himself employed him to perform. The only remaining question is, whether the agreement, so de-

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[a] Voet in Pandetas. Lib. 39 tit. 5 par. 22. Among the causes for revoking a *Donatio inervivos* is the following: "*Si donatarius non parverit conditionibus donationi adjectis.*"—"If the Donee shall not have complied with the conditions annexed to the donation."

clared upon by the plaintiff, have been satisfactorily proved. This Court is of opinion that it has not; the terms in which it is spoken of by the witnesses are much too loose and vague to support a contract of such a nature. The payments made by the defendant to the plaintiff certainly favor the supposition that such an agreement had been in contemplation, but they are not sufficient of themselves to establish it. These payments may have been made under a doubt on the part of the defendant, how far he might be able to establish his right in opposition to the former deed granted to the plaintiff. Taking, however, into consideration those payments, and certain other points, as well as the deed of 1825, in favor of the plaintiff, the case appears to have been one sufficiently doubtful, to justify the plaintiff in trying the question; and it is, therefore further decreed that each party do pay his own costs. No. 540, Caltura, 11th February 1835.

7. The only remaining case on the subject of temples is one relating to a moorish mosque, the facts of which will appear from the following lucid and excellent judgment, delivered by Mr. Justice Norris, "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 Molliamulle mosque in the same village, one thousand rixdollars damages, alleged to have been sustained by them, the plaintiffs, in consequence of the defendants having, for the last three years, celebrated at the Molliamulle mosque the religious festivals of Nombo Perenal and Hadjee Perenal; the right to celebrate which the plaintiff claim as *exclusively* appertaining, from time immemorial, to their own mosque at Marendahn. 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 plaintiff's 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-

cient to shew that, from time immemorial, the Marendahn 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 Mahometan religion and the precepts of the Koran, be celebrated in more than one consecrated mosque of the same village, and whether the favored mosque at Barbeyn 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 matters] 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 Mahometan worship may have been scandalized, and the religious veneration due to the ancient mosque of Marendahn abated, by the irregular practices and arrogant assumption of the Priests officiating at the rival mosque of Molliamulle. 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 disturbance in the celebration of their religious rites at their own mosque; nor do they seek redress for the insult offered to Mahometan worship, by the celebration at an unaccustomed place of rites peculiar to the mosque of Marendahn: 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 diversion from their own mosque to that of Molliamulle of certain offerings, made by devotees, during the celebration of the above-mentioned

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 Mahometan religion : the *civil right* is the sole question with which we are concerned, and this, I apprehend, may be settled in very few words.

8. "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 offering of the devotees? Voluntary, *ex vitermini*, 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 responsibility, 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 Priests and 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, 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 plaintiff's claim had been allowed, was, therefore, reversed with costs. No. 12,348, Caltura, 20th June 1835.

9. Oaths to witnesses are no longer administered at temples; see title "Evidence" p. 141, 2, and title "Oath."

10. Temple rights can no longer be sued for without stamps; see title "Stamps." par: 17.

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### TENDER.

When a debt is admitted, the amount should either be tendered, or paid into Court, in order to save the costs of ulterior proceedings: see title "costs," par: 73.

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### THOMBO.

See title "Husband and Wife," p. 216.

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### TOLL-COLLECTOR.

Rights and duties of; see title "Prosecution;" paragraphs 22, 40, and 41.

### TRANSLATION.

See title "Interpreter."

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### TREASON.

Property belonging to the wife or relations, held not to be included in a sentence of confiscation; see title "Husband and Wife," par: 224, 5.

Defendant in a civil action being in prison, on a charge of treason; answer taken from him verbally: title "Pleadings," par: 28. And "Sequestration ought not to issue against his property, as for want of appearance under such circumstances, see title "Sequestration," par: 2.

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### WITNESSES.

See title evidence, more especially from p: 121 to 148. The writer observes that this title of "Witnesses" is referred to at

p: 132, but he finds nothing in his notes, to add to what has been given under evidence. He may, however, take this opportunity of observing, with reference to the 29th Rule of the first section, that the concurrence of two Assessors, with the D. J.; in the belief of a *party's* intention to deceive by his answers on examination, was introduced in accordance with the practice of the S. C., which has been accustomed, in deciding on the prevarication of a *witness*, to appeal to the Jury as to their belief of such witnesses' intention: and also, that the concluding provision of the 29th Rule was merely intended to guard against the supposition, that the examination of a *party* to a particular fact would preclude the adverse party from calling *witnesses* to the same fact; an exclusion which prevailed under the former system, founded on the practice of the Civil Law, by which the oath of the party was decisive of the question put to him.

Attachment ought not to be granted against a witness for non-attendance, unless a Subpœna has been served upon him personally. Letter Book, 8, 25th October 1834, supra: title "Process," par: 1.

END OF THE NOTES.

LIST of TITLES, under which the foregoing notes are arranged: many of them, it will be observed, are only inserted in the notes for the purpose of referring to other TITLES, where the subjects in question are mentioned.

ACTION.	FORMS.
ADMINISTRATION. /	FRAUD.
AGREEMENT. —	——, ORDINANCE AGAINST,
AMENDMENT. //	GAMING.
APPEAL. //	GANGSABE.
APPEARANCE. } 2	GOVERNMENT.
APPRAISERS. } 3	HABEAS CORPUS.
ARBITRATION. } 3	HEARING.
ARRACK.	HUSBAND & WIFE.
ARREST.	IDIOT.
ASSESSORS.	IMPORT DUTIES.
ATTACHMENT.	IMPRISONMENT.
ATTORNEY.	INFANT.
AUCTIONEER.	INFORMER.
BAIL.	INHERITANCE.
BOND.	INJUNCTION.
COMMISSION.	INQUEST.
CONDITIONS.	INSOLVENT.
CONTEMPT.	INTEREST.
COPIES.	INTERPRETER.
COSTS.	INTERVENTION.
CUSTOMS-DUTIES.	ITESTATE.
DEBTOR & CREDITOR.	ISSUE.
DECREE.	JUDGMENT.
DEPOSITIONS.	JURISDICTION.
DONATIO INTER VIVOS.	JURORS.
DOWRY.	KANDY.
EDICTAL CITATION.	LAND.
ESCAPE.	LAW.
EVIDENCE.	LEGITIMACY.
EXAMINATION OF PARTIES.	LIBEL [PLEADING.]
EXECUTION.	—— [DEFAMATION.]
——, CRIMINAL,	LOAN BOARD.
——, PARATE,	LUNATIC.
——, OF DEEDS.	MALICIOUS PROSECUTION.
FALSE CLAIM.	MARRIAGE.
—— IMPRISONMENT.	——, PROMISE OF,
FELONY.	MERITS.
FIDEI COMMISSIO.	MINORITY.
FINES.	MORTGAGE.
FISCAL.	

MOTION. <sup>(e)</sup>	PROCTOR.
MUTINY ACT.	PROMISSOR NOTES.
NANTISSEMENT.	PROSECUTION.
NONSUIT.	-----, MALICIOUS,
NOTARY.	QUANTUM MERUIT.
NUISANCE.	RAJEKARIA.
OATH.	RECOGNIZANCE.
ORLIGATION.	REGISTRATION.
OFFICER, GOVERNMENT,	RENTR.
-----, OF COURT.	RESJUDICATA.
PARATE EXECUTION.	RESTITUTIO IN INTEGRUM.
PARTNERSHIP.	REVENUE LAWS.
PAUPER SUITORS.	SECURITY.
PAWNING.	SEQUESTRATION.
PAYMENT INTO COURT.	SERVANTS.
PEARL FISHERY.	SHIPPING.
PENALTY.	SHROFF.
PERCENTAGE.	SOLDIER.
PERJURY.	STAMPS.
PETITION.	SUBPCENA.
PLEADINGS.	SURVEYS.
POLICE.	TAX.
POST OFFICE.	TEMPLE.
POUNDAGE.	TENDER.
PRACTICE.	THOMBO.
PREEMPTION.	TOLL-COLLECTOR.
PRESCRIPTION.	TRANSLATION.
PRIEST [BUDHIST.]	TREASON.
PRINCIPAL & SURETY.	WITNESSES.
PROCESS.	











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