THE

CEYLON LAW REPORTS,

BEING

REPORTS OF CASES DECIDED

BY THE

SUPREME COURT OF CEYLON.

EDITORS:

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Assisted by

J. VANLANGENBERG AND F. M. DE SARAM

(ADVOCATES.)

VOLUME II.

COLOMBO:

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1893.

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Rec. July 8, 1903

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JUDGES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

BURNSIDE, C. J.	BURNSIDE, C. J.	BURNSIDE, C. J.
CLARENCE, J.	DIAS, J.	LAWRIE, J.
DIAS, J.	LAWRIE, J. (*Acting.*)	WITHERS, J. (*Acting.*)

BURNSIDE, C. J.	LAWRIE, A. C. J.	LAWRIE, A. C. J.
LAWRIE, J.	WITHERS, J.	WITHERS, J.
WITHERS, J.		BROWNE, J. (*Acting.*)

Attorney-General.	***Solicitor-General.***
THE HON'BLE C. P. LAYARD (*Acting.*)	C. S. HAY, ESQ., C.C. (*Acting.*)
" SIR SAMUEL GRENIER.	J. H. TEMPLER, ESQ., C.C. (*Acting.*)
" C. P. LAYARD.	C. P. LAYARD, ESQ.
	J. H. TEMPLER, ESQ., C.C. (*Acting.*)
	P. RAMANATHAN, ESQ., C.M.G.

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MEMORANDA.

1892. May 16. THE HON. LOVELL BURCHETT CLARENCE, Senior Puisne Justice, having quitted the Island on May 12, 1892, on leave, ARCHIBALD CAMPBELL LAWRIE, Esquire, District Judge of Kandy, was sworn in as acting Puisne Justice.

July 5. THE HON. HENRY DIAS, Junior Puisne Justice, retired.

July 7. GEORGE HENRY WITHERS, Esquire, Advocate, was sworn in as acting Puisne Justice.

July 11. THE HON. SIR SAMUEL GRENIER, Kt., Attorney-General, having returned to the Island, and CHARLES PETER LAYARD, Esquire, Solicitor-General, having left Ceylon on leave, J. H. TEMPLER, Esquire, Crown Counsel, was sworn in as acting Solicitor-General.

September 25. THE HON. A. C. LAWRIE was confirmed in the office of Puisne Justice.

October 31. THE HON. SIR SAMUEL GRENIER, Kt., Attorney-General, died.

November 1. CHARLES PETER LAYARD, Esquire, Solicitor-General, was appointed temporarily and provisionally to the office of Attorney-General, and took the oaths of office on November 8.

November 10. J. H. TEMPLER, Esquire, Crown Counsel, was sworn in as acting Solicitor-General.

December 14. THE HON G. H. WITHERS was confirmed in the office of Puisne Justice as from January, 1, 1893, on which date the Hon. L. B. CLARENCE retired from the Bench.

December 15. PONNAMBALAM RAMANATHAN, Esquire, C.M.G., Advocate, having been appointed Solicitor-General, took the oaths of office.

1893. April 14. THE HON. SIR BRUCE LOCKHART BURNSIDE, Kt., Chief Justice, left the Island on leave.

April 24. THE HON. A. C. LAWRIE, Senior Puisne Justice, was sworn in as acting Chief Justice. DODWELL FRANCIS BROWNE, Esquire, District Judge of Colombo, was sworn in as Commissioner of Assize to preside at the first Criminal Sessions of the Southern Circuit.

July 15. D. F. BROWNE, Esquire, District Judge of Colombo, was sworn in as acting Puisne Justice.

July 31. THE HON. SIR B. L. BURNSIDE, Kt., Chief Justice, retired.

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1.—*Administrator—Right to retain funds—Control of Court—Order to pay money into Court—Joint administration—Procedure.*

An administrator has the right, until the estate is closed, to retain in his hands the funds of the estate for the purposes of administration.

Although an administrator is generally subjected to the control of the court, an order upon him to pay money in his hands into court is not justified, unless such order is shown to be necessary for the protection of creditors or heirs in consequence of the misconduct or default of the administrator.

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2.—*Administration—Substituted plaintiffs—Action to set aside claim—Civil Procedure Code, section* 247.

A judgment-creditor having died, persons claiming to be his heirs were substituted plaintiffs in his room and, having issued writ, seized certain property, which was claimed by a third party. The court having upheld the claim the substituted plaintiffs brought the present action under section 247 of the Procedure Code against claimant, who in his answer took exception to plaintiffs maintaining the action without taking out administration to the deceased creditor's estate.

Held (reversing the judgment of the District Court) that the plaintiffs having been substituted plaintiffs in the original action, and having seized the property as judgment-creditors, were entitled to maintain this action to have such property declared executable under their judgment.

D. C. Galle, No. 476. WEERAKOON v. NIKULAS 48

3.—*Administration—Marriage in community—Administrator of deceased husband's estate—Powers over entire matrimonial estate—Widow-administratrix.*

A widow who had taken out letters of administration to her deceased husband's estate—the marriage having been in the community of property—

Held entitled in her capacity of administratrix to maintain an action in respect of the entirety of a leasehold interest which had belonged to the common estate, notwithstanding her own right to one-half of such interest as surviving spouse.

Per BURNSIDE, C. J.—Upon the death of one of the spouses the entire common estate vests, in the first instance, in the administrator of the deceased, for disposal among the persons legally entitled to individual shares of it.

Per LAWRIE, J.—An executor or administrator can administer and realise only such estate as the deceased had testing powers over. The administrator of a deceased spouse cannot, therefore, deal with the entire common estate, but only with the half to which the heirs or legatees of the deceased have right.

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4.—*Administration—Right of heirs of deceased mortgagee to sue—Necessity for administration to whole estate—Practice.*

A mortgagee who was married in the community of property died leaving a widow and children surviving, who sued on the mortgage as his legal representatives, averring that the deceased's moiety of the common estate was worth Rs. 700 only, and that the plaintiffs were therefore entitled to sue without taking out letters of administration.

Held that, in determining whether the administration was necessary, regard should be had to the entire estate (and not to the deceased's moiety only), and as this exceeded Rs. 1,000 in value, administration could not be dispensed with.

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Banker and Customer.

Banker and customer—Necessity for demand by cheque—Note indorsed by customer and held by banker—Right of banker to debit note to customer's account—Notice of dishonour—Pleading—Replication, necessity for—Civil Procedure Code, sections 79, 146.

In the ordinary relation of banker and customer, it is not necessary that the customer's demand for the balance due to him should be by cheque. Any demand, if not complied with, will entitle the customer to recover such balance by action.

A banker, holding as indorsee a promissory note payable at his bank, upon which the customer is liable as an indorser, is entitled upon dishonour of the note to debit the customer's account with the amount thereof, provided due notice of dishonour has been given to the customer.

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Per CLARENCE, J.—Although, under the Civil Procedure Code, pleadings are not to go beyond answer except by special leave, yet if a defendant's answer contains averments requiring to be met, it is none the less incumbent on the plaintiff to meet them, either by obtaining leave to reply or by asking the court, under section 146 of the Code, to frame an issue upon defendant's answer.

Judgment of the District Court affirmed by CLARENCE and DIAS, JJ., BURNSIDE, C. J., dissenting.

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Cause of action.

1.—*Cause of action—Declaration of title to land—Ouster—Pleading—Evidence.*

Where an action for declaration of title to land is based upon an ouster, and both the title and the ouster are put in issue—

Held that the action must fail unless the ouster is proved, and that it is not competent for the court, upon a fictitious cause of action, to decide the mere question of title.

D. C. Colombo, No. C. 1,250. LENOHAMY v. SAMUEL 101

2.—*Cause of action—Money paid—Implied promise—Sale of paddy field by Government—Payment of grain tax by mortgagee—Liability of owner.*

The owner of a paddy field gifted it in 1885 to defendant subject to an already existing mortgage. The field having been seized and sold by Government for the grain tax due for the year 1887, the plaintiff, an assignee of a decree obtained upon the mortgage paid to Government the amount for which the land was sold and had the sale cancelled, and brought the present action to recover the amount from defendant.

Held that the circumstances disclosed a good cause of action, as the law implied a promise on defendant's part to reimburse plaintiff the amount of the tax.

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Civil Procedure.

1.—*Stamps—Guardianship proceedings—Civil Procedure Code, Chap.* XL.—*Ordinance No.* 3 *of* 1890—*Construction.*

Guardianship proceedings under Chapter XL. of the Civil Procedure Code are not liable to stamp duty; and this exemption extends to applications under that chapter in the way of summary procedure, notwithstanding the provisions of section 373 of the Civil Procedure Code.

D. C. Kurunegala (Guardianship) No. 12. In the matter of the guardianship of RICHARD and JAMES HENRY, minors .. 2

2.—*Promissory note—Action by indorsee against makers—Traverse of averment of presentment—Admissibility of evidence to prove excuse for non-presentment—Civil Procedure Code—Pleading—Agreement between debtor and creditors to pay to a trustee--Payment to the trustee—Defence.*

According to the rules of pleading laid down in the Civil Procedure Code, an excuse for non-presentment must be specially pleaded by a statement of facts relied on in that behalf.

When the presentment of a promissory note is averred in the plaint and traversed in the answer, such averment is not proved by evidence showing circumstances of excuse or waiver of presentment, nor is such evidence admissible in the absence of necessary averments in the plaint.

Where to an action by the endorsee against the makers of a promissory note it was pleaded that the defendants and the plaintiff and other holders of promissory notes of defendants had agreed that the defendants should pay all monies then due by them on promissory notes, of which the note sued upon was one, in certain instalments to certain one of the creditors as trustee for the rest and for defendants, the trustee undertaking in the meantime to retire such notes when due, and that the defendants had in pursuance of the agreement paid all the instalments to the trustee—

Held that the agreement and payment to the trustee thereunder was a good defence to the plaintiff's action on the note.

D. C. Colombo, No. 2,173. SADAYAPPA CHETTY V. LAWRENCE 3

3.—*Civil Procedure—Execution against the person—Decree for plaintiff for land and costs—Costs exceeding Rs.* 200—*Civil Procedure Code, sections* 209, 298, 299.

A writ of execution against the person of a judgment-debtor can only issue after a writ against his property has issued and been returned with one of the returns specified in section 298 of the Civil Procedure Code.

A plaintiff is entitled to take the defendant's person in execution only when he recovers a sum of money and such sum exceeds Rs. 200; but not for costs of suit when he recovers some other specific relief (such as a declaration of title to land or ejectment) and costs, although such costs exceed Rs. 200.

A decree in defendant's favour for costs alone is a decree for a " sum awarded" within the meaning of section 299, and entitles the defendant, where such costs exceed Rs. 200, to writ against plaintiff's person.

D. C. Kandy, No. 2,510. SOYSA V. SOYSA .. 15

4.—*Civil Procedure—Security in appeal—"Tendering" of security—Time within which security must be perfected—Notice of appeal—Civil Procedure Code, section* 756.

Under section 756 of the Civil Procedure Code it is not sufficient for a party wishing to appeal from the judgment or order of a District Judge to tender security in appeal within 20 days from the judgment or order appealed against, but he must perfect the security by entering into the security bond within the time limited.

D. C. Batticaloa, No. 327. KANDAPPEN V. ELLIOTT 17

5.—*Curator—Property of minors—Person entitled to take charge under a will or deed—Executor of will of parent—Guardian appointed by will—Civil Procedure Code, sections* 582, 583, 585.

A testator died leaving a will whereby he disposed of his estate in favour of his minor children, and naming an executor whom he also appointed guardian of the children.

Held reversing the order of the District Court, that the executor was not a person entitled to have charge of the property of the minors by virtue of the will within the meaning of section 585 of the Civil Procedure Code, and the court was therefore not bound to grant him a certificate of curatorship.

The testator by appointing the executor entrusted to him the task and charge of distributing his assets generally, but not any special trust to take charge of the minors' shares or hold them in trust for the minors.

D. C. Galle, No. 2,948. In the matter of the minor children of SIMAN PERERA ABEYWARDANA. ABEYWARDANA V. ABEYADEERA 19

6.—*Sequestration—Action by corporation—Principal officer—Shroff of Bank—Power of Attorney, sufficiency of—Practice—Civil Procedure Code, sections* 653, 654, 655.

In an application for obtaining sequestration of a defendant's property under section 653 of the Civil Procedure Code, the affidavit required by that section to establish that the defendant is fraudulently alienating his property need not necessarily be that of the plaintiff himself but may be that of any person having knowledge of the facts.

The shroff of a bank is a "principal officer" of such corporation within the meaning of section 655 of the Code, and is competent to make affidavit in substitution for the affidavit of the plaintiff required by sections 650 and 653.

A bank corporation sued by attorney, who was authorized by his power "to sue for, recover and receive" every debt due to the corporation; "to sue, arrest, attach, destrain, sieze, sequester, imprison, and condemn, and out of prison

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again release, acquit, and discharge all persons": "to sign, draw, make, or endorse any other security or securities in which the said bank is now or may hereafter be interested or concerned or to which the signature of the said Bank may be necessary or required"; and further "to sign, deliver, and execute all deeds, conveyances, and assurances to which the said bank may become a party, and generally to act, do, manage and transact all and every such matters, and things in and about the premises in as full and ample a manner as the said bank could do."—

Held that under the authority contained in the above power the attorney could bind the bank by deed in all matters appertaining to a suit which he was authorized to bring, and in any proceeding for sequestration in such suit he was competent to execute the bond required to be entered into by the plaintiff under section 654 of the Code.

D. C. Colombo, No. C 469. THE BANK OF MADRAS v. PONNESAMY MODELLY .. 22

7.—*Appeal—Security—Dispensing with security by consent—Application to appeal out of time—Practice—Civil Procedure Code, section* 756.

The provisions of the Civil Procedure Code as to security in appeal are intended for the benefit of respondent parties, who may waive such benefit at their option.

Accordingly, where a respondent consented to dispense with security in appeal—

Held, that the appeal lay without security, notwithstanding the provisions of section 756 of the Civil Procedure Code.

C. R. Galle, No. 940. JAYASEKERA v. JANSZ 25

8.—*Practice—Service of summons—Service on proctor—Service out of the jurisdiction—Substituted service—Appearance—Civil Procedure Code, sections* 29, 69, 72, 85.

The defendant in an action by way of summary procedure on liquid claims was represented upon appearance to the summons by a proctor, whose proxy authorized him generally to defend the action. By virtue of this proxy the proctor took exception to the procedure, and after an appeal to the Supreme Court the plaintiffs were directed to proceed by way of regular procedure. The proctor also applied to dissolve a sequestration of defendant's property, and unsuccessfully appealed against the refusal of his application. The plaintiffs then issued summons by way of regular procedure, and service was effected on the proctor.

Held, affirming the judgment of the District Court, that the service on the proctor was a good service under section 29 of the Civil Procedure Code.

D. C. Colombo, No. C. 469. THE BANK OF MADRAS v. PONNESAMY MODELLY .. 26

9.—*Jurisdiction—Promissory note made at one place and indorsed at another—Action by indorsee against maker—Cause of action—Civil Procedure Code. sections* 5, 9.

A promissory note made at a certain place, the maker being described as of the same place, is, in the absence of express provisions to the contrary, a note payable at that place.

In an action brought in the District Court of Negombo by the endorsee against the maker, who was resident in Chilaw, of a promissory note made at Chilaw, but indorsed at Negombo—

Held that under section 9 of the Civil Procedure Code the District Court of Negombo had no jurisdiction.

D. C. Negombo, No 213. NARAYEN CHETTY v. FERNANDO 30

10—*Civil Procedure—Insufficiently stamped plaint—Objection by defendant—Taking plaint off the file—Answer on the merits—Practice.*

Where a plaint is insufficiently stamped the proper course for the defendant is at once to take steps to have it taken off the file and not to wait till the trial and then take exception to the sufficiency of the pleading.

C. R. Colombo, No. 2,333. FERNANDO v. FERNANDO. 35

11—*Civil Procedure—Want of particulars in plaint—Answer on the merits—pleading——Motion to take the plaint off the file—Irregularity.*

An objection to a pleading for want of particulars is not a matter to be set up by plea. A party requiring more particulars should, before pleading to the merits, take the objection by way of motion to take the pleading off the file.

Accordingly, where in an action for land the plaint did not disclose the plaintiffs' title to the shares of the land claimed or who the other shareholders were, and where the defendants filed an answer denying the plaintiffs' title and also taking legal objection to the non-disclosure and non-joinder of the other shareholders, and on the day of trial moved to take the plaint off the file.

Held that the defendants' procedure was irregular.

D. C. Chilaw, No. 152. MUDALY APPUHAMY v. TIKERALA 35

12—*Jurisdiction—Residence of defendant—Civil Procedure Code, section* 9.

The place where a party defendant carries on business is not a place where he resides, within the meaning of section 9 of the Civil Procedure Code, so as to give jurisdiction to the court within whose local limits such place is situated.

D. C. Kandy, No. 4,171. KANAPPA CHETTY v. SAIBO & Co. 37

13.—*Civil Procedure—Non-joinder—Debt due to several joint creditors—Service tenure—Commuted payment—Action by some of several shareholders of a panguwa—Civil Procedure Code, section* 17.

In the case of a debt due to several joint-creditors jointly the debtor cannot be sued piecemeal, but all the creditors must join in one action, notwithstanding the provisions of section 17 of the Civil Procedure Code.

The provision of section 17 of the Code, to the effect that no action shall be defeated by reason of the non-joinder of parties, means that when the non-joinder is apparent, in the face of which

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the court cannot proceed, the court instead of dismissing the action should allow plaintiff to add parties, if application is made in that behalf.

When two out of three co-owners of a *panguwa* sued the tenants for their share of the commuted payment due in respect thereof—

Held, that there was here a non-joinder of plaintiffs, and, in the absence of an application to add the remaining co-owner, the action was rightly dismissed.

C. R. Kegalla, No. 49. UKKU BANDA v. LAPAYA 38

14.—*Claim in execution—Claim upheld—Right of execution-debtor to bring action to set aside claim—Civil Procedure Code, sections* 241, 247.

A debtor, whose property when seized in execution has been successfully claimed by a third party, is entitled to maintain an action against the claimant under section 247 of the Civil Procedure Code.

C. R. Panadura, No. 559. SILVA v SILVA. 50

15.—*Civil Procedure—Mortgage bond, action on—Summary Procedure on liquid claims—Civil Procedure Code, Chapter* LIII.

The summary procedure on liquid claims under Chapter LIII. of the Civil Pocedure Code is not applicable to actions on mortgage bonds.

D. C. Anuradhapura, No. 54. DISSANAIKE v. DE ZILVA 55

16. *Civil Procedure—Intervention—Adding parties—Action for title to land—Claim adverse to both parties—Civil Procedure Code, sections* 18, 19.

The plaintiff sued defendant in ejectment claiming title to a half share of the lands in litigation. The defendant being in default of answering, the case was set down for *ex-parte* hearing on a certain day. In the meantime certain third persons, who denied plaintiff's right and alleged title in themselves to the whole of the lands, were upon their application added as parties to the action.

Held, that inasmuch as any judgment either for plaintiff or for defendant would not affect the added parties, they were not interested in any question involved in the action within the meaning of section 18 of the Civil Procedure Code, and ought not to have been added as parties to the action.

Per DIAS, J.—The application to be added as parties was in the nature of an intervention under the old procedure which was abolished by section 19 of the Civil Procedure Code.

D. C. Ratnapura, No. 146. APPUHAMY v LOKUHAMY 57

17.—*Sequestration—District Court—Jurisdiction—Common law—Injunction—Rules and Orders,* 1833—*Ordinance No.* 8 *of* 1846—*Ordinance No.* 15 *of* 1856, *sections* 4 *and* 5—*Ordinance No.* 11 *of* 1868, *section* 24—*Courts Ordinance, No.* 1 *of* 1889, *section* 22—*Civil Procedure Code chapters* XLVII. XLVIII. L.

The power of district courts to issue writs of sequestration is now limited to cases of fraudulent alienation of property, as provided by the Civil Procedure Code, and they have therefore no jurisdiction generally to issue sequestration for the protection, *pendente lite*, of property the subject of litigation.

So *held* by BURNSIDE, C. J., and LAWRIE, J., dissentiente DIAS, J.

D. C. Galle, No. 1,020. SEYADORIS v HENDRICK 63

18.—*Arbitration—Reference in pending suit—Award—Appeal—Civil Procedure Code, sections* 687, 690, 692.

No appeal lies from an order entering up judgment in terms of an award made upon a voluntary reference in a pending suit, even when the party aggrieved wishes not to attack the award on its merits but to question its validity on legal grounds.

D. C. Kandy, No. 4,383. CASSEEM v PACKEER 67

19.—*Civil Procedure—Death of sole plaintiff—Substitution of legal representative—Application by way of summary procedure—Motion—Civil Procedure Code, sections* 91 *and* 395.

In applications under Chapter XXV. of the Civil Procedure Code the provision of section 105 requiring such applications to be by petition is restricted in its operation to cases where the court has a judicial discretion to exercise in the matter of the application, but when, as under section 395, the court has no discretion, the application should not be by petition by way of summary procedure but by motion as directed by section 91 of the Code.

Under the Civil Procedure Code the practice of reviving judgments does not obtain and such revival is not required.

A dual motion to substitute a person in the room of a deceased plaintiff and to revive judgment and issue execution is bad for irregularity, because the applicant must be on the record before he can ask for revival of judgment or for execution.

D. C. Galle, No. 49,861. ABEYEWARDENA v MARIKAR 76

20.—*Civil Procedure—Minor action by—Application to have next friend appointed—Plaint—Civil Procedure Code, Chapter* XXXV.

An application for the appointment of a next friend under Chapter XXXV. of the Civil Procedure Code must be accompanied by the plaint in the action intended to be brought, in order that the court may exercise its judgment as to whether it is to the interest of the minors that the action should be brought.

D. C. Kalutara, No. 68. In the matter of an application for the appointment of a next friend. FERNANDO v FERNANDO .. 82

21.—*Civil Procedure—Costs—Execution—Costs due in interlocutory proceedings—Writ against person—Decree—Civil Procedure Code, sections* 298, 299, 353.

An interlocutory order for costs is an order for the payment of money within the meaning of section 353 of the Civil Procedure Code and is enforceable in like manner as a decree for money, and if the costs exceed R. 200 in amount, writ against the person may be sued out for

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their recovery even before the termination of the case.

D. C. Colombo, No. C 87. PULLENAYAGAM v PULLENAYAGAM 82

22—*Civil Procedure—Intervention—Added parties—Parties improperly added—Admissibility of defendant's documents—Documents not specified in list—Claim in reconvention—Civil Procedure Code, sections* 50, 51, 52, 54, 58, 111, 112, 113.

Since the Code came into operation, intervention in a pending action can only be permitted in pursuance of and in conformity with the provisions of section 18.

Where, therefore, certain parties were added as defendants to a pending action, upon their own application, they not being parties who ought to have been joined or whose presence was necessary to enable the court effectually to settle all the questions involved in the action, and a trial was had upon issues settled, by consent, as between them and the plaintiff and as between the plaintiff and the original defendants, resulting in a judgment for plaintiff against both the original and added defendants—

The Supreme Court, upon appeal by the parties so added, quashed all the proceedings at the trial as between them and the plaintiff, affirming the decree against the original defendants who had not appealed.

A defendant who claims a judgment in reconvention is bound by the provisions of sections 50 and 51 of the Code requiring a plaintiff to specify in a list annexed to his plaint and to produce in court the documents on which he relies, and a document not so specified or produced is not admissible in evidence without the express leave of the court under section 54.

D. C. Kurunegala, No. 20. PUNCHIRALA v PUNCHIRALA 84

23—*Civil Procedure—Proctor—Petition of appeal—Signature by one proctor for another—Advocate's signature—Civil Procedure Code, section* 755.

A petition of appeal of a defendant, commencing—"The petition of appeal of the defendant by his proctor" who was named—was signed "for" that proctor by another and was also countersigned by an advocate.

Held that the signature of one proctor for the other was bad, but that the petition of appeal having also been signed by an advocate fulfilled the requirements of section 755 of the Civil Procedure Code.

D. C. Colombo, No. C 2,273. ASSAUW v BILLIMORIA 86

24—*Appeal—Order under Small Tenements Ordinance,* 1882—*Appealable time—Mode of reckoning—Practice—Notice to quit—Ordinance No.* 11 *of* 1882, *section* 8—*Civil Procedure Code, section* 754.

An appeal against an order made under the Small Tenements Ordinance, 1882, must be lodged within five days of the order, and such time must be reckoned in the manner prescribed for appeals from courts of requests by section 754 of the Civil Procedure Code.

In the case of an ordinary monthly tenancy from month to month, a notice given on January 30 and requiring the tenant to quit "at the end of February next"—

Held a good notice.

C. R. Colombo, No. 616. BABAPULLE v. DOMINGO 96

25—*Claim in execution—Order conclusive to what extent—Claim disallowed as too late—Vendee of claimant—Civil Procedure Code, sections* 242, 243, 244, 245, and 247.

An order made under section 245 of the Civil Procedure Code, disallowing a claim to land seized in execution, is conclusive against the claimant, not only as to possession, but as to title, unless within fourteen days he institutes an action to establish his right to the land. Such order is equally conclusive against any subsequent transferee from the claimant, and is a bar to any action by such transferee for the recovery of the land.

So *held* by BURNSIDE, C. J., and WITHERS, J.

Per LAWRIE, J.—The order is conclusive only in respect of the particular seizure made, and as between the claimant and the purchaser under such seizure. If such seizure be released, the order will not estop the claimant from again asserting a right against a new seizure.

D. C. Badulla, No. 246. MENACHY v. GNANAPRACASAM 97

26—*Practice—Action order to abate—Case "struck off"*—Res Judicata—Lis pendens—*Minor, conveyance of land by—Repudiation—Prescription—Interruption by previous action—Civil Procedure Code, sections* 402, 403.

An action, instituted before the date when the Civil Procedure Code came into operation, was after that date "struck off, no steps having been taken for more than year and a day".

A subsequent action having been brought on the same cause of action—

Held that the "striking off" of the previous action did not amount to an order abating the action, under section 402 of the Code, and was therefore no bar, under section 403, to the new action.

The owner of certain land gifted it by deed to his minor son B, and died in 1873, when administration was taken out to his estate. The administrator sold and conveyed the land to the defendant in 1876 and put him in possession. B, still being a minor, in 1881 conveyed the land to defendant in confirmation of the administrator's conveyance, but in 1884, after attaining majority, conveyed it to the plaintiff, without however executing any express repudiation of his previous conveyance. B's conduct in the administration proceedings, during his minority, was such as in the opinion of the court estopped him from questioning the administrator's title.

In an action of ejectment—

Held that B's conveyance of 1881 was not void, but voidable only by B by express repudiation after attaining majority, and that the mere execution of the conveyance to plaintiff did not amount to such repudiation, and plaintiff's title therefore failed.

D. C. Kegalle, No. 128. SIRIWARDENE v. BANDA 99

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27.—*Civil Procedure—Testamentary action—Judicial settlement—Administration of estates of persons dying previous to the Code—Civil Procedure Code, Chapter* LV., *sections* 725, 726.

The provisions of Chapter LV. of the Civil Procedure Code relative to the judicial settlement of an executor or administrator's account do not apply to the estates of persons who died previous to the Code coming into operation.

Semble, per WITHERS, J., that under the Code one of several joint administrators, who is also one of the next of kin of deceased, may petition for the judicial settlement of accounts by the other administrators as well as himself, but, where the joint administrators have filed their final accounts, one of them cannot compel them to exhibit their accounts over again without disclosing material *prima facie* probative of errors in those accounts.

D. C. Colombo (Testamentary) No. 5,001. In the matter of the estate and effects of LANSEGEY ANDRIS PERERA DHARMAGUNAWARDANE 105

28.—*Civil Procedure—Decree for possession of property—Resistance to execution—Resistance by person other than judgment-debtor—Petition of complaint, requisites of—Investigation of claim—Civil Procedure Code, sections* 325, 326, 327.

A petition, presented under section 325 of the Civil Procedure Code, complaining of resistance to a proprietary decree, although it is required by section 327 to be registered and numbered as a plaint in an action, need not contain all the requisites of a plaint, such as disclosing a cause of action against the respondents. No formal pleadings need be filed, but the court should, upon the petition being presented, proceed to investigate the respondent's claim as if an action had been instituted against him by the decree-holder.

D. C. Mannar, No. 8,231. DOMINGU v. SANDARASEKERE 108

29.—*Civil Procedure—Decree* nisi—*Decree absolute for default—Appeal—Civil Procedure Code, sections* 86, 87.

No appeal lies from a decree *nisi* for default of appearing or answering, nor from any order making such decree absolute on the ground either of defendant's failure to appear to shew cause against it or of his not shewing sufficient cause. If such decree be made absolute on the former ground, the defendant may within a reasonable time move the court to set it aside on proof that he was prevented from appearing to the decree *nisi* by reason of accident or misfortune, or by not having received due information of the proceedings, and upon refusal of his application may appeal. But if the defendant appear in due time and shew cause against the decree *nisi* and the same be made absolute, the defendant has no further remedy by appeal or otherwise.

D. C. Badulla, No. 370. NACHCHIAPPA CHETTY v. MUTTOO KANKANI .. 110

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30.—*Practice—Decree for immediate payment of claim—Subsequent application for payment by instalments—Civil Procedure Code, section* 194.

Where a decree has been once entered for the payment of a sum of money, it is not competent for the court to vary the decree by subsequent order allowing the amount of the decree to be paid by instalments.

C. R. Kandy, No. 1,668. CARPEN v. NALLAN 111

31.—*Civil Procedure—Dormant judgment—Revival—Judgment entered before the Code came into operation—Prescription—Ordinance No.* 22 *of* 1871, *section* 5—*Civil Procedure Code, sections* 2, 337, 347.

Judgments passed before the Civil Procedure Code came into operation are not governed, on the question of limitation, by section 337 of the Code, but by the previously existing law.

D. C. Kalutara, No. 36,247. WIJESEKERA v. JAYASURIA 112

32.—*Civil Procedure—Appeal—Deposit of costs of serving notice of appeal—Limit of time for making such deposit—Civil Procedure Code, section* 756.

The deposit of a sum of money, under section 756 of the Civil Procedure Code, to cover the expenses of serving notice of the appeal on the respondent, must be made within 20 days, and, in the case of a court of requests, within 14 days from the date of the decree or order appealed against, and such deposit is a condition precedent to the right of prosecuting and appeal.

D. C. Colombo, No. C 2,328. HENDERSON v. DANIEL. 123

33.—*Civil Procedure—Appeal to Privy Council—Application for certificate—Security for costs of hearing in review—When and how given—Civil Procedure Code, section* 783.

The nature, amount, and sufficiency of the security for costs to be given by an appellant, upon his application for a certificate under section 781 of the Civil Procedure Code preparatory to appeal to the Privy Council, must be determined by the Supreme Court upon the appellant's petition after due notice to the respondent, and the mere deposit of a sum of money with the registrar by way of such security is insufficient, unless it be received with the consent of the respondent.

D. C. Galle, No. 55,354. ISMAIL LEBBE v MOHAMADO CASSIM.

D. C. Colombo, No. C 1,251. JACKSON v THE COLOMBO COMMERCIAL CO. .. 124

33.—*Civil Procedure—Replication, necessity for—Pleading—Settlement of issues—Civil Procedure Code, sections* 79, 813.

Under the Civil Procedure Code there is no necessity for a replication to any new matter in the answer, but such new matter will be taken as denied, or if the plaintiff desires to question its sufficiency as an answer to the declaration, he may at the trial have an issue settled by the court on the point.

D. C. Kandy, No. 5,619. LOKUHAMY v SIRIMALA 125

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35.—*Civil Procedure—Appeal to Privy Council—Final or definitive judgment—Amount involved—Civil right—Decree for damages not yet assessed—Ordinance No. 1 of 1889, section 42—Civil Procedure Code, sections 780, 781—Inventions Ordinance, No. 6 of 1859, section 34.*

By section 52 of the Charter of Justice, 1833, re-enacted in section 42 of the Courts Ordinance, 1889, an appeal to Her Majesty in Her Privy Council is given in any civil suit against any final judgment, decree, or sentence of the Supreme Court, or against any rule or order having the effect of a final or definite sentence, subject to the following rules: *first*, that such judgment, decree, sentence, rule, or order shall first be brought by way of review before the Supreme Court collectively; *secondly*, that any such judgment, decree, sentence, or order in review shall be given or pronounced for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000, or shall involve directly or indirectly the title to property or to some civil right exceeding that value; and *thirdly*, that the person aggrieved by such judgment, decree, order, or sentence in review shall within 14 days apply to the Supreme Court by petition for leave to appeal.

Chapter LXIII., secti n 779, of the Civil Procedure Code enacts that subject to the provisions of the Courts Ordinance, 1889, a party may appeal against any final judgment, decree, or sentence of the Supreme Court, or against any rule or order having the effect of a final or definitive judgment, decree, or sentence; and (section 780) that whoever desires to appeal under this Chapter must apply within two calendar months by petition to the Supreme Court to have the judgment, decree, sentence, rule, or order against which he is desirous so to appeal brought before the Supreme Court collectively by way of review, such petition (section 781) stating the grounds of appeal and praying for a certificate either that, as regards amount, or value, and nature, the case fulfils the requirements of section 42 of the Courts Ordinance, 1889, or that it is otherwise a fit one for appeal to Her Majesty in Council. The person aggrieved by the judgment, decree, order, or sentence in review shall (section 783), if he desires to appeal, apply by petition within fourteen days for leave to appeal.

Held by BURNSIDE, C. J., and LAWRIE, J. (*dubitante* LAWRIE, J.) that the limitations as to finality and value imposed by the above provisions applied as well to the original judgment of the Supreme Court as to that pronounced in review.

In an action for the infringement of a patent, a judgment of the Supreme Court, holding that plaintiff's patent had been infringed and granting an injunction, but directing an enquiry as to damages, which had not yet been assessed—

Held not to satisfy the requirements of the above enactments either as to finality or value, and to be therefore not appealable.

Per BURNSIDE, C. J.—The words in section 781, "or that it is otherwise a fit one for appeal to Her Majesty", have probably crept into the Code through inadvertency, and not through any deliberate intention to confer on the Supreme Court an unlimited discretion to allow such appeals.

D. C. Colombo, No. C 1,251. JACKSON v. THE COLOMBO COMMERCIAL CO. .. 127

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36.—*Civil Procedure—Death of sole plaintiff—Substitution of minor heirs—Application for appointment of next friend, requisites of—Irregularity.*

In the case of the death of a plaintiff in an action, the application for the substitution of the next of kin as plaintiffs in the room of the deceased plaintiff and for the appointment of a next friend of the next of kin, being minors, may properly be made in one petition.

C. R. Galle, No. 1,183. DON LOUIS v. BASTIAN. 137

37.—*Civil Procedure—Co creditors—Bond in favor of several persons—Action by one to recover his share of the debt—Plaint—Civil Procedure Code, section 17.*

It is open to one of several joint mortgagees to sue on the bond for his share of the amount due, by making his co-mortgagees defendants to the action, if they refuse to join him as plaintiffs. *D. C. Galle No.* 253, 1 C. L. R. 85, followed.

D. C. Kegalle, No. 108. RANMENIKA v. VANDERPUT. 138

38.—*Civil Procedure—Claim in execution—Order disallowing claim—Claimant not leading evidence—Action brought to set aside order on claim—Practice—Costs—Civil Procedure Code, section 247.*

A claimant, although he has not appeared or led any evidence at the investigation in support of his claim, can, in the event of the claim being disallowed, bring an action under section 247 of the Code to establish the right which he claims to the property. But in such case the plaintiff, although successful, must pay the defendants' costs.

D. C. Galle, No. 1,172. SILVA v. WIJESINHA. 143

39.—*Civil Procedure—Resistance to execution of proprietary decree—Writ of possession—Party put in possession under writ subsequently dispossessed—Civil Procedure Code, sections 325 and 326—Jurisdiction.*

Section 325 of the Civil Procedure Code enacts that if the officer charged with the execution of a writ for delivery of possession of property is resisted or obstructed by any person "or if after the officer has delivered possession" the judgment creditor is hindered by any person in taking complete and effectual possession" the judgment creditor may complain of such resistance or obstruction by petition, and section 326 and the following sections provide for dealing with the matter of such petition.

Where a judgment-creditor, who had been duly put in possession of certain land under a proprietary decree on June 3, 1892, and had subsequently on September 21, 1892, been dispossessed again by the judgment-debtor, complained to the court by petition—

Held that the judgment-creditor was not entitled to proceed under the above sections of the Code.

Per LAWRIE, J., on the ground that although in case of disturbance shortly after delivery of possession the court has the power to deal with a complaint under the above sections with the

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view of compelling complete and lasting obedience to its decree, yet where, as in the present case, the disturbance takes place several weeks after, the only remedy is by a new action.

Per WITHERS, J., on the ground that the hindrance in taking complete possession contemplated by section 325 is one occurring at the time of and not at any time after delivery of possession, and should at all events follow as instantly upon delivery of possession as the circumstances of the case will permit.

D. C. Kandy, No. 4,684. MENIKA v. HAMY. 145

40.—*Civil Procedure—Action in ejectment—Adding of parties—Adjudication of questions involved in the action—Irregularity—Form of order to add parties—Practice—Appeal Revision—Civil Procedure Code, sections* 18 *and* 19.

In an action in ejectment, where the defendants pleaded title in themselves and others whom they referred to in the answer, the court, when the action came on for trial, considered that the presence of the persons named in the answer was necessary to enable the court to adjudicate upon all the questions involved in the action, and ordered the case to be struck off the trial roll for the purpose of adding them as defendants—

Held, that no parties other than the original parties were necessary to enable the court effectually and completely to adjudicate upon and settle any question involved in the action, and that the order to add the persons named in the answer was improper.

Held, further, that, when the order is properly made to add new parties as defendants, the form of such order should be one directing the plaint and summons to be amended by the addition of their names as defendants and directing the plaintiff to cause those parties to be duly served with copies of the summonses and of the plaint further amended as plaintiff might be advised within a certain time from the date of the order, and that it is irregular to order the case to be taken off the trial roll for that purpose.

D. C. Kalutara, No. 521. WIRARATNE v. ENSOHAMY 157

41.—*Civil Procedure—Action by minor—Appointment of next friend—Application by way of summary procedure—Defendant to the action—Respondent—Civil Procedure Code, sections* 375, 377, 478, 481, 492, 494, *and* 502.

In an application for the appointment of a next friend of a minor for the purpose of instituting an action on behalf of the minor, the intended defendant need not be made respondent to the petition notwithstanding the provision to that effect in section 481 of the Civil Procedure Code, which only applies to cases where a petition for a minor to be represented by a next friend is made in the course of or as incidental to an action.

When an action is brought on behalf of a minor without the due appointment of a next friend, the proper course for the defendant is not to file answer, but at once to move the court to have the plaint taken off the file.

D. C. Chilaw, No. 401, MOHAMMADO UMMA v. CADER MOHIDEEN 163

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42.—*Receiver—Civil procedure—Appointment of receiver—Action for lan between co-owners—Right to or interest in land—Preservation of property—Protection of pecuniary interest of owners—Civil Procedure Code, section* 671.

Plaintiff and defendant became purchasers of a crown land at an auction sale. After the purchase the defendant dug certain plumbago pits in the land and began to take out plumbago, and the plaintiff instituted this action, claiming his share of the plumbago and praying for a writ of sequestration. Subsequently, but before the summons was issued to defendant, plaintiff applied under Chapter L of the Civil Procedure Code for the appointment of a receiver, alleging that defendant was continuing the mining operations and appropriating the plumbago to himself, and that the defendant not being possessed of property the plaintiff would not be able to recover the value of his share of the plumbago. The court granted the application. At the date of the action the crown had not made any grant to either plaintiff or defendant, but at the date of the order of the court appointing a receiver a grant had been made out in favour of the plaintiff and defendant, though not delivered.

Held, that the order appointing a receiver was improperly made—

By LAWRIE, J., on the grounds (1) that summons not having been issued the action had not commenced at the date of the order, and, therefore, the land in question was not the subject of an action in respect of which a receiver could be appointed under the Civil Procedure Code; (2) that a receiver could be appointed for the protection of the property itself and not of the pecuniary interest of the applicant, and it not being shown that the defendant was mismanaging the property, the reason for the appointment of a receiver did not exist; and (3) that in the case of co-owners, a receivership ought not to be allowed any more than an injunction, except in the case of waste, which was not shown here.

By WITHERS, J., on the ground that the application being one incidental to the main action and not a separate independent matter of summary procedure, it was incumbent on the plaintiff to shew that not merely at the date of the order but at the date of the institution of the action he had a right to or interest in the land within the meaning of section 671 of the Civil Procedure Code, and as at the date of the action the crown grant had not been made, the plaintiff had then had no such right to or interest in the land.

D. C. Galle, No. 1,020. SEYADORIS v. HENDRICK 167

43.—*Civil Procedure—List of documents relied on by a plaintiff—Requisites of such list—Admissibility of documents—Civil Procedure Code, section* 51*—Pleading—Action in ejectment—Particulars of title—Plaint.*

The list of documents relied on by a plaintiff in an action and required to be annexed to the plaint by section 51 of the Civil Procedure Code should succintly state the names of the parties, dates, and nature of the instruments and other particulars sufficient to enable the defendant to understand what is going to be proved and to make necessary inquiries relating to them; and there must also be shewn a clear connection of

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the documents with the plaintiff and the subject matter of the action. Otherwise the documents referred to in such list are not admissible in evidence. So *held* by LAWRIE and WITHERS, JJ.

In an action for title to land and recovery of possession—

Held by BURNSIDE, C.J., and WITHERS, J., that where the plaintiff has a present fee simple absolute in the premises it is sufficient to state that fact in the plaint and it is not necessary to plead all the steps in the title.

But *held* by WITHERS, J., that if a plaint alleges that the estate once in another has now vested in the plaintiff, it must state the name of that other and the date and nature of the conveyance. If the plaintiff has only a particular estate as distinct from one in fee simple or if in the case of an estate in fee simple it is not yet in possession, the steps in the title must be indicated and the nature of the instruments passing it must be stated.

D. C. Batticaloa No. 108. 9 S. C. C. 185, 1 C. L. R. 75 referred to and commented on.

D. C. Colombo, No. C 1,143. ABUBAKAR v. PERERA 170

44.—*Civil Procedure—"Summary procedure"—Petition—Civil Procedure Code, sections* 91, 282.

The "summary procedure" provided by Chapter XXIV. of the Civil Procedure Code can only be adopted in cases to which it is expressly made applicable by the Code.

An application by an execution-creditor for an order confirming a sale under section 58 of the Fiscals Ordinance, 1867—

Held, to have been properly made by motion, under section 91 of the Civil Procedure Code.

D. C. Badulla, No. 26,776. PITCHA BAWA v. MEERA LEBBE 174

45.—*Civil Procedure Assignment of judgment—Substitution of assignee as plaintiff—Discretion of court—Non service of summons—Practice—Civil Procedure Code, section* 339.

Under section 339 of the Civil Procedure Code, the court has a discretion to grant or refuse the application of an assignee of a decree to have his name substituted in the record of the decree for that of the original plaintiff, and to have the decree executed, but such discretion should be exercised reasonably and on sufficient material.

Non service of the original summons and decree *nisi* on the defendant is not of itself a good case for disallowing such an application.

D. C. Galle, No. 549. PUNCHI APPU v. BABANCHI 177

46.—*Civil Procedure—Realisation of assets—Seizure of money due to judgment-debtor—Several decree holders—Claim to concurrence—Civil Procedure Code, section* 352, *and sections* 230, 279.

The mere seizure by the fiscal of money due to a judgment-debtor in the hands of a third party is not "realisation" of the asset within the meaning of section 352 of the Civil Procedure Code, and it is open for other creditors who have applied at that stage for execution of money decrees against the same judgment-debtor to claim in concurrence.

D. C. Ratnapura, No. 267. SOYZA v. WIRAKOON 178

47.—*Civil Procedure—administration—Rights of widow to administration—Next of kin—Conflict of claims—Enquiry as to assets—Costs—Civil Procedure Code, section* 523.

A widow is under section 523 of the Civil Procedure Code, entitled in letters of administration to her deceased husband's estate in preference to the next of kin, notwithstanding that the court is satisfied, on a conflict of claims to administration between her and one of the next of kin, that she has been a party to an attempt to deprive the estate of some of its assets.

Any enquiry as to whether any particular asset is part of the estate and as to the conduct of the widow with reference thereto is premature at the stage at which such conflicting claims to administration are considered.

D. C. Colombo (Testamentary) No. C 213. In the matter of the estate of S L. M. AHAMADO LEBBE MARIKAR deceased.

MAHAMADO ALI v. SELLA NATCHIA ... 179

48.—*Civil Procedure—Appeal—Motion to strike out a count in the plaint—Proxy—Proctor's authority to sue*

An order disallowing a motion with liberty to renew it at a future time is not an appealable order.

Where a proxy authorized the proctor to sue on a promissory note, but the plaint, when filed also contained money count for the consideration of the note—

Held, by WITHERS, J., that the proxy was a sufficient authority to introduce the money count in the plaint.

D. C. Colombo, No. C3,677. MUTTIAH v. PERUMAL CHETTY 180

49.—*Civil Procedure—Probate—order nisi—Costs—Appeal Form of objection to decree by respondent—Civil Procedure Code, Chapter xxxviii, and sections* 758 *and* 772. —

A respondent to an appeal, who wishes under section 772 of the Civil Procedure Code to take an objection to the decree which he might have taken by way of appeal, must furnish to the Supreme Court before the day of hearing a statement of the grounds of objection set forth in duly numbered paragraphs. It is not sufficient merely to serve on the appellant notice that certain specific objections will be taken.

Upon the day for shewing cause against an order *nisi* made under section 526 of the Civil Procedure Code, the respondent shewed as cause that no copy of the petition had been served together with the order *nisi*, as required by section 379. The district court held that the petition should have been so served, but, without discharging the order, enlarged the time for shewing cause and directed the petition to be served in the meantime, making each party bear his own costs, as the practice of the court had been not to serve the petition, and the question was now raised for the first time.

Held that the court had a discretion to en-

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large the time instead of discharging the order, and that such discretion had been properly exercised.

Held also, that the respondent, having successfully resisted making the order absolute, was entitled to his costs, and there was no sufficient reason for departing from the rule that costs follow the event.

D. C. Colombo (Testamentary) No. 284 C. In the matter of the estate and effects of ALEEMA UMMA deceased.
NEYNA v. NEYNA.
D. C. Colombo (Testamentary) No. 285 C. In the matter of the last will and testament of FERNANDO deceased.
FERNANDO v. FERNANDO ... 181

49.—*Mortgage—Mortgagee's decree—Seizure—Claim—Action to set aside claim—Validity of mortgagee's decree as against claimant—Rules and Orders of 1833—Civil Procedure Code, section 247.*

In an action to recover a mortgage debt, instituted prior to the enactment of the Civil Procedure Code, the plaint prayed for a mortgagee's decree declaring the mortgaged land specially bound and executable for the debt. The summons to defendant, and the rule *nisi* for default of appearance to the summons, only called upon defendant to answer the money claim on the bond, but did not mention the prayer for a mortgagee's decree. Judgment was passed by default of appearance, with a special mortgagee's decree as prayed.

Held, that the mortgagee's decree was regularly obtained, and so long as it remained of record bound the land and could not be questioned by any party claiming the land by title acquired subsequent to such decree.

D. C. Colombo, No 1,473 C. RUDD v. LOOS. 188

51.—*Civil Procedure—Claim in execution—Mortgage decree, enforcement of—Claimant's title acquired subsequent to mortgage—Action under section 247 of the Civil Procedure Code—Hypothecary action—Roman Dutch Law—Practice.*

In the case of a mortgage, where a person in possession of the property upon a title acquired under the mortgagor subsequently to the mortgage is not made a party to the mortgage suit, such person can rightfully claim the property when seized in execution under a mortgage decree obtained by the mortgagee against the mortgagor.

An action under section 247 of the Civil Procedure Code, so far as regards an execution-creditor, is limited to the purpose of having it declared that the property seized is liable to be sold in execution of his decree. Consequently such action is not available the holder of a mortgage decree against a successful claimant, whose title, though derived from the mortgagor, is not subject to or affected by the mortgage decree, but in order to realise the mortgaged property in the hands of such claimant, the decree-holder must bring a distinct and separate hypothecary action as contemplated by the Roman Dutch Law.

D. C. Kalutara, No. 626. MORAES VEDEBALE v. ANDRIS APPU 191

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52.—*Civil Procedure—Action against company—Recognised agent—Power of manager to appoint proctor—Authority of proctor to sign petition on behalf of company—Appealable order—Authority of proctor to sign petition appealed—Ordinance No. 22 of 1866—Civil Procedure Code, sections 24, 25, 27, 470, 471, 755*

A joint stock company, as a corporation aggregate, cannot appear in an action, and is consequently not entitled to take advantage of the provisions of section 24 of the Civil Procedure Code as to "recognised agents", but its plaint or answer must (under section 470) be subscribed on behalf of the company by any member, director, secretary, manager, or other principal officer thereof, who is able to depose to the facts of the case. Where such company appears to an action by an attorney, such attorney must be appointed under its seal, or be appointed by an agent empowered under the company's seal to bring or defend an action.

A joint stock company was sued as defendant in an action, and an *interim* injunction obtained which the company applied to dissolve. The application was made through a proctor appointed by a person professing to be the recognised agent and manager of the company. The district court ruled that the recognised agent could not appoint a proctor, whereupon the agent himself signed the petition, which was then partly heard. The company appealing against the above ruling—

Held, that such ruling once and for all terminated the question before the court and was therefore appealable.

Held also, that the company's application and the proxy to their proctor not having been taken off the file or revoked, such appeal was properly filed by such proctor.

D. C. Colombo, No. 3,762 C. THE SINGER MANUFACTURING CO. v. THE SEWING MACHINES CO., LTD. 200

53.—*Civil Procedure—Assignment of judgment—Action on assignment—Application for substitution of assignee as plaintiff—Cause of action—Civil Procedure Code, section 339.*

A judgment obtained against the present defendants in a previous action was assigned to the present plaintiff by the judgment creditor. An application by the assignee to be substituted plaintiff in the original action, which was opposed by the defendants on the ground of the deed of assignment being a forgery, was disallowed by the court, whereupon the assignee brought the present action on the assignment to recover the amount of the assigned judgment.

Held, that the action was well brought—

By LAWRIE, A. C. J., on the ground that although the assignee of a judgment could not in the first instance bring a separate action on the assignment, yet he could do so, when he had been prevented by defendant's opposition from being substituted plaintiff in the original action and proceeding to execution therein.

By WITHERS, J., on the ground that the assignee could sue in a separate action for the judgment debt, subject only to his being depriv-

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ed of costs or having to pay costs if such action was unnecessarily or vexatiously brought.

D. C. Kalutara, No 571. WEERAWAGOE v. FERNANDO 207

See BANKER AND CUSTOMER.

Claim in execution.

See CIVIL PROCEDURE, 14.
CIVIL PROCEDURE, 25.
CIVIL PROCEDURE. 37
CIVIL PROCEDURE, 51.

Clerk.

Clerk—Wrongful dismissal—Domestic servant—Notice—Action for a month's wages in lieu of notice.

A clerk as such is not a "domestic servant", and is not entitled before dismissal to a month's notice or a month's wages, unless the terms of his engagement were on the footing of the custom as to the month's notice or month's wages usually governing the contracts of domestic servants with their employers.

C. R. Gampola, No. 649. WIJESINGHE v. RYAN... 93

See CRIMINAL LAW, 7.
CRIMINAL LAW, 12.

Commuted payment.

See CIVIL PROCEDURE, 13.

Company, action against.

See CIVIL PROCEDURE, 52.

Compensation.

See CRIMINAL PROCEDURE, 4.

Compounding offence.

See CRIMINAL LAW, 3

Concurrence.

See CIVIL PROCEDURE, 46.

Continuing offence.

See CRIMINAL LAW, 5

Co-owners, action between.

See CIVIL PROCEDURE, 42.

Corporation, action by.

See CIVIL PROCEDURE, 6.

Costs.

See CIVIL PROCEDURE, 3.
CIVIL PROCEDURE, 21.
CIVIL PROCEDURE, 32.
CIVIL PROCEDURE, 33.
CIVIL PROCEDURE, 38.
CIVIL PROCEDURE, 47.
CIVIL PROCEDURE, 49.
PRACTICE, 7.

Criminal Law.

1.—*Criminal Law—Robbery—Theft—"Dishonest" taking—Wrongful loss—Penal Code, sections* 21, 22, 366. 379, 380.

To constitute the offences of theft or robbery under the Penal Code, the taking of the property must be with the intention of causing permanent and not merely temporary deprivation, and such intention must exist at the time of the taking.

Where, therefore, the accused person had, in a moment of anger, forcibly taken from the complainant and carried away a bill-hook with which the complainant had struck at a dog belonging to the accused—

Held, that the accused in taking away the bill-hook had not committed the offence of robbery within the meaning of the Penal Code, in the absence of evidence of such subsequent conduct on his part as showed that he originally had the intention of permanently depriving the complainant of the article.

D. C. Criminal, Kurunegala, No. 2,446. THE QUEEN v. KANAGASABAY ... 14

2.—*Theft—Claim of Right—Bona fides—Colourable title—Criminal law.*

When a person charged with theft sets up a claim of right to the property, it is not necessary for such defence to prove that he had even a colourable title to the property. It is sufficient if he *bona fide* believed the property to be his.

P. C. Gampola, No. 11,442. SAMINADEN PULLE v. CORNELIS APPU. 22

3.—*Criminal law—Voluntarily causing hurt—Compounding—Withdrawl of case—Power of magistrate to refuse—Ceylon Penal Code, section* 314—*Criminal Procedure Code, section* 355.

A party complainant has a right at any time before trial to compound an offence under section 355 of the Criminal Procedure Code and to withdraw the charge, but after the defendant has pleaded it is competent to the police magistrate to refuse to allow the charge to be withdrawn, notwithstanding the fact of the offence having been compounded.

P. C. Kalutara, No. 13,078. LOUIS v. DAVIT 57

4.—*Criminal law—Misconduct in a "public place" while intoxicated—Police station—place to which public have access—Ceylon Penal Code, sections* 343, 488.

A police station is not a "public place" within the meaning of section 488 of the Ceylon Penal Code.

P. C. Gampola, No. 12,946. PIETERSZ v. WIGGIN 111

5.—*Criminal Law—Encroachment on street—Continuing offence—Institution of plaint—Limitation Ordinance No. 7 of* 1887, *sections* 175, 283.

The offence, created by section 175 of the Municipal Councils Ordinance, 1887, of erecting an obstruction or encroachment on a street, is a continuing offence so long as the encroachment is maintained. and a prosecution is not barred by section 283 if not instituted within three months from the date when the encroachment was first made.

M. C. Colombo, No. 5,104. AKBAR v. SLEMA LEBBE 127

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6.—*Criminal law—Criminal intimidation—Injury—Threat of procuring imprisonment—Ceylon Penal Code, sections 43, 483, 486—Charge—Criminal procedure.*

Section 483 of the Ceylon Penal Code enacts:—"Whoever threatens another with any injury to his person, reputation, or property.......... with intent to cause that person..........to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

Section 43 defines "injury" as "any harm whatever illegally caused to any person in body, mind, reputation, or property."

Held that a threat of procuring by means of a false case a person's imprisonment if he should make a certain complaint was not a threat of an injury contemplated by the Penal Code, inasmuch as imprisonment by a competent court of justice is not harm illegally caused to the person undergoing it.

P. C. Mannar, No. 424. CASIN v. KALIVA.. 133

7.—*Criminal law—Breach of trust—Clerk or servant—General deficiency in accounts—Charge—Ceylon Penal Code, sections 388, 391—Evidence.*

Mere failure to pay over sums received by a clerk or servant for his employer does not in itself constitute the offence of criminal breach of trust under the Ceylon Penal Code; and in a charge of breach of trust against a clerk or servant it is not sufficient to prove a general deficiency in accounts, but there must be evidence of some specific sum having been misappropriated or converted to the defendant's use.

P. C. Colombo, No. 22,645. BUCHANAN v. CONRAD 135

8.—*Criminal law—Mischief—Wrongful loss—Intent—Proof—Ceylon Penal Code, section 408.*

In a prosecution for mischief it is not incumbent on the prosecutor to prove that the accused intended to cause or knew that he was likely to cause loss or damage to any known individual provided the act complained of was a wilful act committed in respect of property of which there would naturally be some owner.

P. C. Matara, No. 17,279. DISSAN v. SUBEHAMY 142

9.—*Criminal law—Using criminal force—Intent—Act done in defence of property—Public servant—Ceylon Penal Code, sections 88, 90, 92, 343.*

The complainant, a fiscal's officer charged with the execution of a writ against a certain person, came to the defendant's house and was proceeding to seize certain moveable property as belonging to the execution-debtor when the defendant ran up and claiming the property as his own prevented the seizure by pulling the complainant by the hand to the outer verandah.

Held that the above facts did not disclose any intent on defendant's part to cause injury, fear, or annoyance to the complainant, and the defendant therefore did not commit the offence of using criminal force under section 343 of the Ceylon Penal Code.

P. C Galle, No. 8,610. GOONEWARDENE v. KADER.. 149

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10.—*Criminal law—Mischief—Cutting and wounding a trespassing animal—Ceylon Penal Code, section 408—Evidence.*

Cutting a bull with a katty while trespassing on a man's land, even when coupled with the fact of ill-feeling existing between the accused person and the owner of the animal,—

Held not necessarily to amount to the offence of mischief within the meaning of section 408 of the Ceylon Penal Code.

P. C. Kandy, No. 15,118. RANGHAMY v. BODIA 176

11.—*Criminal law—Criminal trespass—Charge—Intent to commit an offence—Mischief—Evidence—Ceylon Penal Code, sections 38, 409, 427, and 433.*

In a prosecution for criminal trespass under section 427 of the Penal Code, where the offence consists in an entry upon property with intent to commit an offence, the offence which the defendant is alleged to have intended to commit must be specified in the charge.

The plucking of such fruits as coconuts or jak from trees does not amount to the offence of "mischief" as defined in section 408 of the Penal Code, inasmuch as such plucking does not cause the destruction of the trees or fruits or any such change in them or in their situation as destroys or diminishes their value or affects them injuriously.

P. C. Colombo (Additional), No. 490. ANDREE v. COOREY.. 203

12.—*Criminal breach of trust—Public servant—Duty—Implied contract—Head clerk of the District Road Committee—Ordinance No. 10 of 1861—Ceylon Penal Code, sections 388, 389, 391, 392.*

The offence of criminal breach of trust by a public servant and punishable under section 392 of the Ceylon Penal Code is not committed in respect of monies received by the public servant on account of his employer and misappropriated by him, unless it is his duty in his capacity as such public servant to receive such monies.

But where money is actually received by him there is an implied obligation on his part to pay it, and misappropriation thereof by him comes within the definition of the offence of criminal breach of trust under section 388 of the Ceylon Penal Code and is punishable under section 389.

D. C. Crim. Puttalam, No. 23. THE QUEEN v. COSTA.. 205

See FOREST ORDINANCE, 5.

Criminal Procedure.

1.—*Criminal Procedure—Appeal—Non-summary case—Order of discharge—Appeal by the complainant—Criminal Procedure Code, sections 405 and 406.*

An appeal lies at the instance of a complainant from an order discharging the defendant in a case not summarily triable, but the Supreme Court would not in general interfere on such appeal and would leave the question of committing the defendant for trial to be dealt with by the Attorney-General's Department.

P. C. Kandy, No. 12,481. KALU BANDA v. PUSUMBA.. 1

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2.—*Criminal Procedure—Sentence—Imprisonment and fine—Warrant of distress—Further imprisonment in lieu of fine—Jurisdiction—Criminal Procedure Code, sections* 17, 378.

Where an accused person is sentenced to a fine, if the court desires to award any term of imprisonment in default of payment of the fine under section 17 of the Criminal Procedure Code, such award should be made at the time of and as part of the original sentence.

Where the sentence was one of fine without any alternative term of imprisonment, and no property being found upon distress issued, the court then imposed a term of imprisonment in lieu of the fine.

Held that the second sentence of imprisonment was illegal.

D. C. Badulla (Criminal) No. 4,130. THE QUEEN v. VIDANE 31

3.—*Criminal Procedure—Witness—Inability to execute bond for appearance before court—Remand—Criminal Procedure Code, sections* 181, 182.

Inability of a witness to execute a bond for appearance before a superior court under section 181 of the Criminal Procedure Code is not a ground for remanding him to jail.

P. C. Nuwera Eliya, No. 6,394. THE QUEEN v. FLYNN 49

4.—*Criminal Procedure—Compensation—Crown costs—Evidence—Criminal Procedure Code, sections* 222, 223.

A police magistrate is bound to hear all the evidence the complainant may offer in support of the prosecution before he can make an order for compensation and crown costs on the ground of the complaint being frivolous and vexatious.

P. C. Avisawella, No. 11,286. PAULU v. DANIEL 51

5.—*Criminal Procedure—Proclamation—Attachment of property—Confiscation—Criminal Procedure Code, sections* 62, 63, 64.

Before a police magistrate can issue a proclamation under section 62 of the Criminal Procedure Code there must be some sworn information before him that the accused person has absconded or is concealing himself.

When attachment of property is made under section 63 of the Criminal Procedure Code the property becomes forfeited to the Crown only at the expiration of the twelve months mentioned in section 64, but no order of court is necessary in that behalf.

P. C Matara, No. $\frac{15,041}{15,601}$. LEMESURIER v. ABESAKERE 62

6.—*Criminal Procedure—Probation—First Offenders Ordinance,* 1891—*Offence punishable with not more than three years' imprisonment—Voluntarily causing grievous hurt—Power of court to release on probation—Ceylon Penal Code, section* 316—*Criminal Procedure Code, Schedule* II.—*Ordinance No.* 6 *of* 1891, *section* 1.

The Ordinance No. 6 of 1891, which empowers a court to release on probation of good conduct a person convicted of an offence, is expressly applicable only to offences "punishable with not more than three years' imprisonment".

Held that the words "punishable with not more than three years' imprisonment" mean "punishable by the court before which the conviction was obtained".

D. C. Trincomalee (Criminal) No. 2,353. QUEEN v. KRISNEN.. 107

7.—*Criminal Procedure—Appeal by Attorney-General—Petition, how lodged—Forwarding by post—Practice.*

The petition of appeal of the Attorney-General in a criminal case must be lodged in court by the Attorney-General or by some person authorised by him, and the requirements of the Criminal Procedure Code are not satisfied by the transmission of the petition by post.

D. C. Kurunegala (Criminal) No. 2,450. THE QUEEN v. HERAT 118

8.—*Criminal procedure—Charge not summarily triable—Acquittal—Powers of police magistrate—Ceylon Penal Code, section* 317—*Criminal Procedure Code, section* 168.

In a case not summarily triable an order of acquittal recorded by a police magistrate amounts only to a discharge under section 168 of the Criminal Procedure Code and is appealable.

On a complaint against a person for committing grievous hurt under section 317 of the Penal Code, the police magistrate investigated the case, and holding that though the defendant did cause the hurt complained of he acted in self-defence, recorded an order of acquittal—

Held that the police magistrate had no power to deal with the question of self-defence and determine the prosecution, for in a case not summarily triable though he might discharge an accused person if he considered there was no evidence to go to a jury, yet if he found there was such evidence he could not adjudicate upon the worth of any suggested defence but should proceed with the case with a view to committal to a higher court.

P. C. HATTON No. 12,011. MATHES v. SAMSEEDIN 165

9.—*Criminal Procedure—Charge for an offence not summarily triable—Trial for a lesser offence—Riot—Affray—Powers of police magistrate—Consent of defendant—Ceylon Penal Code, sections* 145, 157—*Criminal Procedure Code, section* 242.

Where after evidence an accused is charged by a police magistrate for an offence not summarily triable and is not discharged from the matter of charge, it is not competent for the police magistrate, while such charge is still pending, to formulate another charge for a lesser offence arising out of the same circumstances and to try the accused summarily thereon.

P. C. Nuwara Eliya, No. 7,321. CHRISTIAN v. PEDRIS APPU 197

10.—*Criminal Procedure—Judgment—Offence—Charge—Criminal Procedure Code, section* 372.

The offence for which a person is condemned or of which he is acquitted should be specified

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in the judgment itself as directed in section 372 of the Criminal Procedure Code, and it is not enough to refer in the judgment to the charge.

P. C. Jaffna, No. 10,008. MURUGASU v. ARUMOGAM 79

Crown Costs.

See CRIMINAL PROCEDURE, 4.

Curator.

See CIVIL PROCEDURE, 5.

Custom.

See FISHING, 2.

Cut.

See FOREST ORDINANCE, 4.

Decree nisi.

See CIVIL PEOCEDURE, 29.

Deed of gift.

Settlement—Fidei-commissum—*Deed of gift—Life rent—Joint property—Survivorship—Ordinance No.* 21 *of* 1844—*Construction of deed.*

A deed of gift granted by owners of land to their daughter and son-in-law by way of dowry on the occasion of their marriage purported to "gift and make over to the said two persons in paravani" certain lands and houses. The deed proceeded to provide that the donees "are empowered to possess up to the end of their lives" and that after the death of the donees "the heirs, descendants. executors, and administrators of both of them are empowered to possess for ever and do anything they please with them", and that the donors, "their heirs, descendants, administrators, or executors cannot hereafter exercise any power or lay any claim with respect to" the lands gifted.

Held that under the above gift the donees took only a life estate in severalty with remainder to the children to be born of the marriage.

The daughter, one of the donees, having died intestate and without issue of the marriage—

Held that on her death a half share of the property reverted to the donors, and that neither her administrator nor the surviving donee had any interest in that half.

D. C. Kandy, No. 5,312. KEPPITIPOLA v. BANDARANAYAKE 173

See REGISTRATION, 1.

Dewa Nileme.

See LEASE, 1.

Detinue.

See PROCTOR'S LIEN.

Diga marriage.

See KANDYAN LAW, 2.

District Court, powers of

See CIVIL PROCEDURE, 17.

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Documents, list of

See CIVIL PROCEDURE, 22.

CIVIL PROCEDURE, 43.

Domestic Servant.

See CLERK.

Donatio inter vivos.

Administration—Donatio inter vivos—*Gift taking effect after death of donor—Testamentary dispositon—Settlement.*

A deed of gift after reciting that the donor owned and possessed certain lands by virtue of deeds herewith "delivered" proceeded as follows :—"Whereas I do hereby determine that all the property aforesaid being divided into three, two-third shares thereof should go to my son Kader Mohideen and one-third share to my daughter Sego Umma, I shall during my life-time hold and possess the same, and that after my death the said lands shall become the property of my said two children or their heirs or administrators and that they and their heirs and administrators shall divide the same as herein appointed and uninterruptedly possess the same for ever as their own. . . . . I do hereby further declare that hereafter I cannot revoke this deed."

Held that the above instrument did not amount to a testamentary disposition but was a settlement *inter vivos*, which took effect at once, and that on the death of the donor the value of the property dealt with by the instrument should be excluded in deciding whether the estate of the deceased required administration.

D. C. Chilaw, No. A400. In the matter of the estate of NEINA MOHAMMADO .. 52

Dormant Judgment.

See CIVIL PROCEDURE, 31.

Ejectment.

1.—*Ejectment—Title—Crown grant—Prescription—Possession previous to action.*

In an action of ejectment plaintiffs claimed title by prescriptive possession, and defendant under a Crown grant. Plaintiffs established in evidence that the land had for a series of years been cultivated by private parties, under some of whom they claimed, and that in Government *wattoors* dated 15 and 24 years before action the land had been described as belonging to private parties.

A judgment in favor of the plaintiffs was affirmed by the Supreme Court (CLARENCE, J., dissenting)—

By BURNSIDE, C. J.. on the ground that although it lay upon plaintiffs suing in ejectment to prove their title as against defendant's Crown grant they had established a prescriptive possession even as against the Crown.

By DIAS. J., on the ground that plaintiffs had proved that the land was their own and not Crown property at the date of the grant.

D. C. Colombo, No. 87,427. 8 S. C. C. 31, considered.

D. C. Kegalle, No. 6,371. SELLA NAIDE v. CHRISTIE 43

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2.—*Ejectment—Title to land—Mortgage—Conveyance of land by mortgagor to assignee of mortage decree—Prior sale of land against mortgagor under writ—Judicial sale.*

A mortgagor of a certain land, against whom judgment and mortgage decree had passed in a suit upon the mortgage bond, by a private conveyance, in which the mortgagee joined to signify his consent, sold the land to an assignee of the mortgage decree in satisfaction of the mortgage. Previous to this sale the same land had been sold under a simple creditor's writ against the mortgagor to a purchaser, who duly obtained a fiscal's transfer and entered into possession.

In an action in ejectment by the purchaser under the private conveyance against the purchaser at the fiscal's sale—

Held that the former had no title to the land as against the latter.

D. C. Galle, No. 394. SANDO v. ABEYGOONEWARDANE 91

3.—*Ejectment—Sale of rents, issues, and profits—Right to possession—Assessment for rates—Failure to pay taxes—Legality of warrant of distress—Ordinance No.* 6 *of* 1873 *—Ordinance No.* 18 *of* 1884*—Ordinance No.* 7 *of* 1887, *sections* 127, 133, 139, 151, 159.

For default of payment of certain municipal taxes and rates two warrants were issued for their recovery under the provisions of the Municipal Councils Ordinance, 1887, on January 29, 1890, returnable on March 15; two others on May 20, returnable on July 10; and two others on July 23, returnable on September 15. Under these warrants the plaintiffs' house in respect of which the taxes and rates were due was seized on July 9, and on September 1 the "rents issues and profits" of the house for a period of four years were sold and purchased by the defendant, who entered into possession of the house

In an action of ejectment against the defendant—

Held, by BURNSIDE, C. J., and WITHERS, J., (*dissentiente* LAWRIE, J.) that the sale was invalid, the warrants having expired on their returnable dates, and it being essential to a valid sale that both the seizure and the sale should take place before such returnable dates; and further that a sale of the rents, issues, and profits of land conferred on the purchaser no right to possession as against the owner or any person holding under him, but merely the right to recover any rent accruing from a tenant or occupier, or the value of any profits derived from the land.

Per LAWRIE, J.—The warrant did not expire on their returnable dates, the authority of the officer entrusted with them not being limited by those dates. He was simply required to certify on those dates what he had done by virtue of the warrants. The sale of the rents, issues, and profits conveyed to the defendant the right to demand these from the owner or his tenant in possession, and the defendant having got into peaceful possession ought not to be ejected until the owners tendered or secured to him a fair rent for the four years.

D. C. Kandy, No. 5,368. THE COMMISSIONER OF THE LOAN BOARD v. RATWATTE 114

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See CIVIL PROCEDURE, 40.
CIVIL PROCEDURE, 43.

Evidence.

See CAUSE OF ACTION, 1.
CIVIL PROCEDURE, 2.
CRIMINAL LAW, 7.
CRIMINAL LAW, 11.
CRIMINAL PROCEDURE, 4.
FOREST ORDINANCE, 5.
GAMING, 2.
MUNICIPAL COUNCILS ORDINANCE, 1.
PRESCRIPTION, 2.
PROMISSORY NOTE, 1.

Execution.

See CIVIL PROCEDURE, 3.
CIVIL PROCEDURE, 21.
CIVIL PROCEDURE, 28.
CIVIL PROCEDURE, 39.
CIVIL PROCEDURE, 51.
HUSBAND AND WIFE, 2.
ROAD ORDINANCE.

Executor.

1.—*Executor—Estate of executor—Will disposing of property in one district—Powers of executor as to the property—Probate—Succession* ab intestato*—Sale by executor.*

In the absence of any special restriction in a will excluding from the executor's power any part of the testator's estate, the executor's power extends to the whole of the estate, though if any part of the estate is left undisposed of by the will such part has to be distributed as under an intestacy.

Therefore, a purchaser from the executor of property undisposed of by the will acquires good title as against the heirs or persons claiming under them.

D. C. Kalutara, No. 40,428. SILVA v. PERERA 53

2.—*Executor—Estate of an executor in Ceylon—Specific devise—Title of devisee—Time of vesting—Executor's assent—Notarial instrument—English Law—Roman Dutch Law.*

In a question, under a specific devise of land, as to the necessity of the executor's assent for the validity of the devisee's title—

Held, per BURNSIDE, C. J.—In Ceylon, if a person dies intestate, all his immoveable property passes to his administrator; but if he leaves a will, only such property as is not specifically devised passes to his executor. Lands specifically devised vests in the devisee immediately on the testator's death, by virtue of the devise contained in the will, but the devisee's title is imperfect, the land remaining liable for the testator's debts in due course of administration. The executor's right to resort to property so devised for payment of debts is an interest in land, of which he can divest himself only by deed duly executed.

Per LAWRIE, J.—The title in land specifically devised passes, by virtue of the devise, to the devisee, but that title may be defeated by the

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creditors of the testator or by the executor in the course of realizing the estate for payment of debts. Until the debts are paid the devisee may be required either to relinquish the land or contribute to the extent of its value towards payment of debts. The devisee's title may be perfected by securing the executor's assent to the devise. Such assent need not be evidenced by notarial deed, and need not even be express, but may be implied.

Per WITHERS, J.—An executor in Ceylon is a different person from the executor under the Roman-Dutch Law, who had no more powers than the will gave him, and did not represent the testator. An executor or administrator in Ceylon does represent the deceased for purposes of administration and has the status and powers of a legal representative, and by probate or letters an estate commensurate with those powers, sufficient for administration and limited thereto, passes to him. No assent of the executor or administrator is necessary to pass title to the heirs appointed by the will or the heirs-at-law, for they have this title on the death of the testator or intestate, subject to the suspension of enjoyment during administration and subject to the limited estate or title of the executor or administrator. The executor's or administrator's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by the heirs.

D. C. Colombo, No. C 1,187. MOHAMADO CASSIM v. CASSIM MARIKAR 72

Fidei-commissum.

See DEED OF GIFT.

"Firm offer".

See SALE OF GOODS.

Fiscal.

See PRACTICE, 2.

PRACTICE, 5.

Fishing.

1.—*Bye-law*—Ultra vire—*Fishing without licence—Ordinance No.* 7 *of* 1876, *sections* 35, 79—*Local Board of Nuwara Eliya—Bye-law No.* 54 *of May* 29, 1888.

Ordinance No. 7 of 1876, section 35, authorises the Local Boards thereby established to make bye-laws, *inter alia*, "for regulating the mode and times of fishing," and section 79 makes the breach of such bye-laws an offence punishable by fine.

A bye-law, framed by a Local Board under the above section, prohibited fishing in certain waters within its limits without a license from the Chairman of the Board.

Held that the bye-law was *ultra vires* of the Local Board.

P. C. Nuwara Eliya, No. 5,551. TRINGHAM v. VOLLENHOEVEN 18

2.—*Fishing—Right of exclusive fishing—Sea—Cause of action.*

No right of exclusive fishing in any particular part of the sea or at any particular time can be acquired by any custom among fishermen regulating the times and places of fishing.

But where a fisherman has actually begun fishing operations and is prevented by force or violence from exercising his occupation or is disturbed therein by another, then an action accrues to him to recover compensation.

C. R. Trincomalie, No. 722. ARUMOKAM v. TAMPIYA 205

Forest Ordinance.

1.—*Timber—River drift—"Land"—Forest Ordinance No.* 10 *of* 1885, *section* 46.

The term "land" in section 46 of the Forest Ordinance, No. 10 of 1885, means a defined space of land and does not include a river-bed or a high road

P. C. Panadura, No. 7,214. ASSISTANT GOVERNMENT AGENT, KALUTARA v. AARON 99

2.—*Forest Ordinance—Removing timber without permit—Breach of rules under Ordinance—Rules published in* Government Gazette—*Proof—Presumption in Favor of Crown—Conviction, form of—Criminal Procedure Code, Section* 372—*Ordinance No.* 10 *af* 1885, *Chapters* II *and* III, *and sections* 41 *and* 46—*Ordinance No.* 1. *of* 1892, *section* 27.

The judgment of a police magistrate should specify the offence of which, and the section of the Penal Code or other law under which, the accused is convicted.

In a prosecution for breach of rules prescribed under section 41 of the Forest Ordinance, 1885, it must be shown that the land in question is not included in a reserved or village forest.

P. C. Pasyala, No. 12,242, LEWIS v. SENANAYAKE 149

3.—*Forest Ordinance—Removing "timber" without a pass—Forest-produce—Ordinance No.* 10 *of* 1885, *sections* 44, 46—*Ordinance No.* 1 *of* 1892, *section* 27.

Since the passing of the Ordinance No. 1 of 1892, removal of timber without a pass as distinguished from forest-produce is not an offence.

P. C. Gampola, No. 13,750. MARIKAR v. DIAS 158

4.—*Forest Ordinance—"Cut"—Felling and removing trees—Ordinance No.* 10 *of* 1885, *sections* 40, 45 *and* 46—*Ordinance No.* 1 *of* 1892, *section* 27.

In section 40 of the Ordinance No. 10 of 1885 the word "cut" means the act of simply cutting and not actually cutting down, and therefore evidence proving the felling of a tree will not support a charge of cutting the tree.

P. C. Rakwana, No. 7,984. MADUWANWALA v. FREDERICK 162

5.—*Criminal law—Unlicensed digging for plumbago—Forest Ordinance No.* 10 *of* 1885 *—Breach of rules framed under section* 41 —Mens rea—Bona fide *mistake—Crown land—Evidence.*

Section 41 of Ordinance No. 10 of 1885 provides

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for the making of rules, *inter alia*, for regulating or prohibiting the digging for plumbago in any forest not included in a reserved or village forest.

A rule framed under the above section enacted that "no person shall dig plumbago on any land at the disposal of the Crown except on permission granted under licence" in a prescribed form.

Held that the condition of mind of the accused person is not an element in the offence created by the above enactments, and therefore a *bona fide* mistake that a Crown land in which plumbago is dug is private property affords no defence.

Held also that in a charge for breach of the above rule it must be proved that the land is forest land at the disposal of the Crown and not included in a reserved or village forest, and that the deposition of a witness that the land is "Crown land" does not amount to such proof.

P. C. Galle, No. 8,614. TATHAM v. UGA .. 169

Forest produce.

See FOREST ORDINANCE, 3.

Frauds and Perjuries Ordinance.

See LEASE, 2.

IMMOVEABLE PROPERTY, 1.

IMMOVEABLE PROPERTY, 4.

Gaming.

1.—*Gaming—"Public place"—"Place to which public have access whether as of right or not"—Ordinance No. 17 of 1889, section 3, subsection 2—Construction.*

The word "access" in section 3 subsection 2 of the Ordinance No. 17 of 1889 means legal access, *i. e.*, access as of right or by the express or tacit licence of the owner of the land, and not such access as would constitute a trespass against the owner.

The land of a private individual, whether enclosed or not, the entering of which would be a trespass against the owner, is not a place to which the public have access within the meaning of the Ordinance.

P. C. Panadura, No. 5,211. PERERA v. PERERA 6

2.—*Gaming—Betting—Acts of gaming—Betting for a stake—Evidence—Charge—Ordinance No. 17 of 1889, sections 3 and 4.*

To make an act of betting "unlawful gaming" under section 3 of Ordinance No. 17 of 1889 the betting must be for a stake.

In a prosecution for unlawful gaming under the Ordinance the act or acts on the part of the accused, alleged to constitute unlawful gaming, must be particularized in the evidence and should be specified in the judgment of the court.

P. C. Panadure, No. 8,345. DON SIMAN v. SINNO APPU 193

Grain tax.

See CAUSE OF ACTION, 2.

Guardian.

See CIVIL PROCEDURE, 5.

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Guardianship proceedings.

See CIVIL PROCEDURE, 1.

Husband and wife.

1.—*Husband and wife—Separate estate—Mortgage of separate property by wife—Written consent of husband—Validity of bond—Matrimonial Rights Ordinance, 1876, section 9.*

A mortgage created by a woman married after the proclamation of the Ordinance No. 15 of 1876, over immoveable property belonging to her separate estate, amounts to an act "disposing of and dealing with" such property within the meaning of section 9 of the Ordinance, and requires the written consent of her husband for its validity.

When such consent has not been given, the creditor cannot even recover the debt due on the bond, inasmuch as the general personal incapacity of a married woman to bind herself by contract renders the instrument inoperative even as a simple money bond.

D. C. Tangalle, No. 80. SILVA v. DISSANAYAKE 123

2.—*Husband and wife—Thesawalame—Debt incurred by husband during marriage—Divorce a mensa et thoro—Liability of acquired property to satisfy such debt—Claim in execution—Rights of wife.*

The property acquired during marriage by a husband and wife, who are governed by the Thesawalame, remains liable for debts incurred by the husband during marriage, notwithstanding a subsequent decree of divorce *a mensa et thoro* between the husband and wife.

D. C. Jaffna, No. 22,887. KATHARUVALOE MENATCHIPILLE.. 132

See KANDYAN LAW, 3.

Hypothecary action.

See CIVIL PROCEDURE, 51.

Immoveable property.

1.—"*Planter's share"—Interest in land—Notarial agreement—Ordinance No. 7 of 1840, section 2—Prescription.*

A "planter's share" is an interest in land within the meaning of section 2 of Ordinance No. 7 of 1840, and cannot be acquired by the planter except by means of a notarial instrument or prescriptive possession.

Prescription with reference to a "planter's share" begins to run, not from the date when the planting commenced, but from the completion of the agreement, when the planter has taken his share and begun to possess it adversely to the owner of the land.

D. C. Matara, No. 35,819. JAYASURIA v. OMAR LEBBE MARCAR 6

2.—*Cause of action—Agreement to sell land subject to an usufructuary mortgage—Refusal of mortgagee to be redeemed—Action for damages under the agreement—Penalty.*

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PAGE.

By a notarial instrument defendant agreed to sell to plaintiff a land belonging to him and then under mortgage to a third party with right of possession, the plaintiff agreeing to redeem that mortgage and pay certain other debts of defendant and to pay the balance purchase money to defendant. The agreement was to be fulfilled within one month of its date. The mortgage was, upon the terms of it, to be on foot for a period of three years, which was still unexpired, and the mortgagee upon the request of the plaintiff refused to be redeemed. Thereupon plaintiff sued defendant for the damages agreed upon for non-fulfilment of the contract, the plaint averring that defendant had "in collusion" with the mortgagee induced him not to accept plaintiff's tender.

Held that the mortgagee was not bound to accept the money and release the mortgage till the three years had expired, and that the plaintiff's action failed, inasmuch as the plaintiff, having on the face of the agreement express notice of the mortgage, must be taken to have notice of the terms of the mortgage.

D. C. Trincomalee, No. 23,288. ISMALEVAI MARKAR v. KATHER SAIBO 49

3.—*Registration—Deed affecting land—Pleading—Practice—Ordinance No. 14 of 1891, section 17.*

A party, who has not specially pleaded it, is not entitled to rely on the priority conferred by the Registration Ordinance on deeds affecting land.

C. R. Kandy, No. 1,834. SAIBOO v. SIRIMALE 146

4.—*Immoveable property—Interest in land—License to draw toddy—Possession—Notarial instrument—Ordinance No. 7 of 1840, section 2.*

An agreement, by which an owner of land lets the cocoanut trees standing thereon for drawing toddy and which involves a license to enter upon the land for that specific purpose only, is not one affecting an interest in land, and need not therefore be contained in a notarial instrument.

C. R. Panadure, No. 719. FERNANDO v. THEMARIS 183

Implied contract.

See CRIMINAL LAW, 12.

Implied promise.

See CAUSE OF ACTION, 2.

Indorsee against maker, action by

See CIVIL PROCEDURE, 2.

CIVIL PROCEDURE, 9.

Injunction.

See CIVIL PROCEDURE, 17.

Instalments, payment by

See CIVIL PROCEDURE, 30.

Insolvency.

Insolvency—Lying in jail for debt—Residence previous to petition for sequestration—Jurisdiction—Application for order to prosecute petition in a particular court—Procedure—Ordinance No. 7 of 1853, sections 16, 17, 20, and 26.

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Section 16 of Ordinance No. 7 of 1853 directs the petition for the sequestration of the estate of any person as insolvent to be made to the District Court of the district in which the debtor shall have resided or carried on business for six months next immediately preceding the time of filing such petition.

Section 17 empowers the Supreme Court to order any such petition to be prosecuted in any District Court without reference to the district in which the debtor resided or carried on business.

In an application to the Supreme Court under section 17 of the Ordinance for an order to prosecute a petition in the District Court of Kandy by a person who had resided in Kandy but who had been arrested under a civil writ issued from the District Court of Colombo and had lain in jail in Colombo upon committal thereunder for over 21 days—

Held that the proper court for a petitioner, who has lain in prison for more than 21 days under a writ in execution of a judgment, to submit a petition for the sequestration of his own estate is the court of the district in which he resided or carried on business for six months immediately prior to his incarceration, and that, the District Court of Kandy thus already having jurisdiction, the application could not be entertained.

Held further, that to an application under section 17 of the Ordinance must be annexed the petition, the declaration of insolvency, the account and affidavit, intended to be submitted by the petitioner for the sequestration of his own estate, so that the Supreme Court might be satisfied as to the *bona fide* intention of the petitioner to initiate insolvency proceedings.

In the matter of the application of ALUTWELEARATCHIGEY DON ELIAS DE SILVA .. 162

Interest in land.

See IMMOVEABLE PROPERTY, 1.

IMMOVEABLE PROPERTY, 4.

Intervention.

See CIVIL PROCEDURE, 16.

CIVIL PROCEDURE, 22.

PRACTICE, 4.

Interlocutory proceedings, costs due in

See CIVIL PROCEDURE, 21.

Inventions Ordinance.

See CIVIL PROCEDURE, 35.

Judicial Settlement.

See CIVIL PROCEDURE, 27.

Jamaica Rum.

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Judgment.

See CIVIL PROCEDURE, 30.
CIVIL PROCEDURE, 31.

Jurisdiction.

See CIVIL PROCEDURE, 9.
CIVIL PROCEDURE, 12.
CIVIL PROCEDURE, 17.
CIVIL PROCEDURE, 39.
CRIMINAL PROCEDURE, 2.
INSOLVENCY.
PARTITION.
PRACTICE, 3.

Jurisdiction, service of summons out of.

See CIVIL PROCEDURE, 8.

Kandyan Law.

1.—*Kandyan law—Adoption—Requisites of—Public declaration by adoptive parent.*

To establish an adoption under the Kandyan law there must be evidence amounting to a public declaration of the adoption for purposes of inheritance.

D. C. Kandy, No. 2,781. PUSUMBAHAMY v. KEERALA.. 53

2.—*Kandyan Law—Diga marriage—Forfeiture of inheritance Registered marriage—Ordinance No. 3 of 1870, section 11.*

The exclusion under the Kandyan law of a *diga* married daughter from a share in her father's property still attaches to a daughter who goes out in *diga*, even though the marriage is invalid by reason of its non-registration under the provisions of Ordinance No. 3 of 1870.

C. R. Kandy, No. 1,114. KALU v. HOWA KIRI 54

3.—*Kandyan Law—Husband and wife—Right of husband in deceased wife's estate—Paraveny property.*

Under Kandyan Law a husband is not entitled to any life interest in the *paraveny* property of his deceased wife.

D. C. Kegalle, No. C 85. DINGIRIHAMY v. MENIKA 76

See PRESCRIPTION, 1.

Land.

See FOREST ORDINANCE, 1.
IMMOVEABLE PROPERTY.

Land Acquisition.

See PRACTICE, 4.
PRACTICE, 6.

Landlord and Tenant.

1.—*Landlord and tenant—Lease—Tacit hypothec for rent—Lien—Interruption by lessor of lessee's enjoyment—Re-entry—Cancellation of lease.*

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A lessor has a lien for rent due upon the goods of the lessee brought upon the demised premises, but he cannot, by way of preventing the removal of the goods and so preserving his lien, enter upon the premises and exclude the lessee therefrom. Such entry and exclusion constitute an interruption by the lessor of enjoyment of the demised premises, discharging the lessee from liability for future rent, and entitling him to annulment of the lease and to damages

D. C. Colombo, No. 1,944 C. MEERA LEBBE MARIKAR v. BELL 94

2.—*Landlord and tenant—Notice to quit—Monthly tenancy—Requisite length of such notice—Double rent.*

To terminate a monthly tenancy there must be a complete calendar month's notice; that is to say, the notice must be given before the commencement of the month at the expiry of which the tenancy is to determine

Accordingly, in the case of a monthly tenancy commencing from the first day of the month, a notice to quit given on the first day of a month requiring the tenant to quit the premises at the end of that month,

Held to be a bad notice.

C. R. Kalutara, No. 840. FONSEKA v. JAYAWICKRAMA 134

3.—*Landlord and tenant—Action for rent—Misdescription of land demised—Representation as to acreage—Fraud—Reduction of rent—Reform of the instrument of demise—Defence—Counter claim—Remedy.*

In a question as to the defence to an action of covenant for rent arising out of the acreage of land demised being found to be less than that stated in the instrument of demise—

Held per LAWRIE, A. C. J.—Where there is no fraud on the part of the lessor and the lessee gets the whole estate or *corpus* which he meant to take on lease, an error in the description of the property as consisting of so many acres does not entitle the lessee to a reduction of the rent. But where the lessee does not get the whole estate, he may claim either a proportionate reduction of the rent, or a recision of the contract as founded upon an error *in essentialibus*.

Per WITHERS J.—Irrespective of fraud, where a lease is *ad quantitatem* and the extent of land is found to be less than the lease purported to demise, the lessee is entitled to a reduction of the rent. He must, however, claim this relief by bringing the *actio locati* himself, or if he is sued by the lessor, he must affirmatively demand, by way of counter-claim, a reform of the instrument of demise as to the quantity of land and as to the amount of rent payable thereunder, and a diminution of the past and future rent. But in the absence of such counter-claim and the instrument standing unreformed, he has no defence to an action on the part of the lessor for payment of arrears of rent or for re-entry.

D. C. Colombo, No. 2,533 C. STORK v. ORCHARD.. 184

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Lease.

1.—*Buddhist temple—Incumbent—Dewa Nileme—Right to lease so as to bind successor—building lease.*

The question whether the incumbent of a Buddhist temple can grant long leases of temple property so as to bind his successor must be decided according to the circumstances of each case, the principle being that such dealing with temple property should be consistent with the interests of the temple.

Where the Dewa Nileme of the Kandy Maligawa granted a building lease for 35 years—

Held that the lease was binding upon the Dewa Nileme's successors in office, who could not therefore treat the lessee or his repsesentative as a mere trespasser but could only seek to terminate the tenancy for breaches of covenant, if any.

D. C. Kandy, No. 4,288. GIRAGAMA DEWA NILEME v. HENAYA 42

2.—*Frauds and perjuries—Verbal agreement for lease—Refund of money paid on such agreement—Notarial instrument—Ordinance No. 7 of 1840.*

Money paid in pursuance of a contract, which is void under the Ordinance No. 7 of 1840 for want of a notarial instrument but which is not performed, is recoverable by action.

C. R. Panwila No. 3,713 Gren. (1873-74) Pt. II., p. 34, followed.

C. R. Matara, No. 1,456 GREGORIS v. TILLEKERATNE 191

See LANDLORD AND TENANT, 1.
LANDLORD AND TENANT, 3.
REGISTRANION, 2.

Legal Representative.

See CIVIL PROCEDURE, 19.
CIVIL PROCEDURE, 36.

Lien.

See LANDLORD AND TENANT, 1.

Lis Pendens.

See CIVIL PROCEDURE, 26.

Maintenance.

1.—*Maintenance—Refusal to make order for maintenance—Appeal—Ordinance No. 19 of 1889, sections 3, 14, and 17.*

No appeal lies against the refusal of a police magistrate to make an order for maintenance under the Maintenance Ordinance, 1889.

P. C. Colombo, No. 3,760. FERNANDO v. IAMPERUMAL.

P. C. Colombo, No. 165. SELESTINA v. PERERA 88

Mens rea.

See FOREST ORDINANCE, 5.

Minor.

Minors, action against—Practice—Mortgage—Guardian ad litem—Interest of minors in land—Inheritance.

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A mortgagor of land died intestate leaving a widow and certain minor children. The mortgagor put the bond in suit, making the widow party to the action "for herself and on behalf of the children", and obtained a judgment for money and a mortgage decree.

In an action by the children against the purchaser under the mortgagee's writ—

Held that the judgment and decree in the mortgage suit were inoperative against the children, they not having been represented therein by a guardian *ad litem*, and that they were entitled to a decree for half the mortgaged property as against the purchaser.

D. C. Kandy, No. 4,213. MATHES APPU v. HABIBU MARIKAR 46

See CIVIL PROCEDURE, 5.
CIVIL PROCEDURE, 20.
CIVIL PROCEDURE, 26.
CIVIL PROCEDURE, 41.

Mortgage.

Limitation—Bond payable after notice—Breach of condition—Assignment—Power of assignee to sue—Ordinance No. 22 of 1871, section 6.

By a bond dated April 29, 1878, the obligors declared themselves "held and firmly bound unto "(the obligee) in the penal sum of Rs. 44,000, for "the payment whereof we bind ourselves our "heirs executors administrators and assigns:" and the condition on the bond was as follows: "that if we (the obligors) shall and will well and "truly pay or cause to be paid unto (the obligee) "and his aforewritten the sum of Rs. 22,000 on "receiving from (the obligee) or his aforewritten "three months' notice in writing desiring repay-"ment of the said sum and interest thereon at the "rate aforesaid (such notice however not to be "given until twelve months after the date hereof) "then this bond to be void," &c.

By deed dated July 7, 1882, the obligee assigned the bond to two other parties, who were thereby constituted and appointed "my true and lawful attorney and attorneys in the name of me (the obligee) and my aforewritten to ask, demand," &c. No part of the principal or interest having been paid, the assignees of the bond sued the obligors thereon in their own names, alleging that they had on January 19, 1889, given notice in writing to the obligors requiring payment three months thereafter.

The libel was filed on April 24, 1889, and summons issued on April 25, 1889.

Held that the bond was once with a condition to pay on three months' notice in writing, that limitation began to run only from the breach of that condition, viz., failure to pay on three months' notice in writing, and that therefore the present action was not barred by the provisions of section 6 of Ordinance No. 22 of 1871.

Held, by WITHERS, J., that, notwithstanding the absence of words in the bond making it payable to the assigns of the obligee, the bond was assignable, and the assignees could by our law sue in their own names, the power given to them in the deed of assignment to sue in the name of the original obligee being only *pro abundanti cautela.*

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D. C. Colombo, No. 1,636. RAMEN CHETTY v. FERDINANDS 194

See CIVIL PROCEDURE, 15.
EJECTMENT, 2.
HUSBAND AND WIFE, 1.
MINOR.

Municipal Councils Ordinance.

1.—*Public street—Encroachment—Obstruction in street—Verandah—Ordinance No. 7 of 1887, section 175—User by public—Evidence—Survey—Ordinance No. 4 of 1866, section 6.*

The Municipal Councils Ordinance No. 7 of 1887, section 175, makes it an offence to set up any obstruction or encroachment in any street.

In a charge under the above enactment against the owner of a house by the side of one of the streets in the Pettah of Colombo, where the alleged obstruction consisted in the defendant having closed up with walls the two sides of the verandah along the side of the street—

Held that, the verandah *prima facie* being private property, no obstruction to a street within the meaning of the Ordinance was proved in the absence of evidence of the user of the verandah by the public as a thoroughfare.

An old survey of 1844 made by a person described as Town Surveyor and since deceased, in which the verandah in question was marked as an encroachment, having been received in evidence—

Held that, even if the survey was admissible without proof of its genuineness or correctness, under section 6 of Ordinance No. 4 of 1866, though it did not purport to be signed or made by the Surveyor-General or an officer acting on his behalf, it did not prove that the verandah was an encroachment on the street, inasmuch as a survey, though it might prove the position and size of roads, buildings, and other objects delineated thereon, was not proof of any matters beyond the special skill or knowledge of the surveyor, such as that any particular part was a "reservation" or an "encroachment".

M. C. Colombo, No. 5,104. AKBAR v. SLEMA LEBBE 175

2.—"*Alter*"—*Construction—Chairman Municipal Council, power of—Ordinance No. 7 of 1887, section 209—Cesspit privy—Dry earth closet.*

Section 209 of the Municipal Councils Odinance, 1887, provides that all drains, privies, and cesspits within the Municipality shall be under the survey and control of the Chairman, and shall be altered, repaired, and kept in order at the cost of the owners, and that if such owner neglects after notice in writing for that purpose to alter, repair, and put the same in order in the manner required by the Chairman, the Chairman may cause the same to be altered, repaired, and put in order in the manner required.

In a prosecution under section 183 of the Penal Code for resistance to certain officers empowered to carry out an order made by the Chairman to clean out and stop up a cesspit privy and convert it into a dry earth closet under the provisions of the above enactment—

Held that the word "alter" in the above section of the Ordinance meant varying without effecting an entire change, and did not cover the conversion of a cesspit privy into a dry earth closet, and that therefore the defendant committed no offence in resisting the execution of an order which the Chairman had so made.

P. C. Colombo, No. 19,216. GUNESEKERA v. MANUEL 78

Next friend, appointment of.

See CIVIL PROCEDURE, 20.
CIVIL PROCEDURE, 36.
CIVIL PROCEDURE, 41.

Next of kin.

See CIVIL PROCEDURE, 47.

Non-joinder.

See CIVIL PROCEDURE, 13.

Notice of appeal.

See CIVIL PROCEDURE, 4.
CIVIL PROCEDURE, 32.

Notice to quit.

See CIVIL PROCEDURE, 24.
LANDLORD AND TENANT, 2.

Nuisance.

Nuisance—Barking of dogs—Ordinance No. 15 of 1863, section 1, subsection 4—Interpretation.

Ordinance No. 15 of 1862, section 1, enacts (subsection 4) "whosoever shall keep in or upon any house, building, or land occupied by him any cattle, goat, swine, or other animal so as to be a nuisance to or injurious to the health of any person, shall be liable to a fine."

Held that the generic term "other animal" includes a dog, and that permanent interference with comfort, such as occasioned by dogs which being tied and kept in a neighbour's compound bark with little or no intermission during the night, is a nuisance within the purview of the Ordinance and punishable as such.

P. C. Matara, No. 16,869. SNOWDEN v. RODRIGO 113

Ouster.

See CAUSE OF ACTION, 1.

Ordinances.

No. 8 of 1834, section 2.
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No. 7 of 1840, section 2.
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IMMOVEABLE PROPERTY, 4.

No. 10 of 1844, section 26.
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No. 21 of 1844.
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ROAD ORDINANCE.

No. 15 of 1862, section 1, subsection 4.
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No. 8 of 1863, sections 38, 39.
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No. 8 of 1863, section 39.
See REGISTRATION, 1.

No. 10 of 1863, section 8.
See PARTITION.

No. 4 of 1866, section 6.
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No. 22 of 1871, sections 8, 9.
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No. 6 of 1873.
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No. 3 of 1876, sections 8, 9, 10, 11, 13, 34, 35.
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No. 15 of 1876.
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No. 15 of 1876, section 9.
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No. 2 of 1883, sections 43, 483, 486.
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See CIVIL PROCEDURE, 1.

No. 3 of 1890, Part II.
See PRACTICE, 2.

No. 6 of 1890, sections 5, 6, 16, 17.
See SALT ORDINANCE.

No. 6 of 1891, section 1.
See CRIMINAL PROCEDURE, 6.

No. 14 of 1891, section 17.
See IMMOVEABLE PROPERTY, 3.

No. 1 of 1892, section 27.
See FOREST ORDINANCE, 2.
FOREST ORDINANCE, 3.
FOREST ORDINANCE, 4.

Paddy field.
See CAUSE OF ACTION, 2.

Panguwa.
See CIVIL PROCEDURE, 13.

Paraveny.
See KANDYAN LAW, 3.

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Partition.

Sale of land--Action for partition--Auction —Agreement not to bid—Notice of sale —Irregularity—Practice—Jurisdiction —Ordinance No. 10 *of* 1863, *section* 8.

At the sale of land under a decree in a partition suit the land was knocked down for a sum amounting only to half the appraised value to one of the parties to the suit, who had agreed with another of the parties that they should not bid against each other and that the land, if purchased, should be shared between them.

Upon an application in the partition suit by some of the other parties to set aside the sale,—

Held (DIAS, J., dissenting), that the agreement between the purchaser and the other party not to bid against each other and to divide the land, if purchased, was not inequitable and did not vitiate the sale.

D. C. Matara, No. 34,392. WETTESINHE v. JAYAN 33

Petition of appeal.

See CIVIL PROCEDURE, 23.

Petition of complaint, requisites of.

See CIVIL PROCEDURE, 28.

Plaint.

See CIVIL PROCEDURE, 10.
CIVIL PROCEDURE, 11.

"Planter's share."

See IMMOVEABLE PROPERTY, 1.

Pleading.

See BANKER AND CUSTOMER.
CAUSE OF ACTION, 1.
CIVIL PROCEDURE, 2.
CIVIL PROCEDURE, 10.
CIVIL PROCEDURE, 11.
CIVIL PROCEDURE, 24.
CIVIL PROCEDURE, 27.
IMMOVEABLE PROPERTY, 3.
PRACTICE, 6.
PROMISSORY NOTE, 1.
PROMISSORY NOTE, 3.
VENDOR AND PURCHASER.

Police Station.

See CRIMINAL LAW, 4.

Practice.

1.—*Practice—Order fixing case for hearing —Appealable order--Courts Ordinance,* 1889, *section* 75.

An order fixing a case for trial is not an appealable order under section 75 of the Courts Ordinance, 1889.

D. C. Kandy, No. 4,417. LE MESURIER v. LE MESURIER 21

2.—*Practice—Stamp—Summons unserved —Reissue of summons—Fiscal—Ordinance No.* 3 *of* 1890, *Part II.*

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A summons once issued and returned unserved by reason that the defendant was not to be found does not require, when reissued, to be stamped anew with the duty imposed either by Part II. or Part IV. of the Schedule to the Stamp Ordinance, 1890.

D. C. Kandy, No. 5,380. SINGHO APPU v. MENDIS 41

3.—*Practice—Order upholding claim in execution—Ex parte proceedings—Application to set aside order--Jurisdiction.*

An inquiry into a claim to property seized in execution should be made with notice to all parties concerned, including the judgment creditor and judgment debtor.

Where a claim was made to property seized in execution and the district judge held an inquiry into the claim without notice to the plaintiff and ordered the seizure to be released—

Held, that the district judge had power, upon application of plaintiff and upon being satisfied of the want of notice, to open up the proceedings and inquire into the claim anew in the presence of the parties.

D. C. Kandy, No. 4,169. RANGAPPA THEWAR v. KUDADURREGE 45

4.—*Practice—Land acquisition—Libel of reference——Claimants—Parties not named in the libel—Intervention—Ordinance No.* 3 *of* 1876, *sections* 11 *and* 32—*Civil Procedure Code, sections* 18 *and* 19.

In the matter of a reference under the Land Acquisition Ordinance 1876, to which the only claimants who appeared before the Government Agent were parties defendant and in which the questions submitted were as to the amount of compensation and the respective rights of these parties, the district court inquired into the claims of certain other persons who appeared before it but who did not regularly make themselves parties to the record.

Held, that the district court had no authority to inquire into the claims of persons other than the original claimants and the proceedings in that respect were irregular.

Per WITHERS, J.—Inasmuch as by section 32 of the Land Acquisition Ordinance 1876 the proceedings are subject to the practice and procedure in ordinary civil suits, no person can intervene in any such proceeding otherwise than as provided in section 18 of the Civil Procedure Code.

D. C. Galle, No. 55,943. TEMPLER v. SENEVIRATNE 70

5.—*Practice—Process—Returnable day—Time within which process should be returned—Fiscal, liability of.*

The fiscal entrusted with the service of a process has the whole of the returnable day to make return to the process and is not in default until the expiration of that day.

D. C. Badulla, No. 399. PALANIANDY v. RANGASAMY. F. C. FISHER, FISCAL of the Province of Uva, appellant 122

6.—*Land acquisition—Libel of reference—Award--Tender of amount of compensation--Parties unable to agree as to respec-*

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tive interests—Pleading—Practice—Irregularity—Ordinance No. 3 of 1876, sections 8, 9, 10, 11, 13, 34, and 35.

In proceedings under the Land Acquisition Ordinance 1876 the Government Agent, after he has made his award as to the amount of compensation, should tender the amount to the claimants, and such tender is a condition precedent to any reference to court, and should be averred in the libel of reference.

If the Government Agent agrees with the claimants as to the amount of compensation, he cannot, in making a reference by reason of the claimants not being agreed among themselves as to their respective interests in the land, re-open the question of the amount of compensation, and the sole matter which he can refer and which the court can adjudicate upon is as to the apportionment of the amount determined by the Government Agent among the claimants.

If, however, the Government Agent does not agree with the claimants as to the amount of compensation, then in referring that matter to the court he cannot refer with it any question as to the respective interests of the claimants in the land. But the court may, if a dispute arises among the claimants after it has determined the amount of compensation, adjudicate upon the respective rights of the claimants to the amount so determined.

D. C. Galle, No. 4,035. ELLIOT v. PODIHAMY 152

7.—*Practice—Costs of appeal—Taxation.*

Costs of appeal include costs incurred in the court below for the purpose of forwarding the appeal to the Supreme Court, and which costs the taxing officer of the court below is competent to deal with.

D. C. Kegalla, No. 85. DINGIRIHAMY v. KALU MENIKA 154

See ADMINISTRATION, 4.
CIVIL PROCEDURE, 6.
CIVIL PROCEDURE, 7.
CIVIL PROCEDURE, 8.
CIVIL PROCEDURE, 10.
CIVIL PROCEDURE, 24.
CIVIL PROCEDURE, 26.
CIVIL PROCEDURE, 30.
CIVIL PROCEDURE, 38.
CIVIL PROCEDURE, 40.
CIVIL PROCEDURE, 45.
CIVIL PROCEDURE, 51.
CRIMINAL PROCEDURE, 7.
IMMOVEABLE PROPERTY, 3.
MINOR.
PARTITION.

Prescription.

1.—*Prescription—Adverse possession—Interruption by pending action—Kandyan Law—Revocability of deed of gift—Ordinance No. 22 of 1871, section 3.*

The institution of an action for the recovery of land against a party in adverse possession does not, if unsuccessful, interrupt such possession. During the pendency of the action such possession is in suspense, and time is not gained by the occupant against his adversary. But if the action is abandoned or lost, the period of its pendency enures to the benefit of the party in possession.

D. C. Kandy, No. 4,646. UNAMBUWE v. JUNOHAMA 103

2.—*Prescription—Adverse possession, requisites of—Acknowledgment of title—Ordinance No. 8 of 1834, section 2—Ordinance No. 22 of 1871, section 3—Burden of proof—Evidence.*

Observations by the Supreme Court on the requisites of adverse possession necessary under the Ordinances for acquiring title to land by prescription.

D. C. Colombo, No. 98,202. JAIN CARIM v. RAHIM DHOLL.. 118

3.—*Prescription—Amendment of plaint—Addition of a new cause of action—Relation back to writ of summons—Ordinance No. 22 of 1871, sections 8 and 9.*

Where after the institution of an action on a promissory note the plaint was amended by the addition of an alternative count for goods sold and delivered—

Held, that this new cause of action related back to the date of the original writ of summons, and the period of limitation in respect thereto should be reckoned up to that date and not up to the date of the amendment of the plaint.

C. R. Colombo, No. 4,126. MORRIS v. DIAS 187

See CIVIL PROCEDURE, 26.
CIVIL PROCEDURE, 31.
EJECTMENT, 1.
MORTGAGE.

Presentment of promissory note.

See CIVIL PROCEDURE, 2.

Privy Council, appeals to.

See CIVIL PROCEDURE, 33.
CIVIL PROCEDURE, 35.

Probation of first offenders.

See CRIMINAL PROCEDURE, 6.

Process.

See PRACTICE, 5.

Proctor, service of summons on.

See CIVIL PROCEDURE, 8.

Proctor's Lien.

Proctor's lien—Title deeds—Mortgage—Action in detinue.

The plaintiffs, owners of a certain land, having agreed with F to sell the land to him and to take from him a mortgage thereof for the purchase money, delivered the title deeds of the land to defendants as proctors and notaries of F, for the purpose of drawing the conveyance and mortgage bond. The instruments were duly drawn and executed, and the plaintiffs subsequently repur-

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chased the land in execution of a judgment on their mortgage, but the defendants detained the title deeds from plaintiffs claiming a lien on them for their fees which were to be paid and were due by F.

In an action by plaintiffs against defendants for the recovery of the title deeds—

Held, that in the absence of any special agreement or of circumstances indicating a contrary intention, the inference was that the plaintiffs in delivering the deeds did not intend to part with the possession of them absolutely in favour of F, and no right to such possession passed to F even on the execution of the conveyance in his favour, and that therefore neither did the defendants as F's proctors and notaries acquire a lien over the title deeds for the fees due by F or any right to detain them from the plaintiffs.

D. C. Colombo, No. C 1,142. ANDERSON, v. LOOS 66

Proctor.

See CIVIL PROCEDURE, 23.

Promissory Note.

1.—*Promissory note—Signature on blank paper—Authority to fill up—Plea of* non est factum—*Evidence Variance —Pleading—Bills of Exchange Act,* 1882, *section* 20

The aigning and delivery of a blank stamp paper in order that it may be converted into a promissory note operates as a *prima facie* authority to fill it up for any amount that may be covered by the stamp.

Per CLARENCE, J.—Any agreement restricting such authority must be specially pleaded, and is not provable under a mere traverse of the making of the note.

D. C. Colombo, No. 1,763. MURUGAPPA CHETTY v. PERUMAL KANGANY 86

2.—*Promissory note—Stamp—Note payable on demand—"Postage Revenue, Five Cents" stamp—Admissibility of note in evidence—Ordinance No.* 3 *of* 1890, *section* 5—*Proclamation of August* 1, 1890.

Since the Stamp Ordinance, No. 3 of 1890, and the Proclamation of August 1, 1890, issued thereunder, a promissory note payable on demand, bearing a stamp of the denomination "Postage Revenue, Five Cents", is not duly stamped and is inadmissible in evidence.

D. C. Kandy, No. 4,967. WATSON v. ALLAGAN KANGANY 89

3.—*Promissory note—Granting of a note on account of a debt—Satisfaction—Extinguishment of a debt—Remedy—Composition—Pleading.*

The taking of a bill or note on account of a debt does not extinguish the liability for the debt, but only suspends the remedy, which revives if the bill or note is dishonoured; but where the bill or note is taken expressly in satisfaction of the debt, the debt is extinguished and the only remedy thereafter is on the instrument.

D. C. Colombo, No. C 509. ARUNASALEM CHETTY v. VEERAWAGO 143

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See CIVIL PROCEDURE 2.
CIVIL PROCEDURE 9.

Public Place.

See GAMING, 1.

Public Servant.

See CRIMINAL LAW, 9.
CRIMINAL LAW, 12.

Public Street.

See MUNICIPAL COUNCILS ORDINANCE, 1.

Receiver.

See CIVIL PROCEDURE, 42.

Reconvention.

See CIVIL PROCEDURE, 22.

Registration.

1.—*Registration—Deed of gift—Valuable consideration—Priority—Ordinance No.* 8 *of* 1863, *section* 39.

The operation of section 39 of the Land Registration Ordinance, 1863, in favour of deeds registered before deeds earlier in date, is confined to deeds made for valuable consideration.

Therefore a deed of gift does not, by reason of prior registration, prevail over another deed of gift prior in date.

D. C. Galle, No. 55,837. MOHAMADU HAMIDU v. RAHIMUTTU NATCHIA .. 32

2.—*Registration—Usufructuary mortgage —Lease—Mortgagee's interest seized in satisfaction of previous judgment—Fiscal's conveyance —Priority in registration—Real property, conveyance of by fiscal—Ordinance No.* 8 *of* 1863, *sections* 28 *and* 39.

A mortgagee with right to possession of the mortgaged land in lieu of interest can legally lease the property to third parties.

Where an usufructuary mortgagee leased the mortgaged property to a third party for a certain term, and subsequently his right, title, and interest in the property as such mortgagee was seized under writ against him and sold to a purchaser who registered the fiscal's transfer prior to the registration of the lease—

Held (BURNSIDE, C. J., *dissentiente*), that the purchaser at fiscal's sale, by reason of prior registration of the transfer to him, had a right to the possession of the property preferent to the lessee.

D. C. Galle, No. 994. UDUMA LEBBE v. SEGO MOHAMMADO 158

See IMMOVEABLE PROPERTY, 3.

Replication, necessity for.

See CIVIL PROCEDURE, 34.

Res judicata.

See CIVIL PROCEDURE, 26.

Resistance to execution of decree.

See CIVIL PROCEDURE, 28.

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CIVIL PROCEDURE, 39.
CIVIL PROCEDURE, 51.

Revision.

See CIVIL PROCEDURE, 40.

River bed.

See FOREST ORDINANCE I.

Riot.

See CRIMINAL PROCEDURE, 9.

Road Ordinance.

Cause of action—Warrant of arrest——Execution—Non-payment of commutation tax—Ordinances No. 10 *of* 1861 *and No.* 31 *of* 1884*—Liability of officer excuting warrant—-Assault—-Handcuffing.*

An officer to whom a warrant is issued for the arrest of a person for non-payment of commutation under the Road Ordinance is protected from civil liability in executing the warraut, even though the tax is not actually due and the warrant had been irregulary issued.

But the warrant does not protect him in respect of any assault committed by him in the course of the arrest or any detention longer than is necessary; nor is he justified in handcuffing the person arrested unless there is necessity, the burden of proving which lies on him.

D. C. Kandy, No. 4,237. PERERA v. ALLIS 39

Roman Dutch Law.

Tacit hypothec of children over property of surviving parent—Marriage in community—Continuance of community between surviving parent and children—Roman Dutch Law—The Matrimonial Rights and Inheritance Ordinance No. 15 *of* 1876.

The principle of the Roman Dutch Law, by which the community of property exisiting between the surviving spouse who remained in possession and the children until a division of the estate was effected, was never adopted in Ceylon, nor was the principle by which the children were given a tacit hypothec over all the property of the surviving spouse for the share inherited by them from the deceased spouse.

D. C. Colombo, No. C. 422. WIJEYEKOON v. GOONEWARDENE 59

See CIVIL PROCEDURE, 51.
EXECUTOR, 2.
VENDOR AND PURCHASER.

Rules and Orders, 1833.

See CIVIL PROCEDURE, 17.
CIVIL PRECEDURE, 50.

Rum.

See SPIRITS.

Sale of goods.

Sale of goods—Cantract—" Firm offer "—Right of purchaser to accept part—Writing, construction of.

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A writing in the terms—"I agree to sell to.. ......the plumbago now at their mills at the following prices, viz., lumps at Rs. 145 per ton, chips at Rs. 75, and dust at Rs. 50," and signed by the owner of the goods.

Held (LAWRIE J. dissenting), to contain a complete contract of sale and not a mere offer to sell.

Held also that, even if it were an offer only, the party to whom the offer was made could only accept or reject the goods as a whole, and it was not competent for him to accept part of the goods and compel the owner to receive back the rest.

D. C. Colombo, No. 119 C. SANDORIS SILVA v. VOLKART BROTHERS 197

Salt Ordinance.

Salt Ordinance—Possessing salt without license—Possessing contrary to tenor of license—Weighing—Ordinance No. 6 *of* 1890, *sections* 5, 6, 16, *and* 17.

Upon a charge of possessing 5¼ cwt. of salt without a license under s. 16 of the Ordinance No. 6 of 1890, it appeared that defendant had lawfully purchased a quantity of 280 cwt. for the possession of which a license was issued to him, and that upon the salt being re-weighed shortly afterwards there were found 285¼ cwt., the charge being laid in respect of the excess.

Held, that the offence disclosed was not that charged, but the offence of possessing salt contrary to the license.

P. C. Puttalam, No. 1,959. SALT INSPECTOR OF PUTTALAM v. NONIS 155

Security in appeal.

See CIVIL CROCEDURE, 7.
CIVIL PROCEDURE, 4.

Sequestration.

See CIVIL PROCEDURE, 6.
CIVIL PROCEDURE, 17.

Service tenure

See CIVIL PROCEDURE, 13.

Shroff of Bank

See CIVIL PROCEDURE, 6.

Small Tenements Ordinance.

See CIVIL PROCEDURE, 24.

Spirits.

Rum—Jamaica rum—Imported spirits—Ordinance No. 10 *of* 1844, *section* 26.

The provisions of the Ordinance No. 10 of 1844 as to sale of spirits mentioned therein apply to such spirits whether manufactured out of or in Ceylon.

Accordingly, the unlicensed sale of Jamaica rum imported into Ceylon

Held, to be an offence under section 26 of the Ordinance.

P. C. Kalutara, No. 13,205. SILVA v. DORIS 71

Stamp.

See CIVIL PROCEDURE, 1.
PRACTICE, 2
PROMISSORY NOTE, 2.

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Substituted service.

See CIVIL PROCEDURE, 8.

Summary procedure.

See CIVIL PROCEDURE, 19.
CIVIL PROCEDURE, 41.
CIVIL PROCEDURE, 44.

Summary procedure on liquid claims.

See CIVIL PROCEDURE, 15.

Summons, service of on proctor.

See CIVIL PROCEDURE, 8.

Taking plaint off the file.

See CIVIL PROCEDURE, 10.
CIVIL PROCEDURE, 11.

Taxation of costs.

See PRACTICE, 7.

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See HUSBAND AND WIFE, 2.

Timber.

See FOREST ORDINANCE, 3.

Toddy.

See IMMOVEABLE PROPERTY, 4.

Trustee, payment to.

See CIVIL PROCEDURE, 2.

Vendor and purchaser.

Vendor and purchaser—Warranty of title—Sale of land—Covenant to warrant and defend—Implied warranty—Roman Dutch Law—Construction of deed—Pleading—Demurrer.

A deed of conveyance contained the following covenant:—"I do hereby declare that I did no act whatever previously to invalidate this sale and I do agree to settle all disputes that may arise in respect thereto."

Held, that the above covenant was limited to the vendor's own acts and to disputes arising therefrom and did not amount to a general covenant to warrant and defend title.

In an action by the vendee against the vendor under the above conveyance, the plaint averred that "by the said deed the defendant represented that he was the owner of the said land and promised to warrant and defend the plaintiff's title to it." It then averred that a third party having ousted plaintiff from a portion of the land, plaintiff raised an action and gave notice thereof to defendant and called upon him to warrant and defend. The plaint further averred "that in breach of his promise defendant failed to warrant and defend his title" to the portion in question, and it then proceeded to state that "the defendant had no title whatever to the said allotment and his alleged title thereto was absolutely defective."

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Held, per BURNSIDE, C. J., and WITHERS, J., that the above was a declaration of an express covenant for title, which was not contained in the conveyance, and was therefore bad on demurrer.

D. C. Badulla, No. 28,689. SILVA *v.* OSSEN SAIBO.. 79

Verandah.

See MUNICIPAL COUNCILS ORDINANCE, 1.

Warrant.

See ROAD ORDINANCE.

Warrant and defend.

See VENDOR AND PURCHASER.

Warranty.

1.—*Warranty—Sale of oil in pipes—Warranty as to pipes—Construction of contract—Action for breach of warranty as to pipes.*

A contract in writing for the sale of "100 tons good merchantable coconut oil, in pipes, with small packages to suit stowage. Delivery in November—December, 1890, at Rs. 330 per ton in good merchantable condition f. o. b. Ship named by buyers."—

Held, to contain an express warranty that the pipes and packages as well as the oil were in gooe merchantable condition and fit for shipment at the time of delivery under the contract.

D. C. Colombo, No. 2,222. DELMEGE *v.* FREUDENBERG 146

2.—*Sale of goods—Warranty—Misrepresentation—Eviction—Repetition of price.*

By Roman Dutch Law there is implied in every contract of sale of goods a warranty by the vendor that the purchaser shall have the absolute and dominant enjoyment of the goods. But before the purchaser can recover damages for breach of such warranty, or claim back the price, he must suffer eviction by the judgment of a competant court that the goods were the property of some third party. Such judgment is not binding on the vendor unless he is called upon to warrant and defend the purchaser's title.

D. C. Colombo, No. C 868. ABDUL ALLY *v.* CADERAVALOE 165

See VENDOR AND PURCHASER.

Water Closet.

See MUNICIPAL COUNCILS ORDINANCE, 2.

Will.

Will—Proof of execution—Probate—Practice.

The question whether a will which has never been admitted to probate can be proved incidentally in an action in support of title to property discussed.

D. C. KALUTARA No. 514. SILVA *v.* GOONEWARDANE 140

Witness.

See CRIMINAL PROCEDURE, 3.

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THE

CEYLON LAW REPORTS,

BEING

REPORTS OF CASES DECIDED

BY

THE SUPREME COURT OF CEYLON.

Editors.—H. L. WENDT and T. E. DE SAMPAYO, Advocates.

Assisted by

J. VANLANGENBERG and F. M. DE SARAM, Advocates,

Present:—BURNSIDE, C. J.

(*February* 4 *and* 11, 1892.)

P. C., Kandy, No. 12,451. } KALU BANDA v. PUSUMBA.

Criminal procedure—Appeal—Non-summary cases—Order of discharge Appeal by the complainant—Criminal Procedure Code, secs., 405 *&* 406.

An appeal lies at the instance of the complainant from an order discharging the defendant in a case not summarily triable; but the Supreme Court would not in general interfere on such appeal, and would leave the question of committing the defendant for trial to be dealt with by the Attorney-General's Department.

This was a prosecution for an offence not summarily triable by the Police Magistrate. A charge having been framed, the case was referred to Crown Counsel, upon whose instructions the Magistrate subsequently discharged the defendant. Thereupon the complainant appealed.

Wendt for complainant appellant.

Dornhorst, for defendant respondant, took the objection that no appeal lay. The Supreme Court had declined to interfere with the refusal of Magistrates to commit, on the ground that such interference would bring the Court into conflict with the Attorney-General's Department, who might refuse to prosecute upon the committal.

Wendt for the appellant. The appeal clearly lies, sec. 406 of the Criminal Procedure Code giving the right to appeal against "any judgment, sentence, or order" of a Police Court; and this Court has so held. Here, the discharge is upon the instructions of the Attorney-General's Department (whose instructions the Magistrate is bound to obey), and it is submitted the propriety of it may be questioned by appeal. It would be idle to re-refer the appellant to the very authority by whose action he is aggrieved.

Cur. adv. vult.

On February 11, 1892, the following judgment was delivered:—

BURNSIDE, C. J.—This is an appeal in a non-summary case against an order discharging the accused. The order was made under instructions from the Attorney-General's Department.

That we have a right on appeal to reverse these orders I do not doubt; but the question is, whether, except under especial circumstances, we should exercise that right. I think not; we cannot compel the Attorney-General to file an indictment, and the decision of this Court would only be *brutum fulmen*, unless indeed the circumstances were such as would justify this Court in the position, that the refusal to act in accordance with the opinion of the Court was due to more than conscientious motives and official discretion.

It is better to leave these questions to be dealt with by the authority to which they have been especially committed by the Legislature, viz., the Attorney-General's Department.

Affirmed.

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Present :—BURNSIDE, C. J., and DIAS, J.

(*February* 19 *and* 26, 1892.)

D. C., Kurunegala, (Guardianship) No. 12. — In the matter of the Guardianship of RICHARD and JAMES HENRY, Minors.

Stamps—Guardianship proceedings—Civil Procedure Code, chap. xl.—*Ordinance No.* 3 *of* 1890—*Construction.*

Guardianship proceedings under chap. xl. of the Civil Procedure Code are not liable to stamp duty; and this exemption extends to applications under that chapter in the way of summary procedure, notwithstanding the provisions of sec. 373 of the Civil Procedure Code.

Revision.

On October 19, 1891, an application purporting to be made under sec. 591 of the Civil Procedure Code was submitted in this matter on behalf of a near relative of the minors for the purpose of recalling the certificate of guardianship. The petition, affidavit, and appointment of proctor tendered were all unstamped. The Secretary of the Court, before passing the papers, asked for the directions of the Court on the question of stamps. The learned District Judge (*P. Arunachalam*) ruled that no stamps were required in guardianship proceedings, and ordered that the papers submitted be accepted and notice issued to the guardian in terms of the prayer of the petition.

The Acting Solicitor-General then moved in the Supreme Court on behalf of the Crown for revision of the District Judge's order, and notice having been issued to the applicant, the matter came on for argument on February 19, 1892.

Hay, A. S.-G., for the Crown. The order under revision is wrong. The petition and connected papers required to be stamped. It is presented under sec. 591 of the Civil Procedure Code, which directs the application to be "by way of summary procedure"; and summary procedure is regulated by sec. 373, which requires a "duly stamped" petition. The value of the stamp must be determined by the Stamp Ordinance, 1890, which, in Part II. of Schedule B, prescribes an *ad valorem* duty on "every petition" in the District Court.

Dornhorst for the applicant. The District Judge's order was right. Under the procedure obtaining before the Code no stamp duty was levied on guardianship proceedings, and there is good reason for the exemption. In the generality of cases the minor's estate, as forming part of his parents' property, has just paid probate or administration duty, and this would make a double tax. The Code itself made no express change in the law; but it is sought to support the charge under the Stamp Ordinance which was enacted long after. It is apparently argued that guardianship proceedings fall within the description "civil procedure" in Part II. of Schedule B, whereas they clearly are included in "testamentary proceedings", for which Part III. specially provides. And it is significant that Part III., by rendering liable to duty "every pleading other than a petition", would seem expressly to exempt such a petition as the present. Part II. again, expressly imposes a duty on a certificate of curatorship under chap. xl. and on every account filed thereunder, implying that all other connected proceedings are to be on blank. A practical difficulty in requiring a stamp is the impossibility of ascertaining the "value" involved in a guardianship petition, the duty being *ad valorem.* No duty being clearly and unmistakeably imposed, the Ordinance must be construed so as to inflict the least burden on the subject.

Hay in reply.

Cur. adv. vult.

On February 26, 1892, the following judgment was delivered:—

BURNSIDE, C J.—After very mature consideration I am of opinion that the ruling in this case by the District Judge is right, and should be affirmed. The Judges of this Court had issued instructions to the Registrar, on the question being submitted to them, that guardianship proceedings were subject to the stamp duties imposed by the Stamp Act on civil proceedings as contradistinguished from testamentary proceedings; and the question having arisen before the District Judge as to whether such proceedings were liable to stamp duties at all, he has decided that they are not, and the Crown has brought the matter before us to be dealt with on revision of the District Judge's judgment.

The reasons advanced by the District Judge for his judgment seem to be conclusive. It is not denied that previous to the passing of the Civil Procedure Code applications for guardianship proceedings were not subject to stamp duties under the old Stamp Acts. No express reference is made to such proceedings either in the old acts or in the recent act of 1890; and if the recent act applied, it can only be because of that part of it which contains the duties on law proceedings.

Now, it is, in the first place, to be observed that all the duties on law proceedings are graduated with respect to the value of the property to which they refer, or the claim in money; and considering that guardianship cases in their primary initiation do not necessarily involve any question of a money value, it is not illogical to conclude that such a mode of

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adjustment of stamp duties was not intended to apply to them.

Then again, a special and one duty only is prescribed for every certificate of curatorship under chap. xl. of the Code, and another duty on accounts filed thereunder. This would seem to exclude the position that any other duties were chargeable in respect of proceedings of the same nature, more especially if such contention involved the conclusion that these very especially taxed proceedings were also liable to taxation under the general imposts on all law proceedings.

Sec. 591 of the Code does certainly require that an application such as that under consideration shall be by petition by way of summary procedure; and sec. 373 directs that it should be upon a "duly" stamped written petition, or it may be made orally upon the "requisite" stamp being furnished; but I see nothing in these words to preclude the conclusion that, if the law does not require a stamp in a particular proceeding by way of summary procedure, a petition in such a matter could be presented unstamped.

Then again, as the learned District Judge has put it, statutes which impose a pecuniary burden on the people must be strictly construed, and charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed, unless the language by which the tax is imposed is perfectly clear and free from doubt. In case of doubt the construction most beneficial to the people must be adopted.

There are great doubts in this case, and we must uphold the District Judge's ruling against the tax.

DIAS, J., concurred.

Affirmed.

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Present:—CLARENCE and DIAS, JJ.

(*December* 18, 1891, *and January* 19, 1892.)

D. C., Colombo, No. 2,173. } SADAYAPPA CHETTY v. LAWRENCE.

Promissory note—Action by indorsee against makers—Traverse of averment of presentment—Admissibility of evidence to prove excuse for non-presentment—Civil Procedure Code—Pleading—Agreement between debtor and creditors to pay to a trustee—Payment to the trustee—Defence.

According to the rules of pleading laid down in the Civil Procedure Code, an excuse for non-presentment of a promissory note or a waiver of presentment must be specially pleaded by a statement of facts relied on in that behalf.

When the presentment of a promissory note is averred in the plaint and traversed in the answer, such averment is not proved by evidence showing circumstances of excuse or waiver of presentment, nor is such evidence admissible in the absence of necessary averments in the plaint.

Where to an action by the indorsee against the makers of a promissory note it was plead d that the defendants and the plaintiff and other holders of promissory notes of defendants had agreed that the defendants should pay all monies then due by them on promissory notes, of which the note sued upon was one, in certain instalments to certain one of the creditors as trustee for the rest and for defendants, the trustee undertaking in the meantime to retire such notes when due, and that the defendants had in pursuance of the agreement paid all the instalments to the trustee;—

Held, that the agreement and payment to the trustee thereunder was a good defence to the plaintiff's action on the note.

The plaintiff as indorsee of a promissory note dated July 10, 1888, payable at the office of the New Oriental Bank Corporation, Colombo, sued the defendants as makers thereof, the plaint averring due presentment of the note at the office of the said Bank.

The defendants, among other things, denied the presentment of the note, and further pleaded in substance that it was agreed between the defendants, one Wytelingam (in whose favour the note in question and other notes had been made) and the holders of the said notes, one of whom was the plaintiff, that Wytelingam should pay and retire all the said notes and that the defendants should by a deed agree to pay to Wytelingam the monies due on the notes by monthly instalments of Rs. 1,000; that it was further agreed that Wytelingam should be the agent and trustee of the said holders for the purpose of receiving such payments, and that the plaintiff and other holders then agreed and promised that if the defendants should so pay Wytelingam, such payment should discharge defendants from all obligations arising on the said notes. The answer proceeded to state that in pursuance of such agreement the defendants by a certain deed (which was pleaded as part of the answer) engaged themselves to pay to Wytelingam the sums of money due on the said notes in instalments as agreed, and that in terms of the deed the defendants did pay all the instalments to Wytelingam.

The plaintiff in his replication, among other things, denied the agreement pleaded, and denied that Wytelingam ever was his agent or trustee, or that the defendants paid to Wytelingam the amount of the note sued upon or that Wytelingam was authorized by plaintiff to receive payment of the same.

The deed pleaded in the answer was an indenture dated July 18, 1888, between the defendants and Wytelingam, which, after reciting that the defendants were indebted to Wytelingam on certain notes

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specified in a schedule A (among them being the note sued on and to certain other persons on notes specified in a schedule B, and that they had requested Wytelingam to give them time for payment of the notes in his favour and to obtain time from the other persons for payment of the notes in their favour, which Wytelingam agreed to do, witnessed that the defendants engaged themselves to pay to Wytelingam Rs. 1,000 monthly, that Wytelingam bound himself to apply such payments in reduction of the amounts due to himself and other creditors on the notes in schedules A and B, and to allow any of the said notes to be dishonoured and not sue or allow the other creditors to sue on any of the said notes, and to save and indemnify defendants from all liability on the said notes. The deed also contained a hypothecation of the stock-in-trade in a certain shop belonging to defendants, as security for the due performance of the agreements on defendants' part.

At the trial the plaintiff sought to meet the denial of the presentment of the note for payment by evidence (which was objected to), to the effect that when the note fell due the defendants informed him of their inability to meet it and requested him to accept a part payment, and a renewal for the balance, but that they did not either pay part or renew for the balance. The learned District Judge (*Owen Morgan*) disbelieved the plaintiff's account of the cause of non-presentment; and as to the agreement pleaded in the answer and payment to Wytelingam thereunder, he found for the defendants, and he dismissed the plaintiff's action with costs.

The plaintiff appealed.

Withers (*J. Grenier* with him) for the appellant. The learned District Judge was wrong in holding there was no presentment of the note. There is evidence, which it is submitted ought to be accepted by the Court, that when the note fell due the defendants informed plaintiff of their inability to pay and requested him to retire it, promising to settle with him. This evidence, it is submitted, was admissible under the averment of presentment, and is *prima facie* proof that the note had been presented: *Lundie* v. *Robertson*, 7 East 231; *Croxon* v. *Whitehall Worthen*, 5 M. & W. 5. Then as to the alleged agreement, it is submitted that it affords no defence to the action The plaintiff is no party to the deed, which on the face of it shows that it was not entered into in consequence of an arrangement with creditors but was an independent agreement between defendants and Wytelingam personally. Further, the note sued on had not been endorsed to plaintiff at the date of the deed, and is in fact scheduled therein as being held by Wytelingam. Therefore the agreement pleaded is no defence in this particular action.

Dornhorst (*Sampayo* with him) for the respondents. The evidence of the alleged promise to pay after the note fell due was not admissible under the special averment of presentment. The facts attempted to be given in evidence constitute an excuse for non-presentment; but such excuse if relied on should have been specially pleaded. Under sec. 40 of the Procedure Code, which corresponds to Order xix., r. 4 under the Judicature Acts, every "material fact" must be pleaded, and therefore such a special matter as an excuse for non presentment should be pleaded. The cases cited are old authorities, and do not apply to modern pleadings. Even if otherwise, all that they did decide was that a promise to pay was *prima facie* evidence of presentment. But here it is admitted that there was in fact no presentment at all; and therefore the cases cited do not help the other side. As regards the main defence, it is submitted that the agreement and payment thereunder, as to which the District Judge found for the defendants, afford a good defence in law. It is not shown that the note had not been endorsed to plaintiff at the date of the agreement. The deed scheduled the notes merely according to the payees, and not with reference to the holders at the time. Further, it is shown that the agreement, to which the plaintiff was a party, embraced all the notes of defendant's outstanding at the time, whoever were the holders.

J. Grenier in reply.

Cur. adv. vult.

On January 19, 1892, the following judgments were delivered:—

CLARENCE, J.—Plaintiff declares on a promissory note payable at the New Oriental Bank Corporation made by defendants in favour of one Wytelingam, and by him endorsed to plaintiff. Plaintiff appeals from a judgment dismissing his action with costs.

Defendants admit the making of the note, but traverse plaintiff's averment of presentment, and also set up a defence, the substance of which is a plea that by agreement between plaintiff and Wytelingam and other creditors of defendants it was arranged that defendants should pay the moneys due on the note now sued on and other notes to Wytelingam in trust for defendants and creditors, and that defendants did so pay Wytelin-

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gam. Plaintiff denies that there was any such agreement.

It is not contended on plaintiff's part that the note was presented at the New Oriental Bank Corporation for payment by defendant. As to this, plaintiff deposed that, on the day when the note fell due, defendants came to him and informed him of their inability to meet it, and asked him to accept part payment and a renewal for the balance, to which he assented; but defendants did not keep their promise to pay part and renew for the balance.

This will be a val d excuse for non-presentment; but, in my opinion, according to the rules of pleading laid down in our Procedure Code, such an excuse for not presenting should be pleaded as such by a statement of the facts relied on in that behalf. I do not think it was open to plaintiff to meet defendant's traverse of his averment of presentment by deposing to an excuse for non-presentment or a waiver of presentment. But the main defence opposed by defendants to plaintiff's declaration is the plea already mentioned, of an agreement between defendants and plaintiff, Wytelingam and other creditors of defendants, and a payment to Wytelingam under that agreement. The agreement is not very clearly pleaded; but the substance of the agreement as pleaded seems to be, that plaintiff and Wytelingam and other holders of defendants' notes agreed with defendants that Wytelingam should retire all the notes and be repaid by defendants in monthly instalments, Wytelingam being a trustee for himself and the other creditors of the moneys so received from defendants, and defendants giving Wytelingam a notarial obligation in the amount of the notes included in the agreement.

Defendants did execute the notarial deed in favour of Wytelingam, and thereby promised to pay Wytelingam the amounts of a number of notes included in two schedules. The note now sued on is included in schedule A, which schedule notes of which Wytelingam was payee. The learned District Judge says in this judgment that this note had not been endorsed to plaintiff at this time. I do not, however, find any evidence as to the date when Wytelingam endorsed the note. It does not follow from the note being included in schedule A that Wytelingam was then still the holder, for the schedules seem to classify the notes according to who were the payees. However that may be, if the defendants' story of the agreement is true, the intention seems to have been to make Wytelingam a means of collecting all the notes and so the note would either way be within the scope of the agreement.

The direct evidence offered by defendant in proof of the agreement is entirely that of second defendant, who says that at a meeting between himself, Wytelingam, and plaintiff, and several other Chetty creditors of defendants, at Wytelingam's house, this arrangement was agreed upon. Neither Wytelingam nor any of the other Chetties are called.

There are, however, some corroborative circumstances going to lend support to second defendant's narrative. He says—and the matter is one on which he could at once have been contradicted if the fact be otherwise—that none of the other Chetties have sued him. Plaintiff is the only one who has sued defendants, and he was not prompt in suing. Defendants have also adduced substantial evidence in proof that they did make to Wytelingam the payments corresponding to the scheduled notes. And lastly, there is the circumstance that plaintiff, when examined as a witness in a previous action, which has already been before us in appeal, in which the Chartered Mercantile Bank was plaintiff and he was defendant, admitted that Wytelingam was appointed a trustee to recover moneys due to himself and other creditors.

The learned District Judge believes that the agreement which defendants set up was made, and so upholds defendants' plea, and I see no reason why we should take upon ourselves to say that he is wrong.

Upon the point as to presentment, I think that plaintiff failed. He alleged due presentment; and the evidence which he offered, to prove a good reason why there was no presentment, was, in my opinion, rightly objected to. There is also no reason why we should pronounce the District Judge to have been wrong in upholding the defendants' main defence.

DIAS, J.—This is an action by the endorsee of a promissory note against the makers. The note was payable at the New Oriental Bank Corporation. Admitting the note, the defendants deny the due presentment, and set up a special plea to the effect that there was an agreement between them and their creditors, including the plaintiff, with regard to the payment of this and other notes then held by the defendants' creditors. On the question of presentment, there does not seem to have been any presentment at all, but the plaintiff tried to excuse the non-presentment by evidence, which he was not entitled to do in the absence of any averment in the pleadings. This, however, is a minor matter; but the defence principally relied on by the defendant is the agreement pleaded in the answer.

In a well considered judgment the District Judge

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upheld the defendants' contention founded on the agreement, and he gives very good reasons for that opinion, and I agree with my brother Clarence that the judgment should not be disturbed.

Affirmed.

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Present.—BURNSIDE, C. J.

(*October* 1 *and* 6, 1891.)

P.C., Panadura, No. 5,211. } PERERA V. PERERA,

Gaming—"Public place"—"Place to which the public have access whether as of right or not"—Ordinance No. 17 *of* 1889, *sec.* 3, *sub-sec.* 2—*Construction.*

The word "access" in sec. 3 sub-sec. 2 of the Ordinance No. 17 of 1889 means legal access, *i. e.*, access as of right or by the express or tacit licenee of the owner of the land, and not such access as would constitute a trespass against the owner.

The land of a private individual, whether enclosed or not, the entering of which would be a trespass against the owner, is not a place to which the public have access within the meaning of the Ordinance.

This was a prosecution for unlawful gaming under Ordinance No. 17 of 1889. The place in which the gaming was alleged to have taken place was described in the evidence as follows:—"The garden belongs to the accused. It is not enclosed. It adjoins the high road—there is no fence between it and the high road. It is not a residing land. Anybody can go on it from the high road."

The defendants appealed from a conviction.
Dornhorst for defendants appellant.
Dumbleton, C. C., for the Crown.

Cur. adv. vult.

On October 6, 1891, the following judgment was delivered:—

BURNSIDE, C. J.—I cannot affirm the conviction, because I cannot find out what offence the accused have been convicted of. The plaint discloses no offence: it says they "engaged in unlawful gaming, betting with dice and money." This is not the proper description of any offence within the Ordinance. Then, the Magistrate says that the charge was framed and read to the accused. If it was, it has been omitted from the record. I cannot find it. Then, the Magistrate says, he convicts each of the accused under sec. 4 of Ordinance No. 17 of 1889. Now, that section creates no offence, but merely imposes a penalty on "unlawful gaming", and within that term is included nearly a dozen different offences; so that I must quash all the proceedings. I do not hesitate to do so, because on the law the Magistrate is mistaken. He holds, that because a place is unenclosed it becomes a public place to which the public "have access whether as of right or not" within the Ordinance relating to gaming. The word "access" must be presumed to mean legal access; and the word "place" must be construed to mean either public place, to which the public have of course legal access as of right, or a private place to which they may have legal access, whether as of right or by the tacit consent or express license of the owner. It cannot be held that because a trespasser on the land of a private individual, by jumping over the fence, obtained access to the place, therefore such a place would be within the Ordinance. A person who obtains access to unenclosed land, without a right or the consent or license of the owner, is as much a trespasser as one who in the same way obtains access to enclosed land, and if the Magistrate's interpretation of the Ordinance were right, then a person who jumped over an enclosure would be a person having access, though not of right, to the place he trespassed on, and so the place would be a public place because the person had access to it, though not of right. Besides which, it would give the Ordinance universal application, as it is not possible to imagine any place in this Island to which the public may not have access either of right or not.

Set aside.

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Present:—BURNSIDE, C.J., and DIAS, J.

(*February* 26 *and March* 4, 1892.)

D. C., Matara, No. 35,819 } JAYASURIA V. OMAR LEBBE MARCAR.

"Planter's share"—Interest in land—Notarial agreement—Ordinance No. 7 *of* 1840, *sec.* 2—*Prescription.*

A "planter's share" is an interest in land within the meaning of sec. 2 of Ordinance No. 7 of 1840, and cannot be acquired by the planter except by means of a notarial instrument or prescriptive possession.

Prescription with reference to a "planter's share" begins to run, not from the date when the planting commenced, but from the completion of the agreement, when the planter has taken his share and begun to possess it adversely to the owner of the land.

This was an action under sec. 247 of the Civil Procedure Code to have it declared that certain property seized under a writ issued at the instance of the plaintiff was the property of his judgment debtor, and liable to be sold under the writ. The property was described in the plaint as "the planter's share or interest, being one-half of the trees of the second plantation" of certain gardens. The answer denied

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the title of the plaintiff's judgment debtor; and further pleaded that even if the judgment debtor planted the land as alleged, he had no right to any planter's interest in the lands, because he had not planted under any notarial agreement. The defendant further alleged title in himself upon a deed of transfer.

Admittedly there was no notarial agreement between the owners of the lands and the planter; but the District Judge found that the plaintiff's judgment debtor had been in possession of the planter's share ever since he commenced the planting of the lands, *i. e.*, for a period of ten years, and held that he had therefore acquired an interest in the lands by prescription.

The defendant appealed from a judgment in favour of the plaintiff.

Dornhorst for appellant. The question for decision in this case is one of vast importance. Can what is termed a "planter's interest" be acquired otherwise than by deed? The provisions of Ordinance No. 7 of 1840 are clear and explicit, and require a notarially executed deed to pass an interest in realty. Custom, however ancient, cannot override the statutory law. The decision in 8 S. C. C. 67 with regard to *ande* cultivation applies. There, notwithstanding an admitted immemorial custom, supported by a Full Court decision (7 S. C. C. 71), it was held that the agreement for the *ande* share could not be proved by parol, but should be evidenced by a notarial deed. The present case will illustrate the danger and injustice which might result from an avoidance of the Ordinance of Frauds and the admission of parol testimony. The appellant is the owner by purchase of the freehold of this land, and must be taken to have satisfied himself about title before purchasing. It would be unjust to admit parol evidence of a planter's interest which could override his registered title by purchase when it is remembered that a prior demise, or even a conveyance or mortgage, would be of no avail, if not registered. It is conceded that a planter's interest, like any other interest in land, may be acquired by prescriptive possession. But the question is, when does the planter begin to possess adversely to the fee-owner? Is it when the plants are put on the ground, or when they begin to bear? It is submitted that prescription would not begin from the time the planter commences to plant, because the possession then would not be adverse to the owner. It must be shown positively in each case when the possession became adverse, which it is submitted is not shown here.

Browne (*Morgan* with him) for respondent. In the case of a planter like the present, who had with the owner's knowledge entered on the land, planted and possessed for many years, to deny his right for want of a notarial agreement would be to make the Ordinance of Frauds work fraud. The right of the planter apart from notarial agreement has been recognised in our Courts for over thirty years without question till now: *C. R., Calpentyn*, 17.716, Ram. Rep. 60 62, p. 113. No one would buy planted land without enquiring into or allowing for and protecting himself against planter's rights. Even if prescriptive possession has to be established, such possession must commence to run from the first acts done in assertion of the right now claimed, such as the first occupation of the land, or the first planting season completed. At least it must run from the first perception of profits, which in cocoanut planting may be other than the nuts.

Dornhorst in reply.

Cur. adv. vult.

On March 4, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—This is an appeal by the defendant, being owner of certain land, against a judgment in favour of the plaintiff, execution creditor, who claimed the right to seize what is called the "planter's share" in the defendant's land belonging to the planter, the execution debtor.

A custom has prevailed throughout the maritime provinces, the origin of which is perhaps coeval with the ownership of land, whereby estates in land have been created and known as "planters' shares" in first or second "plantations". A cultivator, with the leave of the owner of the land, would plant a portion, or perhaps all of it, with cocoanut, jak, areca, or other trees of that character, of slow growth and long lived, upon an agreement or understanding that when they came into bearing the planter should have such an interest in them as might be agreed on. In some cases the planter would have a certain number of the trees with the ground on which they stood and with right to live on the land and to go over it to take care of the trees and pluck the fruit. In some cases the planter's share would be a certain portion of the fruit itself. In some cases he would have the right to retain the trees which he had planted until he had been paid at a stipulated price for each by the owner of the land, and in fact often upon some customary rule which applied to these plantations. But in all cases the interest acquired by the planter has been recognised as a right of property in the land separate from and adverse to that of the owner, to be dealt with by the planter at it his own will, to be sold by him, inherit-

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able by his heirs, subject to his devise, and to his creditors for his debts in all respects, as another property. However convenient and beneficial this simple mode of acquiring an interest in land and improving the land itself may be, it has undoubtedly been the source of much litigation and consequent crime, because the evidence of ownership is left to depend on mere verbal agreement and tradition, supported by witnesses prone to perjury and deeply interested on both sides. That title so acquired should have remained unchallenged since the passing of the Ordinance No. 7 of 1840 is a proof of how interwoven with the actual possession of the land this custom had become; but it being now distinctly challenged in this case, we cannot avoid dealing with it.

Sec. 2 of the Ordinance No. 7 of 1840 enacts that "no sale, purchase, transfer, assignment, or mortgage of land or other immoveable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immoveable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immoveable property, shall be of force or avail in law, unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her, in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses".

Now, I do not think the Legislature did or could have apprehended the absolute revolution which this section necessarily effected in the tenure of land and in the rights of property under a communal system in a country where the peasantry were gossly ignorant of the formalities which had been prescribed, by which alone land was to be transmitted, and which were not acceptable to most of them, where no, or at most an imperfect, system of registration existed, and where infinitesimal shares of land were the individual and collective support of a prædial population who had been accustomed to deal with it and give and accept title to it and create estates in it by the most simple formalities. The property which is sought to be acquired under the description "planter's share" is undoubtedly an interest in land and; under the section it can only be created and a good title acquired to it by the formalities prescribed, viz., by writing by the party making the same or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, the execution of such witnesses being duly attested by such notary and witnesses. This Court has already given a judgment to the same effect with reference to what are known as cultivations in *ande*, and the Legislature at once stepped in and met the matter by legislation.

It was urged that a title to these plantations might be obtained by prescription. That is an undeniable proposition; but looking to the difficulties of proof as to the moment when the possession of the planter became adverse to that of the owner in order that a title by prescription might begin to run, I think we are compelled to say that such a title must at most be very precarious, and courts should be extremely cautious in upholding title alleged to be so acquired. In the case before us the respondent urges that the planter had had an adverse interest from the moment he planted the trees, and the District Judge upheld that contention; but we cannot. The planter planted with the leave of the owner. When, then, did that leave terminate? Surely not at the moment the last sod was covered over each individual seed or around each plant, because it was still under the owner's license that the planter cultivated the plant to bring it to growth and to a crop, when his reward was to begin. It was then said that the adverse interest would be created so soon as the planter took his share. This seems more reasonable; but would the prescription so acquired run only in respect of the particular tree from which the crop was gathered? And, in respect of a plantation, would there be a different title by prescription dependent on the time when each tree began to bear? In this case the evidence to create a title by prescription, even on the theory just propounded, is utterly insufficient for the purpose.

We are therefore bound to rule, however much we may regret it, that the respondent has failed to show any legal title, such as the Ordinance requires, or by prescription, to what is called the planter's share, and the judgment in the Court below must be set aside and judgment entered for the defendant appellant with costs in both Courts.

DIAS, J.—The plaintiff obtained a decree in the Court of Requests against one Davit and another, and, through the Fiscal, seized the planter's share, being one half of the trees of the second plantation of a garden called Kongahawatte, when the defend-

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ant, who is the owner of the soil, claimed the same. According to my reading of the answer, the defendant does not deny the existence of a 2nd plantation in that garden, but denies that it was made by Davit. In fact, he says that the 2nd and 3rd plantations were made by the owner, one Wijesinghe Mudaliyar, under whom apparently the defendant claims. There is a further material averment in the answer, to the effect that the 2nd plantation was made eight years ago, and the planter's right cannot be enforced in the absence of a binding agreement between the planter and the owner of the soil. The above averment is evidently intended to meet an averment in the plaint to the effect that Davit had obtained a prescriptive title to the planter's share in question. This planter's share stands in three contiguous plots of ground, and the planter was Davit, and Wijesinghe Mudaliyar was the owner of the soil. According to the plaintiff's evidence the trees on these plots of ground have just blossomed, so the planter had not time enough to acquire title by adverse possession. Davit's right, if any, can only be sustained by a written agreement duly executed as required by our Statute of Frauds. Admittedly there is no such written agreement; and as against the defendant, who is the present owner of the soil, the plaintiff has to establish Davit's right to the planter's share in question. This he can only do in one of two ways, viz., (1) by a duly executed notarial agreement, or (2) by a title acquired by adverse possession; and as I have already pointed out, neither of these courses is open to the plaintiff. It was contended for the respondent that by long usage, having the force of law, a planter's interest in land can be acquired without a notarial writing. This raises a question of great importance affecting small native coconut gardens throughout the whole of the maritime provinces. There is hardly a native garden in which persons other than the soil owner have not an interest as planters. Almost all the land cases which come up in appeal before us are concerned, more or less, with planter's interests, which by long usage seem to have acquired the form of a tenure, acquiesced in by the people and recognised by the Courts. But I may remark in passing that in these cases the planter's right is based on a title by prescription acquired by ten years' adverse possession. In this case there is no such prescriptive right in the planter, who seems to have commenced the plantation 15 years ago; and I cannot agree with the District Judge as to the time when prescription should begin to run, *i. e.*, from the time the plants were put on the ground. I am not aware of any authentic documents or records which deal with this kind of tenure; but that it had its origin in remote antiquity, and continues up to the present time, there can be no doubt. I may remark that the share of the planter in the land which he plants is not uniform. In some parts of the country the planter takes half of the trees, and in others half of the soil as well. Much depends upon the nature of the ground. If it is either forest or old jungle, the planter gets a smaller share, because he has the benefit of the surface cultivations, such as hill paddy, kurakkan, and so forth, for about two or three years; but if the land is an abandoned chena or scrub jungle, the planter gets a larger share, such as half of the trees, and in some cases half of the soil as well. The above are some of the incidents of this kind of tenure; and if they are to be established by oral evidence we should be opening a door to much perjury and false swearing. On a careful consideration of the matter in all its bearings, I think it more desirable that contracts of this kind should be reduced to writing as required by Ordinance 7 of 1840. The planter's interest as above described is an interest in land within the clear meaning of the Ordinance of 1840; and there being no written agreement the plaintiff's action fails, and it should be dismissed. On the question of costs I had some doubts, as the question raised is a novel one; but as the defendant has taken the objection in the answer, and the plaintiff nevertheless carried the case to trial, the costs should follow the event, and the plaintiff must pay the costs in both Courts.

Reversed.

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Present:—BURNSIDE, C. J., and DIAS, JJ

(*February* 19 *and March* 8, 1892.)

D. C., Colombo, (Testamentary) No. 5,001. — In the matter of the estate and effects of LANSEGEY ANDRIS PERERA DHARMAGUNEWARDANE, Mohandiram, deceased.

Administrator—Right to retain funds—Control of Court—Order to pay money into Court—Joint administration—Procedure.

An administrator has the right, until the estate is closed, to retain in his hands the funds of the estate for the purposes of administration.

Although an administrator is generally subject to the control of the Court, an order upon him to pay money in his hands into Court is not justified, unless such order is shown to be necessary for the protection of creditors or heirs in consequence of the misconduct or default of the administrator.

The appellant, one of three administrators in this matter, and the respondents, the two other administrators having filed accounts, the Court ordered that the administrators should examine

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each other's accounts and agree or disagree as to their correctness. The appellant then filed a statement of objections to the respondents' accounts, and the Court referred the accounts and the objections to the Secretary for report. The Secretary subsequently submitted to Court that he was unable to report as to the correctness of the accounts in the absence of vouchers, or as to the validity of the appellant's objections without explanation from the respondents. The Court thereupon ordered that the objections by one party and the explanation by the other party should be made in a certain form.

The Court also, at the instance of the respondents, ordered the appellant to bring into Court a sum of Rs. 1,877·09, the reason stated being that the appellant's account as compared with that of the respondents' showed that he had that amount in hand, which the learned District Judge said he had no right to detain.

An appeal was taken from the order upon the appellant to bring the above amount into Court.

Sampayo (*Dornhorst* with him) for appellant. The administrator is entitled to retain funds of the estate until distribution. Even assuming the Court has power to make the order appealed against, there must be sufficient ground shewn, and the Supreme Court has deprecated the exercise of such a power; *D. C., Int. Colombo*, No. 4,244, 7 S. C. C. 110. Besides, such an order could only follow upon an inquiry; but here the accounts are still under consideration, and it does not even appear that the actual sum ordered to be brought in is in the hands of the appellant.

Pereira for respondents. An administrator is always subject to the control of the Court, which it is submitted was rightly exercised in this case. Actual misconduct is not necessary to be proved. The amount ordered to be paid into Court is a clear balance in the appellant's hands, as shewn by a comparison of his account and that of the respondents. The District Judge was therefore right in making the order, pending the settlement of the accounts.

Drnohorst in reply.

Cur. adv. vult.

On March 8, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—The order appealed against is that the appellant, one of three administrators of the same estate, bring into Court a sum of Rs. 1,877·09. The order was made by the District Judge on the motion of counsel for two of the administrators, who are the respondents on this appeal, in the course of the discussion in a testamentary proceeding of the accounts of the appellant. The District Judge seems to have thought that this was within his power, because from the appellant's accounts it appeared that he had this amount in hand, and the District Judge says he has no right to retain it. I know of no authority by which an executor or administrator can be ordered to bring into Court the proceeds of the estate which he represents, which have reached his hands. No doubt an administrator is subject to the control of the Court, and the Court might make such orders, for the protection of creditors or devisees or next of kin, as became necessary in consequence of the misconduct or default of the administrator; but until the administration is closed the administrator is entitled to retain the funds of the estate in his hands for the purpose of meeting his liabilities as administrator to the creditors.

If he fail to close the administration in due time, or, having closed it, fail to account to those entitled to the residue, he may be compelled to do so in a proper suit instituted against him by the proper parties; but the Court has no power to make an order *ex mero motu* such as that appealed against.

The grant of administration to three different people has occasioned these difficulties. It is a fundamental rule of Court to prefer a sole administration to a joint one. The law discourages joint administration, and it should never be granted, except in cases of the utmost exigency or necessity. The order appealed against is set aside.

DIAS, J.—Three administrators were appointed to administer the estate of the deceased, and, as might have been expected they are at cross purposes, two of them apparently acting together against the third. The respondent administrators filed an account which purports to be a final account, and called upon their co-administrator to file his account, which he did on the 27th of October, 1891. These accounts were referred to the Secretary of the Court for report, and on the 21st of December, 1891, he reported, for reasons given by him, that he was unable to make a report. Some proceedings then took place and some explanations and objections were filed by both parties, and the District Judge being unable to make anything of the accounts, cut the matter short by ordering the appellant to pay into Court a sum of Rs. 1,877·09, which is said to be in the hands of the appellant according to his own account. Against this order the present appeal is taken. The reasons given by the District Judge are very meagre. As a general rule executors and administrators are entitled to retain the assets of the estates which they administer till they are distributed in due course of law. They administer the estate subject to the control of the Court, and under certain circumstances the Court

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has the power to call upon them to pay into Court moneys in their hands, but this power must be exercised on good and strong grounds. What the District Judge seems to have done in this case is to take the appellant's account and pick out all the credit items and call upon him to bring them into Court. Without taking a general account of the administration of the three administrators it is impossible to say for how much of the assets each is responsible, and the difficulty is further enhanced by the circumstance that the three administrators are also heirs of the estate. I think the order appealed from must be set aside with costs.

Set aside.

———:o:———

Present:—BURNSIDE, C.J., CLARENCE and DIAS, JJ.

(*November* 24, 1891, *and January* 19, 1892.)

D.C., Colombo, No. C. 581. } WEERAWAGO v. the BANK OF MADRAS.

Banker and customer—Necessity for demand by cheque—Note indorsed by customer and held by banker—Right of banker to debit note to customer's account—Notice of dishonour—Pleading—Replication, necessity for—Civil Procedure Code, sections 79, 146.

In the ordinary relation of banker and customer, it is not necessary that the customer's demand for the balance due him should be by cheque. Any demand, if not complied with, will entitle the customer to recover such balance by action.

A banker, holding as indorsee a promissory note payable at his bank, upon which the customer is liable as an indorser, is entitled upon dishonour of the note to debit the customer's account with the amount thereof, provided due notice of dishonour has been given to the customer.

Per CLARENCE, J.—Although, under the Civil Procedure Code, pleadings are not to go beyond answer except by special leave, yet if a defendant's answer contains averments requiring to be met, it is none the less incumbent upon plaintiff to meet them, either by obtaining leave to reply or by asking the Court, under section 146 of the Code, to frame an issue upon defendant's averments.

Judgment of the District Court affirmed by CLARENCE and DIAS, JJ., BURNSIDE, C.J., dissenting.

The plaintiff, a customer having a current deposit account with the Bank of Madras, sued the bank to recover the sum of Rs. 1,039·64 as the balance due to him. He averred that the bank sought to charge him with Rs. 1,000 due upon a promissory note alleged to have been made in plaintiff's favour and by him indorsed to a third party, who had indorsed it to the bank, the bank alleging that upon dishonour of the note, its amount had been debited to plaintiff's account, and the note itself returned to plaintiff's messenger. The plaint proceeded to negative the making of the note, the indorsement by plaintiff, and the delivery to a messenger of plaintiff. The defendants in answer, after pleading certain matters of law, set up the making and indorsement of the note, and averred due presentment and notice of dishonour to plaintiff, who had failed to pay it, whereupon it had been debited to his account—the plaintiff acquiescing therein—and the note itself delivered to a messenger sent by plaintiff. In the event of plaintiff being held entitled to recover, the defendants claimed in the alternative Rs. 1,001·25 as due upon the note.

There was no replication, and at the hearing no issues were framed. The District Judge gave judgment for the defendants.

The plaintiff appealed.

Layard, A. A.-G. (*Browne* with him) for the appellant. The District Judge's ruling as to the necessity for a demand by cheque was erroneous. The demand need not be by cheque alone: *Foley* v. *Hill*, 2 H. L. C. 28. A banker has not the right to debit the amount of a note against his customer, where the latter is an indorser, though he may do so where the customer is the maker who corresponds to the acceptor of a bill of exchange: *Kymer* v. *Lawrie*, 18 L. J. Q. B. 218. Even if it were otherwise, the defendants have failed to prove that plaintiff had due notice of dishonour.

Dornhorst (*de Saram* with him) for the defendants. The general law as to repayment on cheques alone is not disputed; but in the present case a special contract requiring the drawing of a cheque has been averred in the answer and not traversed. Further, the plea that plaintiff acquiesced in the debit to his account has not been met by any traverse, nor by the framing of an issue on the point at the trial. Where new matter is averred in an answer the Court will always give leave to put in a replication. But in the present case there is a claim in reconvention which entitles plaintiff to reply as of right. Plaintiff did not reply or ask for leave to file a replication as he should have done, and must be taken to have admitted the averments in the answer. Among these averments was the allegation of due notice of dishonour to plaintiff, and it was therefore not incumbent on defendants to prove such notice. Even assuming the notice to have been put in issue, the defendants have proved it.

Browne, in reply.

Cur. adv. vult.

On January 19, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—To dispose of this appeal intelligibly,—for the pleadings have thoroughly embarassed what undoubtedly were the real issues which the

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parties to the suit decired should be decided—it is best to state what the law is on the two points which are really in dispute. The first is, what are the ordinary legal relations between a banker and his customer in respect of the payment of money lodged by the latter in the bank? The case of *Watts v. Christie*, 18 *L. J. Ch.* 173, clearly decides that it is the duty of a banker to pay the debt due to the customer pursuant to the order, cheque, or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any other person he pleases. He may do so by written instrument or verbal direction; but the banker is entitled to require some written evidence of the order for the transfer.

The learned District Judge was therefore wrong in holding that the demand can only be made by cheque. No doubt the banker and his customer may make a special contract, varying the ordinary legal relations; but I do not think it is seriously contended that there was any such contract in this case. It certainly was pleaded by both parties, but there is not a tittle of evidence to support any special contract. The second point is, in what relation does the banker stand to a customer with respect to notes in the hands of the bank as indorsees, on which the customer is liable as an indorser? If a note is payable at the bank, the acceptance of such a note or its indorsement in blank by a customer is tantamount to an order from him to his banker to pay the note to the person who is legal holder for value when the note becomes due; and if the bank itself be the holder, the bank has the undoubted right to treat the amount of the note as a debt due from the customer to the bank, and set it off against any balance which may be due to the customer, or claim it in reconvention in an action at the suit of the customer, it being, however, incumbent on the bank, like every other holder, to establish clearly that all the necessary preliminary steps, such as notice of dishonour, etc., had been observed to make the customer liable upon the note to the bank for its amount.

Had the learned District Judge followed the practice prescribed by the Code, he should have set down the issues which were to be tried, and properly they would have been those of law and fact to which I have just alluded, and which were in fact disposed of. And the question for us to decide is, whether they have been rightly disposed of. I have already said that the District Judge has erred in his ruling that, as a matter of law, a bank is only bound to pay on a cheque. Upon this issue, therefore, the plaintiff was entitled to judgment, as the defendant bank does not deny that a formal demand was made for whatever balance was really due to the plaintiff, The defendant bank has set up a special contract, that it was only to pay on cheque; but there is no evidence whatever of such a contract.

On the second issue, the defendant bank has in my opinion also failed. I take it that the burthen of proving the special fact alleged by the defendant bank, that the plaintiff had directly acquiesced in the bank charging his account with the amount of the note, lay on the defendants. Counsel for the defendants referred to the pleadings as shewing that the defendants' allegation to that effect had not been traversed. That is undoubtedly so; but we have before us the record of what took place at the trial, at which the defendants treated the allegation as directly traversed, and a burthen on the defendant bank which counsel laboured to discharge. The defendant bank cannot now fall back on the pleadings and say: "I was not bound to prove the fact, because the plaintiff has not denied it." The defendants have certainly failed to establish any subsequent acquiescence by the plaintiff in his account being charged with the amount of the note. I cannot accept the story of the delivery of the note to some unnamed person, whose present existence seems mythical, as in any way evidence that the plaintiff acquiesced in what had been done.

Then, if that proof has failed, has the defendant bank otherwise established its right as a creditor of the plaintiff on the note? In my opinion it has not. Before the defendant bank could have recovered on the note it was bound to prove as against the plaintiff that he was an indorser in blank, and that every proper condition precedent had been observed, in order to render the plaintiff liable by reason of the default of the maker. The defendants have singularly failed in this respect. The indorsement has been specially denied. The best evidence of that indorsement was the production of the note itself; and it was not competent to the defendant bank to enter upon the secondary proof by which they sought to establish the existence and indorsement of the note, until they had accounted for the absence of the note. If it had been satisfactorily proved that the note had been delivered to the plaintiff, then notice to produce it ought to have been given, and, failing the production, the defendant bank might have resorted to secondary evidence.

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Then again, the evidence that the note had been presented for payment and dishonoured is not sufficient to my mind, nor do I think due notice of dishonour was given. The mere posting of notice to some address, without showing how it was presumed that address would find the plaintiff, is not sufficient.

The defendant bank, therefore, has failed to establish that, as holder of a note which the plaintiff had indorsed and which was dishonoured by the maker, the bank was in a position to sue the plaintiff for the amount of the note, and consequently the defendant bank is not in a position either to charge it to the plaintiff's current account, or to claim the amount in reconvention in this action.

In my opinion the judgment of the learned district judge should be reversed, and judgment entered for the plaintiff with costs. Whilst the pleadings are singularly bungling, I think all the facts which were necessary rightly to dispose of the real contest between the parties were gone into before the district judge, and neither party has been prejudiced by the embarrassments which the state of the pleadings might otherwise have created.

Clarence, J.—I am of opinion that this judgment should stand. Defendants are bankers and plaintiff is a customer of the bank, and the contest between the two parties is—whether defendants are within their right in debiting plaintiff's current account with the amount of a certain promissory note payable at defendants' bank and purporting to have been drawn by one Sivagurunathen in favor of plaintiff and by plaintiff indorsed to one Arunasalem Chetty and by Arunasalem Chetty indorsed and handed to defendants for collection. Plaintiff denies that Sivagurunathen made the note or that plaintiff indorsed it. It is admitted that plaintiff, upon learning that defendants had debited his account with the amount of the note, demanded payment of his balance in full, with which demand defendants did not comply, and plaintiff now sues therefor.

A preliminary point is taken by defendants, that plaintiff has not averred a demand by cheque. I agree with the Chief Justice that point is not maintainable. It is admitted that a demand was made and refused, and that is enough to support plaintiff's action, if in fact there was a balance due to plaintiff.

If it be true that this note was indorsed by plaintiff to Arunasalem and by him indorsed and handed to the bank for collection, then the bank have a right to debit plaintiff's account with the amount of the note, provided always that due notice of dishonor was given to plaintiff. The plaintiff denies that such a note was made by Sivagurunathen or indorsed by himself. The defendants' case is, that the note after dishonor was handed by defendants to plaintiff's kanakepulle. Oral evidence of contents of the note was adduced by defendants, though no notice had been given to plaintiff to produce the original. That oral evidence might under those circumstances have been objected to. Plaintiff, however, made no objection to its admission, and we may take it that plaintiff waived the objection and assented to the contents of the note being evidenced in this way. The district judge finds that plaintiff did indorse the the note to Arunasalem who indorsed it to defendants, and with that finding I see no reason to be dissatisfied.

But before bankers under such circumstances could debit the customer with the amount of a note, the due notice of dishonor to the customer must be established. There was evidence in this case on both sides, and if we had to say whether defendants have proved due notice of dishonor by evidence, we could not say that defendants have proved it. As to the handing of the dishonored note to plaintiff's kanakepulle, the date when that was done is not ascertained and the requisites of a proof of notice through the Post Office are not fulfilled. Plaintiff is not the maker but an indorser of the note, and consequently it would have to be shown that the notice was properly addressed and posted. Now, the witness who was examined as to the posting of the notice said that he addressed the notice to plaintiff at the address, Keyser Street, Pettah, and there is no evidence that plaintiff lived or had any place of business in Keyser Street.

But in fact plaintiff had raised no issue as to notice of dishonor. In his plaint the plaintiff in anticipation of the defence alleged certain negatives concerning the note, but not concerning dishonor. Defendants then answered expressly averring notice of dishonor. Now, it is true that under the Procedure Code pleadings are not to go beyond answer except by special leave, but none the less if a defendant's answer contains averments requiring to be met, it [illegible]s upon the plaintiff to meet them, either by obtai[illegible]es leave to reply or by asking the Court to fram[illegible]ing issue (see section 146) upon the defendants' aver[illegible]ments, but neither of those courses did plaintiff adopt. [illegible] There-fore, I am of opinion that the necessary poi[illegible]nt as to notice of dishonor is established on the [illegible] pleadings. I am therefore for affirming this judgmen[illegible]t with costs.

Dias, J.—The defendants are ban[illegible]kers and the plaintiff is a customer, and the quest[illegible]ion is whether the defendants are entitled to debi[illegible]t the plaintiff's current account with the amount of [illegible] a promissory note on which the plaintiff is liable as [illegible] an indorser. The points at issue are not very cle[illegible]arly brought out in

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the pleadings, and it is to be regretted that no settlement of issues took place before the trial ; but for all practical purposes the material issues were tried and decided, viz., whether the note in question was indorsed by the plaintiff and whether under the circumstances the bank had a right to debit the plaintiff with the amount of the promissory note which was dishonoured. I pass over the other question adverted to by the district judge as to payments by cheques, simply remarking that I do not agree with the district judge. With regard to the indorsement of the note by the plaintiff, that was not proved by the best evidence, that is, the note itself, but the parole evidence offered was not objected to and I assume that the objection was waived. The plaintiff's liability on the note as indorser having been established, the next question is whether the defendants have placed themselves in a position to debit the plaintiff with the amount of the note. As indorser the plaintiff is clearly entitled to notice of dishonour before he can be made liable on the note, and unless he is so liable, the bankers who are the holders of the note had no right to debit the plaintiff with the amount. The question of notice is a question of fact, and the averment in the answer of notice has not been traversed by any pleading, but at the trial some evidence was adduced on both sides which satisfied the district judge, and I see no reason to think that he is wrong. I agree with my brother Clarence that the judgment should be affirmed.

Affirmed.

———:o:———

Present: – BURNSIDE, C. J.

(*January* 28, *and February* 11, 1892.)

D. C. Criminal, Kurunegala, No. 2,446. } THE QUEEN v. KANAGASABAY.

Criminal Law - Robbery Theft—"Dishonest" taking Wrongful gain—Wrongful loss—Penal Code, sections 21, 22, 366, 379, 380.

To constitute the offence of theft or robbery under the Penal Code, the taking of the property must be with the intention of causing permanent and not merely temporary deprivation, and such intention must exist at the time of the taking.

Where, therefore, the accused person had, in a moment of anger, forcibly taken from the complainant and carried away a bill-hook with which the complainant had struck at a dog belonging to the accused—

Held, that the accused in taking away the bill-hook had not committed the offence of robbery within the meaning of the Penal Code, in the absence of evidence of such subsequent conduct on his part as showed that he originally had the intention of permanently depriving the complainant of the article.

The facts of the case sufficiently appear in the judgment of the Supreme Court.

The accused appealed from a conviction upon a charge of robbery under section 380 of the Penal Code.

Dornhorst, for the appellant.

Hay, A. S.-G., for the Crown.

Cur. adv. vult.

On February 11, 1892, the following judgment was delivered :—

BURNSIDE, C. J.—The appellant in this case was charged with robbery under section 380 of the Code.

I take it, for the purposes of the legal question that was raised in appeal on behalf of the first accused appellant, that the case for the Crown is that the first accused's dog rushed out at the complainant, who struck it with a bill-hook which he had in his hand. The accused got angry, rushed at the complainant and snatched the bill-hook from him, and took it away, and he is charged with and convicted of the robbery of it.

It is contended for the first accused that what he did was not robbery but only a civil trespass. For the Crown, the Solicitor-General urged that this was robbery within the Code ; that even if the accused may not have intended to cause wrongful gain to himself he intended to cause wrongful loss to the complainant, and so the taking was dishonest.

By section 22 of the Code it is ordained that whoever does anything with the intention of causing wrongful loss to another person is said to do that thing "dishonestly" ; and theft by section 366 of the Code is defined as follows :—"whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft" ; and by section 379 "theft" is robbery if in order to the committing of the theft the offender uses force of a particular description.

The contention of the Solicitor-General no doubt seems most logical, and yet it does not seem to coincide with our preconceived idea of a theftuous taking, *i. e.* such a taking as is done secretly, or, if forcibly, with an intention of causing loss to the party from whom the property is taken, with some corresponding gain to the taker.

I say "some", because it will be remembered that, although in *R.* v. *Cabbage*, R. & R. 292, six judges against five held that it was not necessary that the taker should act *lucri causa*, yet two of that majority were of opinion that in the case before them evidence of *lucrum* might be discerned ; and indeed if Mr. Solicitor's contention goes to the extent that the mere

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taking in such a case as that before us would be sufficient evidence of a wrongful taking to satisfy the requirements of the Code, then I think the position goes too far. For, it may well be that the accused, before he moved the property, had not any preconceived dishonest intention at all. The taking may have been simply an impulsive act in which the only motive was retaliation, and without any intention of causing permanent loss or gain; as, for instance, where after keeping the article for a moment the taker returned it or offered to return it to the person from whom it was taken.

The Code especially requires that the intent should exist at the time of the act, and I venture to submit my humble opinion that it did not depart from the principle of the Civil Law and of the Common Law, that the intention must be to cause permanent and not temporary deprivation.

Now, if there were no more evidence in a prosecution of this kind than that an accused had forcibly taken away an article with which he considered an injury had been done, which he resented, it might be fairly contended for him that there was no evidence of a dishonest taking, and if there was evidence that soon after he had taken the article he had offered to return it or done something negativing an intention to deprive the owner permanently of it, there would be stronger evidence to negative any persumption of a dishonest taking; but if there were evidence that after the taking the accused dealt with the property as his own by taking it away with him or the like, then it would be a question of fact whether the original taking had not been with the dishonest intent which the Code prescribes: and yet, even such evidence might not preclude the conclusion that the subsequent dealing with the property was the result of an intent which supervened after the taking and did not precede it, in which event the requirements of the Code would still be unsatisfied, to constitute the offence of robbery.

[His lordship then examined the evidence, and upon the weight of evidence set aside the conviction.]

Set aside.

———:o:———

Present:—BURNSIDE, C. J., and DIAS, J.

(*March* 8 *and* 18, 1892.)

D. C. Kandy, No. 2,510. } SOYSA v. SOYSA.

Civil Procedure—Execution against the person—Decree for plaintiff for land and costs—Costs exceeding Rs. 200 Civil Procedure Code, sections 209, 298, 299.

A writ of execution against the person of a judgment debtor can only issue after a writ against his property has issued and been returned with one of the returns specified in section 298 of the Civil Procedure Code.

A plaintiff is entitled to take the defendant's person in execution only when he recovers a sum of money and such sum exceeds Rs. 200; but not for costs of suit when he recover some other specific relief (such as a declaration of title to land or ejectment) and costs, although such costs exceed Rs. 200.

A decree in defendant's favour for costs alone is a decree for a 'sum awarded", within the meaning of section 299, and entitles the defendant, where such costs exceed Rs. 200, to writ against plaintiff's person.

The plaintiff in this action obtained a declaration of title to certain lands with a decree in ejectment and also a decree for costs. The costs were subsequently taxed at Rs. 824·65. A writ against property for the recovery of the amount of costs having been issued certain recoveries were made and there was left a balance of Rs. 644·35 for which writ against property was reissued. The fiscal thereafter returned that copy writ had been duly served upon the defendants and they had been called upon to pay the amount of the writ or to surrender property, but they had failed to do so. Thereupon the plaintiff applied for a writ of execution against the person for the recovery of the costs still due. The district judge disallowed the application, holding that execution against the person could only issue where there was a substantive judgment for a sum of money exceeding Rs. 200, and could in no case issue for costs alone.

The plaintiff appealed.

Dornhorst, for the appellant. Plaintiff is entitled to a writ of execution against defendant's person. The question is—is a decree for costs, in favour either of plaintiff or defendant, a decree for a "sum awarded"? Section 188 which provides the form No. 41 in Schedule II puts a judgment for costs on the same footing as a substantive decree. Therefore, a decree for costs entitles the party to move for a writ against person, provided the costs exceed Rs. 200. If the district judge's view, that there must be a substantive money judgment before execution against the person can issue, be pushed to its logical extent, a party in a land suit, with a decree for costs taxed at Rs. 2,000, would not be entitled to a writ against person, but a person with a money judgment for Rs. 201 would be entitled. The law could not have intended such an anomaly. The policy of the Code was to prevent oppression and restrict the issue of writs against person at the instance of money lenders unless the judgment was for a sum over Rs. 200. The law has been changed only to this extent, that whereas under the old law the limit of a money judgment carrying execution against person was Rs. 100, it is now Rs. 200. This view was upheld in *D. C. Kandy*,

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No. 90,917, 6 S. C. C. 50. [He also referred to *D. C. Colombo*, No. 87 C, 9 S. C. C. 123.]

Browne, for the defendants. It is submitted the district judge was right. The first enactment on this subject of execution against the person was section 164 of the Insolvency Ordinance, 1853, which restricted this remedy to cases in which the amount "claimed or recovered" exceeded Rs. 100. In the case reported 6 S. C. C. 50 it was held that whatever a plaintiff might *recover*, if he had *claimed* more than Rs. 100 he could enforce his judgment by taking defendant's person; and if such a plaintiff had proved unsuccessful, defendant might take his person for the costs, however small in amount. In consequence of this decision, Ordinance No. 24 of 1884, section 5, was passed, which confined imprisonment to cases in which the sum *recovered* exceeded Rs. 100, exclusive of interest and of costs. This Ordinance was interpreted in *D. C. Kandy*, No. 96,125, 7 S. C. C. 164, where it was held that a successful defendant was entitled to take the plaintiff's body in execution of costs of nonsuit. The Code has repealed this Ordinance; and the Code, it is submitted, intended in all cases to exclude execution against the person for costs merely. If costs are not to be taken into account to eke out a small sum recovered, why should execution be allowed for costs pure and simple? According to plaintiff, if he recovered Rs. 180, and Rs. 21 for costs, he could not arrest defendant; but if he got a declaration of title and nothing in money and taxed his costs at Rs. 201, he could. That is an anomaly which the Code does not contemplate. If a plaintiff sues for land, he has his remedy by writ of possession and ejectment, but he cannot take defendant's person for his costs. Where he merely recovers a sum of money, that must be over Rs. 200 or he cannot claim the remedy.

Dornhorst, in reply.

Cur. adv. vult.

On March 18, 1892, the following judgments were delivered :—

Burnside, C. J.—I have come to the following conclusion after carefully reading the several clauses of the Civil Procedure Code.

The person of a judgment debtor is only liable to be taken in execution after execution against property has been returned with one of the returns (*a*) (*b*) (*c*) (*d*) prescribed in section 298.

Under section 299 the words "the sum awarded" refer as well to a decree in favour of the defendant as of the plaintiff. A decree in favour of a defendant for a sum by way of costs alone is a decree "for a sum awarded."

I have had some difficulty in coming to this latter conclusion in consequence of the form No. 60 which is provided in the schedule to the Ordinance, and which suggests that the writ against person can issue only at the suit of the plaintiff. But I do not think the form can be allowed to restrict a meaning which is clearly within the words of the section.

Then arises the question – is a decree for the plaintiff, embracing a substantive matter together with costs, such a decree as may be said to be a decree wherein "the sum awarded" is "exclusive of interest and costs"? I am afraid that, to whatever result it may lead, I must hold that it certainly is not. It is a decree which is specific in one respect and includes costs, which the explicit wording of section 299 of the Code excludes.

I am fortified in this opinion by several sections of the Code. Section 209 says, an order for the payment of costs only—mark the word "*only*"—is a decree for money. Section 224 (*g*) provides for execution only when the claim is for a *debt* due upon the decree. Then in sections 320 and 323, and the forms 62 and 63 given for executing decrees against property, that part of the decree which refers to costs is omitted. There is no form of execution for costs upon a substantive decree with costs; and it is only under the circumstances and in the manner which are specified in section 321 with regard to moveable property, and section 324 with regard to immoveable property, that the substantive decree may be enforced, and no notice is taken of costs. And section 334 and 335 seem to conclude the matter. What the remedy is for costs upon such decrees—and there must be some remedy —I am not called on to decide in this case.

Practically then I arrive at these conclusions as the result of the Ordinance :—A writ against person can only issue in any case after a writ against property has been issued (section 298.)

It can only be issued, by a plaintiff, in an action for money when he recovers a sum with interest, not including costs, amounting to Rs. 200 or over (section 299).

A defendant, having a decree for costs only, may issue execution against person on a judgment, when the sum awarded for costs amounts to Rs. 200 in any action.

A plaintiff, obtaining a specific decree in respect of moveable or immoveable property with costs, can never issue execution against the person, whatever

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the costs may be, because the decree is not one for money, but for some substantive relief together with costs, and execution could not go for costs alone because there is no sum awarded exclusive of costs.

The learned counsel for the appellant suggested a way out of the difficulty by reading the clause in question as applying only to money decrees and not touching the old law as to execution on decrees for substantive relief or specific remedy. I am afraid we cannot do this without openly defying the entire provisions of the Code, which in many cases, and notably the sections which I have quoted, unmistakably provides for execution upon such decrees, and we ought not to apply one law to one set of cases and one to another.

I do not doubt that the correct reading of the Civil Code is as I have stated, but I do not pretend to understand, much less to explain, the reasons—if there are any—for the distinctions which have been made.

The judgment must be affirmed.

Dias, J.—The plaintiff in this case obtained a decree in ejectment with costs, and moved for a writ against the person of the second defendant for the costs which amounted to some Rs. 800. The district judge refused the application on the ground that execution against person cannot be issued for costs. According to section 299 of the Civil Procedure Code no execution against person can issue when the sum awarded, inclusive of interest, if any, up to date of decree shall not amount to Rs. 200 and upwards. In calculating the amount the interest after the date of the decree and the costs of suit are expressly excluded. This section evidently had in view a decree for a sum of money, whether in favour of the plaintiff or the defendant, but what is important in the consideration of the question in hand is that it excludes costs in the computation. Where there is a substantive decree with costs, the costs are merely an incident of the decree, and the effect of the section in my opinion is, that when, as in this case, the plaintiff obtained a substantive decree, he cannot issue execution against the person of the defendant for costs, though the amount of such costs be Rs. 200 or more. On the other hand if the defendant obtains a decree for costs only, it is a decree for a sum awarded as costs within the meaning of the section, and if such costs exceed Rs. 200 the defendant can have a writ against the person. The point is one of some nicety, but on the whole I think the district judge took a correct view of the matter, and his order must be affirmed.

Affirmed.

Present:—Burnside, C. J., and Dias, J.

(*February 26, and March 18,* 1892.)

D. C. Batticaloa, No. 327. — Kandappen v. Elliott.

Civil procedure—Security in appeal—"Tendering" of security—Time within which security must be perfected—Notice of appeal—Civil Procedure Code, section 756.

Under section 756 of the Civil Procedure Code, it is not sufficient for a party wishing to appeal from the judgment or order of a district judge to tender security in appeal within 20 days from the judgment or order appealed against, but he must perfect the security by entering into the security bond within the time limited.

The plaintiff sued the defendant for the recovery of the value of certain bark alleged to have been illegally seized and appropriated by the defendant, who was described in the caption to the plaint as the Government Agent of the Eastern Province. On October 28, 1891, a proctor produced an unstamped proxy from the defendant and moved for time to file answer. The plaintiff opposed the motion and objected to the proctor appearing for the defendant at all, on the ground that the proxy was not stamped. The district judge, however, accepted the proxy and allowed the motion, holding that the defendant was entitled to proceed without stamps. The plaintiff desiring to appeal from the order duly filed on November 11, 1891, a petition of appeal, and on November 21 issued a notice to the defendant that the petition of appeal having been filed the plaintiff would on November 23 tender as security in appeal certain specified property. On November 23 the plaintiff accordingly tendered security, but the defendant objecting to the shortness of the notice given, the district judge adjourned the matter to December 4, when after some discussion the security was accepted by the district judge, and the plaintiff entered into the necessary bond to prosecute the appeal. Thereafter the appeal was forwarded to the Supreme Court and came on for argument on February 26, 1892.

Hay, A. S.-G., for the respondent, took the preliminary objection that the security was out of time and the appeal could not therefore be entertained.

Sampayo, for the appellant, contended that the provisions of the Procedure Code as to security had been substantially complied with. Section 756 only required that the security should be tendered within the time specified. The entering into the bond was

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a mere formal matter, which followed upon the acceptance of the security so tendered.

Hay, A. S.-G., *contra.*

Cur. adv. vult.

On March 18, 1892, the following judgments were delivered :—

Burnside, C. J.—There can be no question that the proceedings on this appeal abated in the Court below, and we must reject the appeal.

By section 754 of the Code the petition of appeal must be presented within ten days from the day when the decree was pronounced, and by section 756, after a petition of appeal has been presented the appellant must *forthwith* give notice to the respondent that he will on a particular day, within 20 days from the date of the pronouncing of the decree, tender security for the respondent's costs of appeal.

Now under this provision it is not sufficient that the appellant, within 20 days of the pronouncing of the judgment to be appealed from, should give notice of his intention to tender security; he must do so forthwith on the filing of the appeal, and he must actually tender the security within the 20 days and within sufficient time to enable the Court to accept or reject it, and the security must be either by a bond with one or more sufficient sureties, or by way of mortgage of immoveable property, or by deposit and hypothecation by bond of a sum of money sufficient to cover the costs of appeal and to no greater amount. He cannot perfect his security after the lapse of 20 days, whatever he may have done before, and it should be borne in mind that if the security tendered should turn out insufficient, or does not satisfy the requirements of the clause and the court reject it, the appellant cannot tender fresh security after 20 days, but the proceedings abate. That is what happened here: the appellant put in his appeal, gave notice and then put in his security, but he did not give the notice forthwith as required by the section, and consequently he could not perfect his security. The proceedings on the appeal abated, and we must reject the appeal.

Dias, J.—This appeal must be rejected, the appellant not having given the necessary security within time. The mere tendering of security within time is not sufficient. It must be perfected within the time allowed by law.

Appeal rejected.

Present:—Burnside, C. J.

(*August* 13 *and* 20, 1891.)

P. C. Nuwara Eliya, No. 5,551. } Tringham v. Vollenhoven.

Bye-law—Ultra vires—*Fishing without license—Ordinance No 7 of* 1876, *sections* 35, 79—*Local Board of Nuwara Eliya—Bye-law No.* 54 *of May* 29, 1888.

Ordinance No. 7 of 1876, section 35, authorizes the Local Boards thereby established to make bye-laws., *inter alia.* "for regulating the mode and times of fishing", and section 79 makes the breach of such bye-laws an offence punishable by fine.

A bye-law, framed by a Local Board under the above section, prohibited fishing in certain waters within its limits without a license from the Chairman of the Board.

Held, that the bye-law was *ultra vires* of the Local Board.

The Bye-law No. 54 of the Bye-laws of the Local Board of Nuwara Eliya of May 22, 1888, framed under section 35 of the Ordinance No. 7 of 1876 and published in the *Government Gazette* of June 29, 1888, enacted that "no person shall fish in Nuwara Eliya or Barrack Plains lakes or in any streams flowing into them, unless he shall have obtained a license from the Chairman of the Board for that purpose", and Bye-law No. 55 provided certain fees for such licenses.

The defendant was charged under section 79 of the Ordinance with having fished in the Nuwara Eliya lake without having obtained a license from the Chairman of the Local Board of Nuwara Eliya, in breach of the above bye-law. The magistrate acquitted the defendant, holding that the defendant had committed no offence, as the bye-law, necessitating the payment of a fee for the license, was *ultra vires*; and the Attorney-General appealed.

Withers, for the appellant.

Dornhorst, for the respondent.

Cur. adv. vult.

On August 20, 1891, the following judgment was delivered :—

Burnside, C. J.—This was a prosecution on a plaint that the accused fished without having a license from the Chairman of the Local Board of Nuwara Eliya for that purpose, in breach of Bye-law No. 54 of May 29, 1888, and thereby committed an offence against Ordinance No. 7 of 1876 The defendant admitted that he had fished but denied that it was an offence. The bye-law in question, made and approved of in the way these bye-laws usually are, prohibited any one from fishing without a license, and this license was only granted on payment of a fee. The magistrate acquitted the accused

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and the Attorney-General has appealed, but no law officer appeared to support the appeal. Mr. Withers supported it for the complainant, the Secretary of the Local Board of Nuwara Eliya. The magistrate thought that no authority was given to the Local Board to make a bye-law whereby a tax was imposed. I do not care to express any opinion on that point, because it is clear that sub-section 10 of section 35 of Ordinance No. 7 of 1876, which empowers Local Boards to make bye-laws "for regulating the mode and times of fishing", did not empower the Local Board to make a bye-law prohibiting fishing altogether without their license. I am surprised that any other construction was possible. The bye-law is *ultra vires* and a nullity, and the defendant was properly acquitted.

Affirmed.

———:o:———

Present :—CLARENCE and DIAS, JJ.

(*October* 27, *and November* 8, 1891.)

D. C. Galle, (Testamentary) No. 2,948. } In the matter of the minor children of SIMON PERERA ABEYAWARDANA.

ABEYAWARDANA v. ABEYADEERA.

Curator—Property of minors—Person entitled to take charge under will or deed—Executor of will of parent—Guardian appointed by will—Civil Procedure Code, sections 582, 583, 585.

A testator died leaving a will whereby he disposed of his estate in favour of his minor children, and naming an executor whom he also appointed guardian of the children.

Held, reversing the order of the district court, that the executor was not a person entitled to have charge of the property of the minors by virtue of the will, within the meaning of section 585 of the Civil Procedure Code, and the court was therefore not bound to grant him a certificate of curatorship.

The testator, by appointing the executor, entrusted to him the task and charge of distributing his assets, generally, but not any special trust to take charge of the minors' shares or hold them in trust for the minors.

Appeal against an order of the district court on two petitions, relative to the appointment of a curator over the property, and guardian of the persons, of the minor children of Simon Perera Abeyawardana.

Simon Perera Abeyawardana by his will devised certain property to his children and appointed Don Andris Abeyadeera, Francis Perera Abeyawardana and Dinister Perera Abeyawardana to be executors thereof, and he also appointed Don Andris Abeyadeera to be the guardian of his children. Henry Perera Abeyawardana, a brother of the testator, alleging in his petition that the estate of the said testator was not being properly administered, prayed that the first respondent Don Andris Abeyadeera be appointed curator over the property of the minors, that the petitioner be appointed joint curator with the first respondent, and that the petitioner be appointed guardian of the persons of the minors. The first respondent to this petition then applied by petition to be appointed curator over the property and guardian over the persons of the minors, claiming a right under the will to have charge of the persons and property of the minors. This latter petition was opposed on the ground of misconduct by the petitioner in his administration of his testator's estate. The two petitions were consolidated and heard on the same day.

The district judge granted a certificate of curatorship to Don Andris Abeyadeera with costs, holding that inasmuch as he was appointed guardian under the will, the court was bound under section 585 of the Civil Procedure Code to grant him a certificate of curatorship. The petition of Henry Perera Abeyawardana was refused, the district judge holding that there was no provision under the Code for the appointment of joint curators, and that no application for the appointment of a guardian of the persons of the minors was necessary, the father having appointed one by his will. The executor Don Andris Abeyadeera was ordered to pay his own costs of this petition.

Both parties appealed.

Dornhorst (*Wendt* with him) for the petitioner, Henry Perera. This is a petition for the grant of a certificate of curatorship to the executor, or to the petitioner or to both jointly. Under section 582 of the Code a party who shall claim a right to have charge of property in trust for a minor under a will or deed may apply to the district court for a certificate of curatorship : but under section 583, any relative or friend of a minor may apply by petition to have a fit person appointed to take charge of the property and person or either property or person of a minor. The petitioner is the uncle of the minors and applies under this section. It is submitted that, in default of the executor applying for a certificate, this appellant was entitled to move to protect the minors' interests. The executor has to administer the estate to a certain point. Thereafter his place must be taken by a curator of the minors' estate. The policy of the law is that the interests of the minors should be kept under the control of some one other than the executor. The executor has merely to collect the assets, and cannot be regarded as a trustee for an indefinite time of the property of the minors.

Browne, for the petitioner, Don Andris Abeyadeera. The executor, it is submitted, is entitled to

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take charge of the minors' property, without any certificate under section 582 which is merely permissive in its terms. The testator's intention, in appointing him guardian of the children, in addition to making him executor, was clearly to dispense with any other protection of their interests. Even apart from section 582, the executor to whom the testator has entrusted the administration of his whole estate is the best person to be vested with the custody of the minors' property. The Code does not contemplate a joint curatorship, and such an appointment is in principle mischievous.

Dornhorst, in reply. The acts of maladministration admitted by the executor render him unfit to be appointed curator in any case.

Cur. adv. vult.

On November 3, 1891, the following judgments were delivered :—

Clarence, J.—These are two several appeals from an order made by the district court upon two consolidated applications by petition for the appointment of a curator of the property of the minor children of Simon Perera Abeyawardana deceased.

Simon and his wife Charlotte made a joint will in 1882 containing dispositions in favour of their children and of the survivor of the spouses, and appointed the surviving spouse executor. Charlotte predeceased Simon, who afterwards died in December 1890, leaving four minor children of the marriage, and a will whereby he disposed of all his estate in favour of the four children, appointed his brother in-law Andris and two of the sons executors, and also appointed Andris guardian of the children. Probate was granted to Andris, the children being all still minors.

Thereafter, in June last, Henry Abeyawardana, a brother of the testator, applied by petition to the district court for the appointment of a curator of the minor children, that is a curator for their property, and asked that one of three things might be done, viz., that the executor Andris might be appointed, or the petitioner himself, or both jointly.

After this the executor Andris petitioned that he himself be appointed curator.

These applications are made under Chapter XL of the Procedure Code and were consolidated and taken up together. The two petitioners, the executor and the testator's brother Henry, were both examined and the district judge made an order committing the curatorship to the executor, ordering at the same time the petitioners to bear their own costs, the executor to bear his own costs out of his own pocket. From this order both petitioners appeal.

The district judge appears to have thought that section 585 of the Code left him no option but to commit the curatorship to the executor. To that position we do not assent. Section 585 requires the court to grant the certificate of curatorship to any person entitled under a will or deed to have charge of the minors' property. The executor is not such a person. The testator by appointing him executor entrusted to him the task and charge of distributing his assets, generally, but not any special trust to take charge of the minors' shares or hold them in trust for the minors.

In the absence of a person absolutely entitled to the curatorship and willing to undertake it, the court may appoint some other fit person. It might well be that the testator having trusted the executor with the distribution of his assets and also with the guardianship over his children's persons, the court would consider him a proper person to be also entrusted with the curatorship over the property. But in view of the admissions made by the executor in the witness box we should hesitate to commit any charge to him. Should it ever be necessary in the minors' interest for the executor to be called to account, it is the curator on whom would fall the duty of protecting the minors' interests, and if there be any reason to suspect the executor's *bona fides*, that is a reason for appointing some independent person to act for the minors. Now, the executor admitted in the witness box that he had wilfully omitted from his inventory considerable items of the testator's assets. If we had been dealing with the matter as judges of first instance, we most certainly would have considered it improper to commit the curatorship to the executor under those circumstances, and we cannot affirm the order which the district judge has made in that behalf.

It does seem desirable, under such circumstances, that some fit person be appointed to protect the minors' interests as curator. Whether the petitioner Henry Perera is a suitable person we do not undertake to say—we note that he seems to be disputing with the executor concerning certain items of property which the executor claims for the estate, and Perera sets up a private claim on his own account. It may be that neither of these petitioners should be appointed curator.

We shall simply set aside the order committing the curatorship to the executor and send the matter back to the district court in order that the district judge may in his discretion after due enquiry appoint

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some fit person. We see no reason to interfere in the executor's favour with the district judge's order as to costs. We shall therefore leave him to pay the costs of his petition including costs of his appeal. The costs of the other petition (including appeal costs) may be left to be disposed of hereafter.

DIAS, J.—I quite agree with my learned brother that the order of the district judge must be set aside. The executor on his own showing is quite unfit to be appointed curator over the minors, and the petitioner Henry Perera, in my opinion, is not in a better position. He seems to set up a claim on his own account to some of the estate property, so his interest is adverse to that of the minors. Under the circumstances, the best course to be followed is to send the case down to the district court for further enquiry and for the appointment of a disinterested person as the curator of the minors.

Set aside.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(*July* 10, 1891.)

D. C. Kandy, No. 4,417. } LE MESURIER v. LE MESURIER.

Practice—Order fixing case for hearing—Appealable order—Courts Ordinance, 1889, section 75.

An order fixing a case for trial is not an appealable order under section 75 of the Courts Ordinance, 1889.

This was an action by a wife for a separation from bed and board with the custody of the children. In his answer the husband pleaded to the jurisdiction of the court. Upon the filing of defendant's plea, the case was fixed for May 18 for argument thereon, but on May 11 plaintiff's proctor moved to discharge this order and fix an early day for the hearing of the action. Defendant's proctor had no notice of this application, but was in court when it was made, and was heard in opposition to it. The district judge allowed the application, and ordered the case to be entered on the trial roll for hearing on May 28.

The defendant appealed.

Dornhorst, for the appellant.

Withers, for the respondent, took the preliminary objection that no appeal lay. It is true that section 75 of the Courts Ordinance, 1889, gives the right of appeal against any "order" of a district court, but the direction of the court now appealed against is not an "order" within the meaning of that section. It is submitted that "order" must be limited, for purposes of appeal, to "final order". Section 75 uses the terms "judgment", "decree", and "order", respectively appropriate to the expression of the court's decision in an action at law, in a suit in equity, and in any matter other than an action or suit. Each of these imports a final decision so far as concerns the court pronouncing it, the only difference being in the form of the proceeding in which it is passed. *Onslow* v. *Commissioners of Inland Revenue*, L. R. 25 Q. B. D. 465. The repealed Ordinance No. 11 of 1868 (section 79) used the same terms, "judgment, decree, or order" in conferring the right of appeal, but that Ordinance clearly contemplated "interlocutory" orders also, as is shown by section 75; and so appeals against interlocutory orders were formerly permitted, but they cannot be now.

Dornhorst, for the appellant. The appeal clearly lies. The argument to the contrary is exactly in the teeth of the Code. Section 75 of the Courts Ordinance permits the appeal against any "order", and "order" is defined by the interpretation clause (section 5) of the Procedure Code. The definitions of "decree" and "order" put it beyond doubt that the former is used to designate a final decision, in whatever form of proceeding pronounced, and the latter an interlocutory order merely, such as that now in question. Accordingly, an order rejecting a plaint, which is final in its operation, is classed as a "decree". The district judge has in effect overruled the defendant's plea to the jurisdiction without hearing him, for the previous fixture for its discussion has been removed and a day fixed for the hearing, presumably on the merits.

Withers, in reply. Even assuming the appeal lies, the defendant, if he alleges the order was made *ex parte*, should have moved the district court to vacate it, and not have appealed direct.

The judgment of the court was delivered by:—

CLARENCE, J.—This appeal is dismissed with costs. On April 21 the learned district judge in the presence of both parties fixed May 18 for discussion of the defendant's objection to the jurisdiction. Thereafter, on May 11, plaintiff's proctor applied to the court to alter that arrangement. It does not appear that previous notice of that application had been given to the other side, and it would not have been proper to ask the court *ex parte* to alter an arrangement already made *inter partes*. We cannot, however, regard what took place on May 11 as *ex parte*, because the defendant's proctor was in court and was heard in opposition to the application. The district judge then altered the arrangement previously made, and directed the case to be entered in the trial roll for hearing on May 28. Defendant seeks to appeal from that order. It is a matter within the discretion of the court to fix days for hearings, trials, and argu-

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ments, and in my opinion a direction given by a district judge fixing a particular day for consideration of a case is not an appealable order within section 75 of the Courts Ordinance. If either party has been aggrieved by the fixture made by the court, that may be taken into consideration by the court of appeal in the event of appeal being taken against the substantive order made by the district court on the day so fixed. It was however argued that the learned district judge here did something more than merely alter the date previously fixed, in that he directed the case to be set down for trial. I see nothing to appeal from in the so-called "order" from that point of view. The defendant of course had a right to have his plea to the jurisdiction disposed of, and it doubtless would be disposed of when the case came to be heard on May 28.

Appeal dismissed.

———:o:———

Present :—Burnside, C. J.

(*March* 3 *and* 4, 1892.)

P. C. Gampola, No. 11,442. } Saminaden Pulle v. Cornelis Appu.

Theft—Claim of right—Bona fides—*Colourable title—Criminal law.*

When a person charged with theft sets up a claim of right to the property, it is not necessary for such defence to prove that he had even a colourable title to the property. It is sufficient if he *bona fide* believed the property to be his.

The defendant was charged with theft of a certain quantity of arecanuts, the complainant alleging the defendant had plucked the nuts from trees in a garden belonging to him. The defendant admitted the plucking and removal of the nuts, but claimed the garden as his own property. Upon the evidence the magistrate held that the defendant had not even "a colourable title" to the land, and convicted the defendant.

The defendant appealed.

Dornhorst, for the appellant.

There was no appearance for respondent.

Cur. adv. vult.

On March 4, 1892, the following judgment was delivered :—

Burnside, C. J.—The learned magistrate in this case, whilst correctly stating the crucial matter for his decision, has misapprehended the effect of the defence and the bearing of the evidence on it. *Bona fides* is a good defence, independent altogether of the question in whom the title to the land really lies, and it may prevail although the defendant may not have, as the magistrate puts it, "a ghost of a right to the land". The policy of the law in theftuous matters is to ascertain *quo animo* the property was taken. It is impossible to read the evidence without, in every line of it, discovering that the accused believed that he had the right to the fruit; and I myself go further and say that, if the evidence points to anything, it is that the complainant is seeking upon some recent conveyance to silence an objectionable antagonist in title, who has had possession long before the complainant became a purchaser.

The accused took the fruit openly as before, and not as a thief would, and the complainant's witness Thammal, who agreed to buy and yet did not buy "stolen property", is not free from the suspicion that he was deeply interested in the success of the complainant's move.

The magistrate says : "if the accused had proved some colourable title to the land, I should have been satisfied ; because if this defence is to be accepted, every thief of prædial products has only to set up a claim to the land."

This will only happen when a magistrate fails to discriminate between mere fictitious assertion of a claim to the land and a *bona fide* claim of right, even though there may not be even "a colourable title" to the land.

Conviction set aside and the accused acquitted.

Reversed.

———:o:———

Present :—Burnside, C. J., Clarence and Dias, JJ.

(*September* 1 *and* 11, 1891.)

D. C. Colombo, No. C469. } The Bank of Madras v. Ponnesamy Moodelly.

Sequestration—Action by corporation—Principal officer—Shroff of bank—Power of attorney, sufficiency of—Affidavit—Practice—Civil Procedure Code, sections 653, 654, 655.

In an application for obtaining sequestration of a defendant's property under section 653 of the Civil Procedure Code, the affidavit required by that section to establish that the defendant is fraudently alienating his property need not necessarily be that of the plaintiff himself, but may be that of any person having knowledge of the facts.

The shroff of a bank corporation is a "principal officer" of such corporation within the meaning of section 655 of the Code, and is competent to make affidavit in substitution for the affidavit of the plaintiff required by sections 650 and 653.

A bank corporation sued by attorney, who was authorized by his power "to sue for, recover, and receive" every debt due to the corporation ; "to sue, arrest, attach, distrain, seize, sequester, imprison, and condemn and out of prison again to release, acquit, and

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discharge all persons"; "to sign, draw, make, or endorse any other security or securities in which the said bank is now or may hereafter be interested or concerned, or to which the signature of the said bank may be necessary or required"; and further "to sign, deliver, and execute all deeds, conveyances, and assurances to which the said bank may become a party, and generally to act, do, manage and transact all and every such matters and things in and about the premises in as full and ample a manner as the said bank could do."—

Held, that under the authority contained in the above power, the attorney could bind the bank by deed in all matters appertaining to a suit which he was authorized to bring, and in any proceeding for sequestration in such suit he was competent to execute the bond required to be entered into by the plaintiff under section 654 of the Code.

This was an action by the Bank of Madras, a bank constituted under the Indian Presidency Banks Act, 1876, against the defendant on certain promissory notes. Upon filing the plaint, the plaintiff upon petition moved for and obtained a mandate of seqestration under section 653 of the Civil Procedure Code on the ground of fraudulent alienation of property by defendant. The affidavit upon which the mandate was obtained were those of Donald Noble, manager and attorney of the bank, who had also as attorney signed the proxy of the plaintiff's proctor, and of C. Ramalingam, the shroff of the bank. The affidavit of Donald Noble, among other things, stated that he had examined the books of the bank, and found from them that the defendant wan indebted to the bank in the amount claimed on the promissory notes in question, that the bank had no adequate security for the same, and that upon certain information given him by C. Ramalingam, the shroff, he verily believed that the defendant was, with a view to avoid payment of his debt to the bank, alienating his property. The affidavit of C. Ramalingam, after stating the circumstances of the defendant's trade in Ceylon, his departure from Ceylon, and his indebtedness to the bank at the date of such departure, set out certain facts upon which he based his belief that the defendant was fraudulently alienating his property; and the affidavit proceeded to state that the promissory notes in question were all endorsed to the bank by the defendant by himself or by his attorney, and that the discount proceeds of the notes were placed to the credit of the defendant's current account at the bank. The security bond required to be given by plaintiff under section 654 of the Code, prior to the issue of sequestration, purported to be executed by the plaintiff bank by their attorney Donald Noble.

The mandate of sequestration having issued, and certain property having been sequestered, the defendant thereafter moved to dissolve the sequestration. This motion was after discussion disallowed by the district judge.

The defendant appealed.

Dornhorst (*Wendt* and *Sampayo* with him) for the appellant. This sequestration was wrongly issued, and should have been dissolved on defendant's application. The requirements of the Code have not been complied with in plaintiff's application. Those requirements must be strictly enforced, for this court has pointed out (*D. C. Colombo*, No. 36,919, Ram. (1864) 120) that "sequestration heedlessly granted may be ruin to a commercial firm", that it is "a burdensome and expensive process which should not be granted unless under an imperative necessity", and that this court thinks itself "bound to be particularly strict". The present application was irregular, in that the affidavits used, those of Mr. Noble and the bank's shroff, did not comply with the law. As to Mr. Noble's, no doubt he could make affidavit on behalf of the corporation, but that is only if he is "a person having personal knowledge of the fact of the cause of action", and he must "depose from his own personal knowledge" (section 655). Now, Mr. Noble's affidavit is relied upon for proof of the debt, and all he says is that he assumed the managership subsequently to the incurring of defendant's debt, and that from an examination of the books (which he did not keep himself) defendant appears to be indebted. That is not enough. Then as to the shroff's affidavit, he is not a "principal officer" of the bank, and does not even call himself such. He does not establish that defendant's quitting the island was with the fraudulent intent to avoid payment, or that there was fraudulent alienation of property, and the fact he deposes to of his own knowledge do not lead to that conclusion. By the terms of section 653, it is the "plaintiff's own affidavit" (or in the case of a corporation, the principal officer's) that must establish both the debt and the fraudulent alienation, and the affidavit of the shroff cannot be allowed to eke out that of the manager in this respect. Then, the security bond, the execution of which is a condition precedent to the issue of the writ, was invalid, Mr. Noble not having had the power to bind the bank by such an instrument. His power is filed, and it does not empower him to sue out sequestration—a special remedy—or to execute such a bond. The defendant's application to recall the writ should therefore have been allowed.

Layard, A.A.-G. (*Browne* and *de Saram* with him) for the respondents. The application for sequestration was in every respect regular. As to the affidavits, it is clear that both Mr. Noble and the shroff are

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"principal officers" of the bank, and either could have made the affidavit required of plaintiff by section 653. Mr. Noble swears to his belief that defendant fraudulently alienated his property, and also left Ceylon abandoning his property to irresponsible persons, and he gives the sources of his information and the grounds of his belief. The shroff Ramalingam establishes the indorsing of the notes by defendant, and his departure from the island without appointing any representative. The terms of the latter part of section 653, "by affidavit", certainly do not limit the affidavit to that of plaintiff himself. As under the repealed Ordinance No. 15 of 1856 such affidavit might be that of a third party quite unconnected with plaintiff or defendant, Mr. Noble's power of attorney is amply sufficient to sustain the sequestration. It not only empowers him generally to bring and defend actions on behalf of the bank, but specially to "arrest, attach, distrain, seize, sequester, imprison, and condemn and out of prison again to release, acquit, and discharge all persons". Nothing could be fuller. The defendant's application was rightly refused.

Dornhorst, in reply.

Cur. adv. vult.

On September 11, 1891, the following judgments were delivered:—

Burnside, C. J.—A sequestration was ordered in this case *ex parte* on November 17, 1890, of the defendant's property, to the amount of Rs. 30,000.

In consequence of certain proceedings intervening which do not affect this appeal, this sequestration was continued until the 8th of July, when the district judge made a final order disallowing a motion on behalf of the defendant to dissolve it, and the defendant appeals.

The action is by the Bank of Madras against the defendant on a number of promissory notes, amounting to Rs. 23,000 and odd.

The plaintiff bank being a corporation, their proxy to sue is signed by their attorney, Donald Noble, who has filed a certified copy of his power of attorney from the bank. Several objections have been taken to the regularity of the order of sequestration which I will deal with *seriatim*. In the first place, we may say that we see no reason to dissent from the general proposition to which we were referred in the case reported in Ramanathan, namely, that sequestration needlessly granted may be ruin to a commercial firm, and that it had been said that sequestration is a burdensome and expensive process which should not be granted except under an imperative necessity. To which, however, it may be proper for us to add that sequestration is a remedy provided for by law to litigants; and if the procedure which the law prescribes, before it can be obtained, were carefully observed and conserved in allowing it, it cannot be said that it had been needlessly granted or without due necessity. The sections 653, 654, and 655 of the Code apply to these proceedings. The main objection to the sequestration in this case is that the affidavits on which the sequestration was granted, and the bond of the plaintiff, are insufficient.

Mr. Noble, being one of the principal officers of the bank corporation, is especially authorized to make the affidavit of material facts which section 653 of the Code requires to be made by the plaintiff, who by such affidavit (with *viva voce* examination if the judge requires it) must satisfy the judge that he has a sufficient cause of action, that he has no adequate security, that he does verily believe that the defendant is fraudulently alienating his property to avoid payment of his debt.

The proviso to section 655 requires that where the person making the affidavit is other than the plaintiff himself, he must have personal knowledge of the facts of the cause of action, and must in his affidavit swear that he deposes from his own personal knowledge of the matter.

I now turn to the affidavit of Mr. Noble. He swears that he is the agent and manager of the bank, that he has examined the books of the bank and finds that the defendant is indebted to the bank in the sum claimed in the action, and that he verily believes (giving the grounds for his belief) that defendant and those representing him have fraudulently and with intent to avoid payment of the debt alienated the property of the defendant. I do not think it posible to say that this affidavit does not in every particular comply with the requirements of the law referring to the affidavit of the plaintiff. But the Code requires in addition that the plaintiff shall at the same time further establish to the satisfaction of the judge by affidavit, or, if the judge should so require, by *viva voce* testimony, such facts as shall cause the judge to infer that the defendant is fraudulently alienating his property with intent to avoid payment of the debt, or that he has quitted the island, leaving property belonging to him.

Now, it was contended that the affidavit here referred to must be the affidavit of the plaintiff himself. The affidavit in this case was not the affidavit of the

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plaintiffs or of the principal manager, Mr. Noble, but of Ramalingam, the shroff of the bank.

In my opinion there is no room for this contention. The words of the law are sufficiently large to embrace the affidavit of any person who can speak to the facts from personal knowledge. The context of the Code makes this clear. Where it intends that the affidavit shall be that of the plaintiff himself, it says "by his own affidavit"—in this instance it says generally "by affidavit." But even assuming for the sake of argument that it was the personal affidavit of the plaintiff that was required, it may be, as I have shewn, made "by any principal officer" of the corporation, and Ramalingam swears that he has been shroff of the bank for 20 years; and the shroff of a bank certainly comes within the category "any principal officer." I hold therefore that this objection signally fails.

Then it was contended that the affidavit did not disclose sufficient material to ground the inference which the law requires. Turning to the affidavit itself, I find that it discloses facts within the personal knowledge of the witness, from which any judge would be justified in inferring that the defendant was fraudulently alienating the property with intent to avoid payment of the debt and that he had quitted the Island leaving property belonging to him. Moreover, the judge granted the sequestration on these facts, and we cannot assume that he did not draw the inference on which alone he was justified in acting. The objection, therefore, to the sufficiency of the affidavit fails.

I now come to the next objection. By section 654 of the Code it is required that "before making the order the judge shall require the plaintiff to enter into a bond, with or without sureties, to the effect that the plaintiff will pay costs and damages that may be awarded &c." The plaintiffs' security bond was executed by Mr. Noble as attorney of the bank, and it was contended that Mr. Noble had no power to bind the corporation by such a bond. This has necessitated a close scrutiny of the power of attorney on which he represented the plaintiffs in the suit. It recites that the intention of the bank was to appoint "Mr. Noble attorney and agent for all and singular the purposes hereinafter mentioned," and it then appointed him the true and lawful attorney of the bank at Colombo "to sue for recover and receive from all persons" every debt &c. due to the bank, and also "to nominate attorneys, solicitors and proctors, to sign warrants to prosecute and defend, and to sue, arrest, attach, distrain, seize, sequester, imprison and condemn and out of prison again to release acquit and discharge all persons whomsoever who shall or may be indebted", and also "to sign, draw, make or endorse any other security or securities in which the said bank is now or may hereafter be interested or concerned or to which the signature of the said bank may be necessary or required," and further "to sign, deliver and execute all deeds, conveyances, and other assurances to which the said bank may become a party, and generally to act, do, manage and transact all and every such matters and things in and about the premises in as full and ample a manner as the said bank could do;" concluding with an agreement "to ratify and confirm all and whatsoever the said Mr. Noble shall lawfully do or cause to be done in and about the premises."

I have no doubt whatever that under the general powers contained in this instrument Mr. Noble could bind the bank by deed in all matters appertaining to a suit which he was authorized to bring, and under the special powers also he was authorized to "sequester" where sequestration was applicable, and in respect of such sequestration he was specially authorized to execute every security to which the signature of the said bank was necessary, and hence the bond in this case is a good binding bond of the plaintiff bank.

The appeal must therefore be dismissed with costs.

CLARENCE, J.—I am of the same opinion and have nothing to add.

DIAS, J.—I am of the same opinion.

Appeal dismissed.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(*March* 18 *and April* 8, 1892.)

C. R. Galle, No. 940. } JAYASEKERA v. JANSZ.

Appeal—Security—Dispensing with security by consent—Application to appeal out of time—Practice—Civil Procedure Code, section 756.

The provisions of the Civil Procedure Code as to security in appeal are intended for the benefit of respondent parties, who may waive such benefit at their option.

Accordingly, where a respondent consented to dispense with security in appeal—

Held, that the appeal lay without security, notwithstanding the provisions of section 756 of the Civil Procedure Code.

Application for leave to perfect appeal out of time.

The defendant in this action filed a petition of appeal from the judgment of the commissioner within the appealable time, and, the plaintiff's proctor having consented to dispense with security in appeal, the case book was forwarded to the Supreme Court without such security. The Registrar, however,

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returned the record for want of security in appeal. Thereupon the defendant by petition applied for leave to perfect appeal out of time under Chapter LX of the Civil Procedure Code, and the matter of this application came on for determination on March 18, 1892.

Wendt, for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

On April 8, 1892, the order of the Supreme Court accepting the appeal was delivered by :—

Clarence, J.—This case comes before us in the guise of an application for leave to appeal out of time. In my opinion the appeal should be accepted for the short reason that the defendant did appeal in time, but his appeal was refused by our Registrar under a mistaken view of the law. It appears that the defendant filed his appeal petition in time, and that the plaintiff by his proctor consented to dispense with security. The Registrar seems to have thought that a party cannot dispense with security. There I think the Registrar was wrong. The provisions as to security were framed for the benefit of respondent parties and there is nothing to prevent a respondent party waiving the benefit if he thinks fit to do so.

No order as to costs of this application.

———:o:———

Present :—Clarence and Dias, JJ.

(*December* 11 *and* 15, 1891.)

D. C. Colombo, No. C 469. } The Bank of Madras v. Ponnesamy Moodelly.

Practice—Service of summons—Service on proctor—Service out of the jurisdiction—Substituted service—Appearance—Civil Procedure Code, sections 29, 69, 72, 85.

The defe dant in an action by way of summary procedure on liquid claims was represented upon appearance to the summons by a proctor, whose proxy authorized him generally to defend the action. By virtue of this proxy, the proctor took exception to the procedure, and after an appeal to the Supreme Court the plaintiffs were directed to proceed by way of regular procedure. The proctor also applied to dissolve a sequestration of defendant's property, and unsuccessfully appealed against the refusal of his application. The plaintiffs then issued summons by way of regular procedure, and service was effected on the proctor

Held, affirming the judgment of the district court, that the service on the proctor was a good service under section 29 of the Civil Procedure Cod .

This was an action by the Bank of Madras as holders, against defendant as indorser, of 23 promissory notes. The case is reported, at two previous stages, in 9 S. C. C. 169, and *ante* p. 22. The defendant now appealed from a refusal of the district court to set aside a judgment for plaintiffs entered up *ex parte* for default of appearing and answering.

The facts material to this report are fully stated in the judgment of Clarence, J.

Dornhorst (*Wendt* and *Sampayo* with him) for the appellant. The orders and decree appealed from were irregularly made, there having been no legal service of summons on defendant, and should have been set aside on defendant's motion. Under section 59 of the Code summons must be personally served. Admittedly there was no such service in this case. But defendant being out of the Island and the fiscal having returned the summons unserved, upon plaintiffs' motion the court directed substituted service under section 60 by posting summons under registered cover to defendant's address in India and by serving a duplicate summons on Mr. Perera, proctor. It is submitted that this was irregular, for substituted service is expressly made applicable under section 60 only to cases where the defendant is within the Island. Even if the posting of the summons to defendant in India be regarded as an attempt to serve out of the colony under section 69, the attempt failed because the registered letter was returned undelivered. As to service of duplicate summons on Mr. Perera, it is of no effect because it was substituted service, which as already submitted was not applicable. Nor can it be regarded as good original service. Mr. Perera was not defendant's proctor at the time and had no authority to accept summons. He had indeed appeared for defendant on a previous proxy, but that proxy was limited to the action as it was then constituted. The action originally was one of summary procedure under Chapter LIII of the Code, and the previous proxy related and must be taken to have been limited to those proceedings. That form of action came to an end when the Supreme Court in the first appeal converted the action into one of ordinary procedure, and Mr. Perera's proxy then became exhausted. The action thereafter became virtually a new action, necessitating fresh summons and fresh appearance. The service of this fresh summons on Mr. Perera at this stage was bad and did not bind defendant, and the decree based thereon is a nullity. Further, the *ex parte* trial and the decree *nisi* following upon it were irregular. For, previous to the date of the *ex parte* trial, the defendant did appear through Mr. Perera in this new action. The court therefore had no jurisdiction to proceed under section 85 as for a default of appearance, and the decree *nisi* should have been set aside on defendant's motion. [Counsel then argued the case on the merits, contending that sufficient cause

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had been shewn to permit of defendant being let in to defend.]

Browne (*de Saram* with him) for the plaintiffs respondents. The learned district judge was right in refusing the defendant's application and making the decree *nisi* absolute. It is submitted there was proper service of summons. This was not a case of substituted service, but of original service. In the first place, there was sufficient service out of the colony. Under section 70 of the Code, the court could prescribe the mode of such service, and in this instance it directed the summons to be posted under registered cover. Such posting was service without delivery of the letter, especially as non-delivery appeared to have been due to refusal of acceptance by defendant who evidently knew what the letter contained. Again, the service on Mr. Perera was equivalent to service on defendant. Mr. Perera's previous proxy was not limited to any purpose, but was an ordinary one authorizing him generally to defend the action. The action was one and the same all throughout, the mode of procedure only being different, and it is submitted that Mr. Perera represented defendant at all stages of the action on his first proxy, though he purported to file a new proxy after the issue of fresh summons. Under section 29 of the Code, service of process on a party's proctor is as effectual for all purposes as service on the party himself and therefore the defendant in this case must be taken to have been duly served through his proctor. As to the *ex parte* trial and the decree *nisi*, the proceedings, it is submitted, were regular. The defendant had indeed appeared for certain purposes—to resist the proceedings by way of summary procedure on liquid claims, and to apply for dissolution of the sequestration issued in the action—but he did not appear to answer the plaint under the exigency of the new summons, within the meaning of section 72. There was thus default in "appearing" and the procedure laid down in section 85 was properly followed.

Dornhorst, in reply. The term "process" as used in section 29 does not include a summons: it manifestly cannot, because before summons a defendant will not have a proctor in the action. "Process" in that section must be taken to mean court's directions other than and subsequent to summons.

Cur. adv. vult.

On December 15, 1891, the following judgments were delivered :—

CLARENCE, J.—This case has now been argued in appeal for the third time. Upon the first occasion defendant succeeded in his contention that the summary procedure under Chapter LIII of the Code is not applicable. Upon the second occasion defendant failed in his endeavour to get rid of the sequestration which the district court had issued in November last year. Defendant now appeals from a refusal of the district court to set aside a judgment entered up *ex parte* for default of appearing and answering.

It is desirable, in order to a disposal of this appeal, to go carefully through the proceedings which have taken place.

Plaintiffs declare on a number of promissory notes and sue to recover a sum of about Rs. 26,400. The action was begun in November last year; the plaintiff obtained a sequestration of property of defendand in Colombo upon grounds considered in the second judgment of this court, and summons was then issued under Chapter LIII of the Code, the plaintiffs endeavouring to proceed by the summary procedure under that chapter. In December last year and subsequently defendant was represented in the action by his attorney Ayaturai Moodeli, Mr. C. Perera, proctor, appearing in the case on proxy in the usual manner. Two proxies to Mr. Perera are filed in the paper-book, one bearing date December 22, 1890, and the other January 5, 1891. Each of the proxies empowered Mr. Perera to defend the suit generally, and under these proxies Mr. Perera conducted the defence, including two appeals by the defendant to this court. In June this year the case came before us upon cross appeals by both parties, and we then held that plaintiffs were wrong in their attempt to proceed under Chapter LIII, and left it open to plaintiffs to proceed in the ordinary manner. About this time also the defendant was appealing from a refusal of the district court to dissolve the sequestration, and that appeal was dismissed in July.

It was then deemed desirable on plaintiffs' part to issue a fresh summons in the ordinary form. Plaintiffs' manager, Mr. Noble, made affidavit of defendant's attorney having left Ceylon and defendant himself being resident at a certain village in Tanjore, and an application was made to the district court to allow service on the defendant out of the jurisdiction. The learned district judge then directed, as I understand, that the summons be served by posting it in a registered letter addressed to the defendant at the indicated address in Tanjore, and also directed a duplicate service to be made on Mr. Perera. This order was made on July 24. The summons thus issued allowed 23 days to appear and answer. The service upon Mr. Perera was effected.

If this appeal had to turn upon the service in India, I should feel difficulty in holding that any

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service in India has been established, but plaintiffs have the service on Mr. Perera to fall back upon. Defendant had already appeared in the action as far back as January by his proctor Mr. Perera, but it was—and I think rightly—deemed necessary to serve him with process under the general procedure, calling on him to answer. Now, by section 29 of the Code, service of process on a party's proctor is sufficient, unless the court otherwise directs, and Mr. Perera was the defendant's proctor. He had been defendant's proctor from January. Appellant's counsel indeed contended that a summons is not "process" within the meaning of section 29. Process in general includes summons, but in the ordinary case it would not be possible for a plantiff to serve his summons through his defendant's proctor, for the simple reason that until the defendant has appeared by a proctor he has no proctor recognizable in the case. The present case is different. Mr. Perera had already status in the case as defendant's proctor, and the service on him of process calling on defendant to answer the plaintiffs' claim was a good service on the defendant.

The process served on the defendant through Mr. Perera is dated July 28, and was served the same day. It was, so far as is material for the purposes of this appeal, in these terms—"You are "hereby summoned to appear in this court either "in person or by proctor within 23 days from the "date hereof, exclusive of such date, at 10 o'clock "of the forenoon to answer the abovenamed plain-"tiffs and you are hereby required to take notice "that in default of your so appearing the action "will be proceeded with and heard and determined "in your absence." This is the ordinary form of summons provided by the Code for the commencement cf an action.

With regard to appearance, the defendant had already appeared in the action by Mr. Perera, and if he had not so appeared the service on him through Mr. Perera could not have been effected, but defendant had not, until this process was served on him, been called upon in the ordinary form to answer the plaint. On August 20, the first day available, the defendant had not taken any further steps, and the plaintiffs moved that the case be set down for hearing *ex parte*, according to the provisions of section 85 of the Code, and it is material to note what took place on that day. We have the learned district judge's note of what took place. Counsel appeared for Mr. Perera—not, be it observed, for the defendant—and contended that the service, including the service on Mr. Perera, was not proper service on defendant, and that Mr. Perera's proxy did not extend to the general defence of the action, but only to the abortive proceeding under Chapter LIII. The district judge held that good service on defendant had been made, and then fixed the case for *ex parte* trial on September 4.

I pause here to say Mr. Perera's contention, that his proxies did not empower him to represent the defendant at this stage of the case, was untenable. Mr. Perera seems to have contended that the proxies only extended to the resisting plaintiffs' attempt to proceed summarily under Chapter LIII. I will not stop to consider how far any such limitation of a proctor's authority could be recognised by the court. It is unnecessary to discuss any question of that kind. The two proxies filed by Mr. Perera in December 1890 and January 1891 distinctly authorised him to defend the action generally. The plaint contained the plaintiffs' declaration against the defendant. What procedure the plaintiffs should or would adopt for obtaining the relief asked for in the plaint, was another matter. The proxies filed by Mr. Perera clearly empowered him to resist whatever proceeding plaintiffs might adopt in the action.

The district judge had fixed the *ex parte* trial under section 85 for September 4, but the trial seems to have been adjourned to September 18. In the meantime, on September 17, Mr. Perera filed a new proxy purporting to be under authority from two attorneys of defendant (other than the original attorney) and moved for an order *nisi* to set aside the order of July 21 as to service, and also the order of August 20 setting down the case for *ex parte* trial. This application was accompanied by an affidavit made on September 17 by defendant's new attorneys. I cannot find record in the paper book of the issue of any order *nisi* on this application of defendant's, or of any fiat by the district court allowing the application for one, but it should seem that in some form or other defendant's application was recognised by the district court and was discussed in the district court on September 28.

Meanwhile, when the case came on for *ex parte* trial upon September 18, we find the learned district judge noting that Mr. Perera for defendant applied that the *ex parte* trial should stand over pending the returnable day of "the order *nisi*", referring no doubt to defendant's application just mentioned. Plaintiffs' counsel then disclaimed having received notice of any order *nisi*, and the *ex parte* trial proceeded, resulting in a decree *nisi* for plaintiffs under section 85 of the

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Code. The decree *nisi* was made on September 18 and defendant had till September 30 to show cause.

On September 28, defendant's application, already mentioned, to set aside the service of the summons and the order for *ex parte* trial came on for discussion. Defendant's counsel repeated the contention that at the time when the district court allowed service through Mr. Perera, Mr. Perera had no proxy authorising him to represent defendant. The district judge dismissed defendant's application —order of dismissal dated October 5.

Again defendant showed cause against the decree *nisi* and the discussion took place on October 7, when the district judge made the decree absolute.

The defendant now appeals from these last two orders of the district court, viz: the order made on October 5, refusing to set aside the service and order for *ex parte* trial, and the order of October 7 making the decree absolute; and substantially the question for decision is—whether, instead of making the decree *nisi* absolute, defendant should have been let in to answer and defend. There are, in fact, two questions: first, were the proceedings under which the decree *nisi* was entered vitiated by any irregularity, and if that question be answered in the negative, then secondly, ought defendant to be still let in to defend on the score of reasonable grounds for the default on which the decree *nisi* was made.

Now, so far as concerns the first of these questions, I think that the decree *nisi* was properly entered up. I was at first struck by the circumstance that the learned district judge purported to make the decree *nisi* for default of appearance, whereas the defendant had really appeared in the action by his proctor Mr. Perera as far back as December, 1890, otherwise he could not have been served through Mr. Perera. But when you consider how the matter really stood, the order is right. Under the ordinary procedure in an action, the proceedings begin by the defendant being summoned to appear and answer. Section 72 and subsequent sections prescribe what is to be done. On the returnable day "if "the parties appear in court the defendant shall "be called upon to answer the plaint." If the defendant "fails to appear on the day fixed for his appearance and answer," the court, if satisfied that the defendant has been served with summons, is required by section 85 to fix the case for *ex parte* hearing in order to a decree *nisi*. Now, the present case stood upon an unusual and extraordinary footing. The case was already over 6 months old when the plaintiffs had to take the step of calling on the defendant to answer to the plaint—a step ordinarily taken at the very beginning of an action. This was in consequence of plaintiffs having unsuccessfully attempted to use the special procedure under Chapter LIII. But though the defendant had in fact "appeared" in the action 6 months ago, it was now necessary for him within the meaning of section 72 to "appear to answer" under the ordinary procedure, viz. to attend the court either in person or by his proctor and file his answer. Then, says section 72, "if the parties appear in court," "the defendant shall be called upon to answer the plaint," and section 85, as already mentioned, provides what is to happen if plaintiff attends and defendant does not. Defendant's original "appearance" in the action 6 months back was not the "appearance" needed now. Defendant had to appear in court in person or by his lawyer to answer. Did defendant so appear? I think that he did not, and though the learned district judge's expression that defendant had not "entered appearance" is a little misleading, he was substantially right in his order, because the defendant had not appeared in court to answer the plaint, within the meaning of section 72. It is true that defendant's proctor Mr. Perera was in court, but only to contend that he did not now represent the defendant. We have the learned district judge's note that counsel appeared before him on the returnable day of the summons, not for the defendant but for Mr. Perera, and argued that Mr. Perera did not represent the defendant beyond the abortive proceedings under Chapter LIII. Therefore I think that the learned district judge was right in holding that on the returnable day of the summons, which called on defendant to appear to answer, the defendant did not so appear, because Mr. Perera expressly disclaimed representing the defendant. It would have been futile for the district judge to "call on the defendant to answer the plaint" when no one attended to represent him. Not only was it contended on September 18 that Mr. Perera's authority to represent the defendant had expired with the proceedings under ChapterLIII, but the same contention was again pressed upon the district court upon defendant's formal application to get rid of the service through Mr. Perera, and it was reiterated in appeal before us.

We must therefore answer the first question in the negative, and hold that the order for *ex parte* trial was rightly made. The only remaining question is, whether defendant has shown any circumstances amounting, within the meaning of section 86, to "reasonable grounds for his default" in appearing to answer.

As to that, if we look at the history of the matter, *res ipsa loquitur*. At the outset of the case, in

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November 1890, plaintiff obtained a sequestration of defendant's property in Colombo upon materials going to show *prima facie*, that defendant was fraudulently alienating his property. That sequestration defendant unsuccessfully attempted to dissolve and is still on foot. Plaintiffs then committed a mistake in their procedure and attempted to proceed under Chapter LIII, which did not apply. This defendant was within his right in resisting. He did resist it, and by our order in appeal made last June, plaintiffs' attempt to proceed under Chapter LIII was finally knocked on the head and plaintiffs were told that they could only proceed under the ordinary procedure. For that plaintiffs had to call on defendant to appear in court to answer to the plaint after the ordinary fashion, and what subsequently took place can only be described as a determined and protracted endeavour on defendant's part to evade service of plaintiffs' process. Ayaturai Moodali, who as defendant's attorney originally instructed Mr. Perera for the defence, is now found to have vanished, leaving no trace behind. Defendant himself is in India. In May defendant gave a new power of attorney to two new attorneys, who, however, lay by and made no sign until September, when they came forward and instructed Mr. Perera and also made an affidavit of a very unsubstantial character. Defendant having a proctor on the record, plaintiffs served the new process on him, which under section 29 it was competent to plaintiffs to do. I dismiss from consideration the attempt at substituted service out of the jurisdiction which in my opinion was abortive, but the service through Mr. Perera was good. Defendant, when then served, did not appear to answer ; on the contrary his proctor set up a frivolous contention that when he was served he no longer represented the defendant. It is abundantly clear that the line of conduct of the defence has been directed to baffling plaintiffs by evading service of their process. Fortunately for plaintiffs they served defendant through his proctor. But for that they would, not improbably, have been unable to serve him at all. Defendant had the opportunity of coming in to answer and defend when he was served through his proctor in July. This on a frivolous pretence defendant abstained from doing, and he must take the consequences. No reasonable grounds are shown for defendant's default, on the contrary there is every reason to believe that it was deliberate and conceived in the desperate hope of being able to get rid of the service.

For these reasons I am of opinion that the defendant's appeal should be dismissed with costs.

Dias, J.—This case has been so fully gone into by my learned brother in his judgment that I have nothing more to add to it, but I cannot let the case pass without remarking that throughout the proceedings the defendant seems to have had but one object, that of avoiding or postponing the payment of the debt. Lastly, the defendant attempted to evade the service of the summons by repudiating his own proctor, Mr. Perera. There is no foundation for the contention that Mr. Perera represented the defendant for a limited purpose only, but the proxies tell a different tale. The defendant cannot be allowed to blow hot and cold, and make use of Mr. Perera when it suits his purpose and throw him overboard when it is convenient to do so. I think with my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

———:o:———

Present :—Clarence and Dias, JJ.

(*July* 7 *and* 22, 1891.)

D. C. Negombo, No. 213. | Narayen Chetty v. Fernando.

Jurisdiction—Promissory note made at one place and indorsed at another—Action by indorsee against maker—Cause of action—Civil Procedure Code, sections 5, 9.

A promissory note made at a certain place, the maker being described as of the same place, is, in the absence of express provision to the contrary, a note payable at that place.

In an action brought in the district court of Negombo by the indorsee against the maker, who was resident at Chilaw, of a promissory note made at Chilaw but indorsed at Negombo—

Held, that under section 9 of the Civil Procedure Code the district court of Negombo had no jurisdiction.

Action by indorsee against maker of a promissory note.

The plaintiff obtained a decree *nisi* for default of appearance by defendant upon summons served, and the decree *nisi* was in due course made absolute. Subsequently, the defendant came in and upon affidavit moved to set aside the decree. The district judge refused the motion and the defendant appealed.

Dornhorst, for appellant. The cause of action, which was the non-payment of the note, did not arise at Negombo ; for the note, not being made payable at any particular place, was payable where it was made, viz. Chilaw. The court had therefore

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no jurisdiction in this case, and should have allowed the defendant's application to set aside the judgment.

Sampayo, for respondent. The indorsement at Negombo was sufficient to give jurisdiction. *C. R. Colombo, No.* 54.714, 1 C. L. R. 10; *Read v. Brown*, L. R. 22 Q. B. D. 128. Further, in the case of negotiable instruments, indorsement is always contemplated, and on the principle that a debtor must seek his creditor, the maker of this note had to pay where the indorsee was, viz. at Negombo. The cause of action therefore arose there. Then, the objection, even if valid, comes too late. The defendant did not appear to answer the plaint or to shew cause against the decree *nisi*, and the judgment ought not now to be set aside on the ground urged.

Dornhorst, in reply. The cases cited do not apply. They were decisions under systems of procedure where "cause of action" was understood to consist of the material facts in the case for the plaintiff and could arise "partly" in one place and "partly" in another. But "cause of action" as defined in the Civil Procedure Code (section 5) is different and must necessarily arise wholly in one place. In this instance, it was "the refusal to fulfil an obligation", *i. e*, the refusal to pay the note, which it is submitted was payable at Chilaw and not at Negombo.

Cur. adv. vult.

On July 22, 1891, the following judgments were delivered :—

CLARENCE, J.—I am of opinion that this order must be set aside and the defendant's application to have the judgment re-opened which was entered against him by default of appearance allowed, for the reason that the plaint discloses on its face no jurisdiction in the Negombo district court.

Section 9 of the Procedure Code allows such an action to be brought in the court within whose local limits of jurisdiction (1) the defendant resides or (2) the cause of action arises or (3) the contract was made. The contract entered into by defendant was made at Chilaw, and the defendant resides at Chilaw. Then where did the cause of action against this defendant arise ? The terms of the note are :—"Three months after date I the undersigned J. M. Fernando of Chilaw promise to pay to M. P. F. Fernando of Negombo," and so on. That is a note payable by the maker at Chilaw. See *Burton* v. *Jones*, 1 M. & Gr. 83. That fact that the payee is averred to have indorsed the note to the plaintiff at Negombo is immaterial for the purpose of this question. "Cause of action" is defined in section 5 of the Code as the wrong for the redress of which the action is brought, including the refusal to fulfil an obligation. The breach of contract attributable to defendant here is an omission to pay at Chilaw. *Read* v. *Brown*, 22 Q. B. D. 128, cited for plaintiff, turned on the words "cause of action wholly or in part" in the *Mayor's Court Procedure Act*.

Nothing is averred in the plaint which confers any jurisdiction on the Negombo district court, as jurisdiction is defined in our Code.

The judgment is set aside and the case sent back to the district court, plaintiff paying defendant's costs of the application in both courts.

DIAS, J.—I am of the same opinion.

Set aside.

———:o:———

Present :—BURNSIDE, C. J.,

(*May* 3, 1892.)

D. C. Badulla, Criminal, No. 4,130. } THE QUEEN v. VIDANE.

Criminal Procedure—Sentence—Imprisonment and fine—Warrant of distress—Further imprisonment in lieu of fine—Jurisdiction—Criminal Procedure Code, sections 17, 378.

Where an accused person is sentenced to a fine, if the court desires to award any term of imprisonment in default of payment of the fine under section 17 of the Criminal Procedure Code, such award should be made at the time of and as part of the original sentence.

Where the sentence was one of fine without any alternative term of imprisonment, and no property being fund upon distress issued, the court then imposed a term of imprisonment in lieu of the fine—

Held, that the second sentence of imprisonment was illegal.

The defendant in this case was convicted by the district judge upon a charge under section 317 of the Penal Code and sentenced to imprisonment for a period of 2 months and to a fine of Rs. 25. He was committed to prison upon the sentence of imprisonment on March 31, 1892, and warrant of distress having issued for the recovery of the fine, the fiscal returned *nulla bona*. Thereupon, on April 11, 1892, the district judge imposed a further term of simple imprisonment for two months in lieu of the fine and a second warrant of commitment was issued for the detention of the defendant for this second term of imprisonment. The Chief Justice having, upon a visit to the jail in which

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the defendant was detained, considered the second committal to be illegal caused the warrant of commitment to be brought up to be dealt with by the Supreme Court.

Hay, A. S. G., for the Crown, intimated that he could not support the commitment.

The CHIEF JUSTICE held that under the provisions of the Criminal Procedure Code the award of any term of imprisonment in default of the payment of a fine must form part of the original sentence and that otherwise the court must be content with the result of the warrant of distress for the recovery of the fine and had no power, on the distress proving fruitless, to impose any term of imprisonment in lieu of the fine.

The second warrant of commitment was accordingly quashed, and it was ordered that the defendant should be discharged on the expiration of the substantive sentence of imprisonment.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(*January* 19 *and* *February* 4, 1892.)

D. C. Galle, No. 55,337. } MOHAMADU HAMIDU *v.* RAHIMUTTU NATCHIA.

Registration—Deeds of gift—Valuable consideration—Priority—Ordinance No. 8 *of* 1863, *section* 39.

The operation of section 39 of the Land Registration Ordinance, 1863, in favour of deeds registered before deeds earlier in date, is confined to deeds made for valuable consideration.

Therefore, a deed of gift does not, by reason of prior registration, prevail over another deed of gift prior in date

Ejectment.

The facts sufficiently appear in the judgment of CLARENCE J.

The defendants appealed from a judgment in favour of the plaintiff.

Dornhorst, for appellants.

J. Grenier, for respondent.

Cur. adv. vult.

On February 4, 1892, the following judgments were delivered :—

CLARENCE, J.—Plaintiff sues to eject defendants from a house and land. Plaintiff avers that Alip Usman Ahamat, who admittedly owned the property, conveyed it by deed of gift dated July 15, 1876, to his daughter Saidittu Umma ; that Saidittu Umma in 1877 mortgaged to Miss Austin, who had judgment on her mortgage, under which the property was sold by fiscal and purchased by plaintiff. Plaintiff also sets up a title by prescription.

Defendants put plaintiff to the proof of the gift to Saidittu Umma and set up a title in themselves under a gift by Alip Usman Ahamat of date April 23, 1876, to defendants, who are the widow and a daughter of the donor. Plaintiff avers this gift deed to be a forgery.

The fiscal's sale under which plaintiff claims was held in 1881, but plaintiff got no conveyance till 1889. Of the execution of the gift deed pleaded by plaintiff there is no evidence. The execution of the other gift deed pleaded by defendants is deposed to by a dismissed notary, who says that the donor executed it in his presence. The district judge bases his judgment on the assumption that both deeds were actually executed by the alleged donor, but upholds plaintiff's title on the ground that his deed is registered whereas defendants' is not ; he appears also to be of opinion that there has been possession on the part of plaintiff and those through whom he claims.

Defendants appeal.

The registration of plaintiff's gift deed does not affect the contest between the parties, inasmuch as plaintiff's deed was not a conveyance made for valuable consideration, and the operation of section 39 of the Land Registration Ordinance 1863, in favor of deeds registered before deeds earlier in date, is confined to deeds made for valuable consideration. Therefore, so far as paper title is concerned, defendants' deed prevails over plaintiff's, apart from the circumstance that the plaintiff's deed is not proved. Plaintiff then has to fall back on his plea of the Prescription Ordinance. Plaintiff himself appears according to his own account to be a member of the same family as defendants. The evidence adduced on plaintiff's part as to possession of the property since 1876 is far from establishing in plaintiff's favor a title by prescription.

I am of opinion that the judgment appealed from must be reversed and judgment entered for defendants with costs in both courts.

DIAS, J.—On the question of registration, the Registration Ordinance does not help the plaintiff's case. Plaintiff has to fall back on his adverse possession, which is manifestly insufficient to give him a title against the defendants. Defendants are entitled to judgment with costs in both courts.

Reversed.

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Present :—Burnside, C. J., and Clarence and Dias, JJ.

(*June* 12 *and July* 7, 1891.)

D. C. Matara, No. 34,392. } Wettesinghe v. Jayan.

Sale of land—Action for partition—Auction—Agreement not to bid—Notice of sale—Irregularity—Practice Jurisdiction—Ordinance No. 10 *of* 1863, *section* 8.

At the sale of land under a decree in a partition suit the land was knocked down for a sum amounting only to half the appraised value to one of the parties to the suit, who had agreed with another of the parties that they should not bid against each other and that the land, if purchased, should be shared between them.

Upon an application in the partition suit by some of the other parties to set aside the sale—

Held (Dias, J., dissenting) that the agreement between the purchaser and the other party not to bid against each other and to divide the land, if purchased, was not inequitable and did not vitiate the sale.

This was a suit for partition of land, of which the plaintiff and the defendants were owners in common. The court, however, decreed a sale and appointed a commissioner to carry it out. The commissioner appraised the land at Rs. 300, and at the sale, which had been adjourned for a fortnight after the date advertised, none of the parties having bid, the commissioner put it up for open competition, when the second defendant became the purchaser for Rs. 150 as the highest bidder. Thereupon the fourth, fifth, and sixth defendants applied to the court in the partition suit to set aside the sale. It appeared at the inquiry upon the application that the plaintiff and the second defendant (the purchaser) had agreed that the plaintiff should not bid at the sale and that he should have half of the land if purchased. The district judge disallowed the sale and ordered a fresh commission to issue for the sale of the land.

The second defendant appealed.

Dornhorst, for appellant.

J. Grenier, for respondents.

Cur. adv. vult.

On July 7, 1891, the following judgments were delivered :—

Burnside, C. J.—I think the order in this case was *ultra vires*. This was a sale under the Partition Ordinance, and I can find no authority whatever for the disallowance summarily by the judge of such a sale. It is not like a sale in execution, where the district judge has special powers conferred on him to affirm or disallow it. The sale was ordered as part of the partition decree by a commissioner duly authorised and ordered to carry it out, and if he has erred one way or the other, the remedy is against him; or if his default is of such a nature as vitiates the whole sale, then there is no necessity to set it aside—it is a nullity and does not affect the rights of parties and their remedies remain for them. But even on the grounds set up I don't think the order should stand. I think it most dangerous to discredit public sales like these, because one of the interested parties thinks the property was sold for less than its value. If any of the parties concerned thought that the property was being sold for less than its value, he had the opportunity of bidding it up; but they remain quiet and allow the sale to be concluded and then seek to set it aside. The commissioner has testified that he gave timely notice of the day of sale, and I cannot agree with the district judge that because he did not effect a sale on that day therefore he could not sell until he had given another six weeks' notice. The object of the law in requiring that six weeks' notice of the sale should be given was no doubt to prevent a precipitate sale following the order; and that time having elapsed, it cannot be said that no sale could be made without giving six weeks' more notice.

I find nothing in the evidence that there was any fraud practised. It was quite legitimate for one of the parties interested to agree with the other or others that if they did not bid the party purchasing would share with him or them, and it cannot I think rightly be said that they thereby prevented a fair sale of the land. The non-agreeing parties had it in their power to run the land up if they wished to defeat such a combination.

The parties ought to be left to the remedies which are specially conserved to them by the proviso in section 9 of the Ordinance, and I repeat that it seems to me a very dangerous practice to interfere with public sales like this, in which bidders should rely on the *bona fides* and the official character of the sale. More harm than possible good will be done if the public learn to distrust these sales as liable to be set aside on some technical objection or dissatisfaction with the price which the property realizes. Bidders will refrain from bidding and property will necessarily be sacrificed. The order is in my opinion *ultra vires*, and there are not any grounds for disturbing the sale, and the appeal should succeed. The respondents will pay the costs of the appeal and of the proceedings in the district court to set aside the sale.

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CLARENCE, J.—In this case the district judge, not seeing his way to a partition of the land, decreed a sale, and appointed a commissioner to carry out the sale. Section 8 of the Ordinance requires six weeks' notice of the sale to be given in such manner as the court may direct. In this instance notice was given by advertisement, but on the advertised day the sale was adjourned for a fortnight, and at the adjourned sale the land was knocked down to the second defendant for about half the sum of which the commissioner says that he had appraised its value. Certain other defendants now ask that that sale may be set aside. Nothing turns on any point as to notice of the sale day, the application to set aside the sale being based on objection to what actually passed on the occasion of the sale. Had I been in the district judge's place, I should not have entertained the application in the first instance, because it was not made upon any affidavit. The application, however, was entertained, and was discussed *inter partes*, being opposed by the plaintiff and (as I gather from the district judge's note) by the defendants other than the applicants.

I do not think that there is any difficulty as to the principles upon which such an application should be disposed of. I cannot doubt that up to the date when the property has become vested in the purchaser by the judge's certificate mentioned in section 8 of the Ordinance the district court has power at the instance of any party concerned to refuse to complete the sale upon proper cause shown. The case is analogous to the "opening of the biddings" in sales by the Court of Chancery in England. When a sale takes place by order of court, and the land has been knocked down to a purchaser, the court has clearly power, if justice requires, to open the biddings at any time short of the date when the sale has been actually completed and order a resale.

As to the grounds upon which biddings should be so reopened, it is matter of legal history that before the Sale of Land by Auction Act 1867 was passed there used to be some conflict between the English courts of law and equity as to the grounds on which in general auction biddings should be opened. We certainly should be prepared to open the biddings in a case of "fraud or improper conduct in the management of the sale", the grounds on which alone in a sale by order of court the biddings can be opened since the Act of 1867.

In the present case it is not suggested that there was any improper conduct on the part of the commissioner who conducted the sale. It seems, however, to be suggested that the plaintiff and the second defendant agreed not to bid against each other and that second defendant should let plaintiff have half the land if he bought it. Supposing that to be so, i would not in my opinion be enough to open the matter. There used to be a passage in Sugden's Vendors and Purchasers to the effect that "if the parties agree not to bid against each other" the court would open the biddings on that ground. In *In re Carew's Estate*, 26 Beav. 187, Lord Romilly considered that point and held it not established by authority that a sale can be invalidated by "a mere agreement between two persons, each desirous to buy a lot, that they will not bid against each other". These two gentlemen agreed not to bid against each other, but that one should buy the lot if it could be got for a certain price, and they would then divide it. Lord Romilly thought that there was no case and no principle on which such an agreement could be deemed inequitable. I am aware of no authority since this case.

I am of opinion that the applicants' application should be dismissed with costs. The appeal succeeds.

DIAS, J.—In this suit, which is a partition suit, the district judge made an order of sale, and one Mr. Booy was appointed commissioner to carry out the sale. The commissioner made his return to the commission, and on January 23, 1891, Mr. C. H. Ernst, for fourth, fifth, and sixth defendants, moved that the sale effected by the commissioner might be set aside for the several reasons set out in his application. The proctor's motion was founded on the bare application which had no affidavit to support it. This application sets out that the plaintiff and the second defendant colluding together had succeeded in obtaining the land for Rs. 150, whereas it is worth Rs. 500. A day was fixed to hear the parties on the matter of this application, and on March 10 the case came on for hearing, and the plaintiff and the commissioner were then examined. From their evidence it appears clear that the garden Kahatagahawatte was knocked down to the second defendant much below its real value. The commissioner appraised the property at Rs. 300, and at the first sale, which fell through, the plaintiff himself bid Rs. 305. The plaintiff's explanation of how he came to give up his bid is very unsatisfactory. He admits that the second defendant, who bought the land for Rs. 150, offered to give him, the plaintiff, one-half of the land. It is evident that the plaintiff and the second defendant have combined together to obtain the land for half of its real value. Besides, according to the commissioner's evidence he did not give notice of the sale as required by the Ordinance. Some pre-

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liminary objection seems to have been taken in the district court on the ground that the application was not supported by an affidavit, but I am not prepared to give effect to this objection. All the facts connected with the dispute between the parties are now before us, from which it appears that the sale was not only irregular, but that the plaintiff and the second defendant acting together have prevented a fair sale of the land. I would affirm the order.

Set aside.

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Present:—BURNSIDE, C. J.

(*February* 18 *and* 23, 1892.)

C. R. Colombo, No. 2,333. } FERNANDO v. FERNANDO.

Civil procedure—Insufficiently stamped plaint—Objection by defendant—Taking plaint off the file—Answer on the merits—Practice.

Where a plaint is insufficiently stamped the proper course for the defendant is at once to take steps to have it taken off the file and not to wait till the trial and then take exception to the sufficiency of the pleading.

The plaintiff sued defendant, claiming Rs. 48 as damages for the alleged obstruction by defendant of a footpath and water-course, in respect of which the plaintiff claimed a right as lessee of the land. The plaint was stamped with stamps to the value of 50 cents only. The defendant filed answer pleading on the merits. But on the day of trial the defendant objected to the plaint as being insufficiently stamped and submitted that the action should be dismissed. The learned commissioner upheld the defendant's objection and dismissed the plaintiff's action with costs.

The plaintiff appealed.

Dornhorst, for appellant.

Pereira, for respondent.

Cur. adv. vult.

On February 23, 1892, the following judgment was delivered :—

BURNSIDE, C. J.—If the proceedings are insufficiently stamped the proper course is to take them off the file of the court. But a defendant cannot hang back until the day of trial and then take exception to the sufficiency of a pleading which he had previously recognized. However, the defendant's wrong cannot cure the plaintiff's fault, and I set aside the judgment of the commissioner and send the case back to enable him to deal with the matter regularly.

If the libel is insufficiently stamped the commissioner may order it to be removed and the plaintiff to pay the costs of his proceedings. The defendant will, of course, bear his own costs—he should have moved earlier. Or, the commissioner may allow the plaintiff to affix proper stamps on paying the prescribed penalty.

I say nothing as to the sufficiency or insufficiency of the stamp.

I make no order as to costs of appeal.

Set aside.

———: o :———

Present:—CLARENCE and DIAS, JJ.

(*January* 22 *and February* 19, 1892.)

D. C. Chilaw, No. 152. } MUDALY APPUHAMY v. TIKIRALA.

Civil Procedure—Want of particulars in plaint—Answer on the merits—Pleading—Motion to take the plaint off the file—Irregularity.

An objection to a pleading for want of particulars is not a matter to be set up by plea. A party requiring more particulars should, before pleading to the merits, take the objection by way of motion to take the pleading off the file.

Accordingly, where in an action for land the plaint did not disclose the plaintiffs' title to the shares of land claimed or who the other shareholders were, and where the defendants filed an answer denying the plaintiffs' title and also taking legal objection to the non-disclosure and non-joinder of the other shareholders, and on the day of trial moved to take the plaint off the file—

Held, that the defendants' procedure was irregular.

The facts material to this report appear in the judgment of CLARENCE, J.

The district judge thought that the plaint was defective in that it did not shew who were the co-owners of the plaintiffs who sued in respect of only certain shares of land and in that it did not disclose the plaintiffs' title. He therefore upheld the objections taken to that effect in the answer and he also

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disallowed a motion on the part of the plaintiffs to file a list of documents on the ground that the documents of title should have been pleaded in and filed with the plaint. He accordingly allowed with costs a motion on defendant's part to take the plaint off the file.

The plaintiffs appealed.

Dornhorst, for appellants. The defendants have misconceived the procedure to be followed. The argument of the matters of law raised in the answer has been mixed up with a motion to take the plaint off the file. The object of such a motion for want of particulars is to enable a defendant to answer, on the ground that without such particulars he is embarrassed and cannot answer. Here, the defendants have answered, and there is in fact an issue of title on record. As to the non-disclosure and non-joinder of the other co-owners, such on objection cannot now be maintained in view of the provisions of section 12 of the Civil Procedure Code, which enables one co-owner of land to sue alone in respect of his share. The district judge was therefore wrong in making the order appealed from at this stage of the case.

There was no appearance for respondents.

Cur. adv. vult.

On February 19, 1892, the following judgments were delivered :—

Clarence, J.—Plaintiff filed a plaint averring that first plaintiff owns Ambegahawatte, title not disclosed, and one-sixth of Kongahawatte, title also not disclosed, that second plaintiff owns one-twelfth of Kongahawatte under a conveyance of date July 12, 1888, earlier title not disclosed, and sue under section 247 of the Procedure Code to set aside an adverse order made under section 245. The plaint also contains a general averment of a title by prescription, but no other averments of title.

Defendants answered, admitting having pointed out for seizure in execution certain shares of these lands, to which defendants set up title, and denying plaintiffs' title to the extent claimed by plaintiffs. The answer also disputed the correctness of the boundaries assigned by plaintiffs to Ambegahawatte and purported to demur to the plaint on the ground of the non-disclosure of plaintiffs' co-sharers and set out the names of certain persons alleged by defendants to be shareholders.

Plaintiffs replied to this answer and took issue as to defendants' averments concerning title and concerning boundaries. The case was then fixed for trial, but before the trial day had arrived defendants moved to amend their answer by adding an objection that the plaint "does not disclose the title of plaintiffs". The district judge refused this application.

On the trial day defendants moved to have the plaint taken off the file. No written motion seems to have been made and we can only gather the grounds of the motion from the district judge's note that defendants moved "that the plaint be taken off the file on the pleas raised in the answer and on general grounds of law". The district judge, after this application had been discussed, made an order taking the plaint off the file and plaintiffs appeal.

We cannot support the order. A defendant sued in a suit based on an alleged title in plaintiff to land is always entitled to have a disclosure of the plaintiff's title, and such a disclosure is required by section 40 of the Code; but an objection for want of particulars is not a matter to be set up by plea. If defendants desired to require more particulars, they should at once, instead of answering to the merits, have moved to have the plaint taken off the file for want of particulars, such motion being made in the manner required by section 91. As to the non-production of documents of title or a memorandum of documents of title at the time of filing the plaint, plaintiff omits those matters at his own risk. It would appear, from the contentious advance in plaintiffs' petition of appeal, that plaintiffs are proposing to rely not merely upon a prescriptive title but on some paper title. If so, they should have disclosed it, and defendants on their side might and should have taken that objection at once by motion instead of answering on the merits. Both parties appear to have mistaken their procedure. The order we make is—that all pleadings subsequent to the plaint be taken off the file, and plaintiffs allowed to amend their plaint. Defendants' objection as to nonjoinder may be dealt with at the same time. All costs including those of this appeal left as costs in the cause.

Dias, J. - In this case both parties misunderstood the procedure. The present order cannot stand, and all pleadings subsequent to the plaint must be struck off, and the case must go back with liberty to amend —all costs will be costs in the cause.

Set aside.

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Present:—Burnside, C. J. and Clarence, and Dias, JJ.

(*May* 15 *and* 26, *and June* 16, 1891.)

D. C. Kandy, No. 4,171. } Kanappa Chetty v. Saibo and Co.

Jurisdiction—Residence of defendant—Place of business—Civil Procedure Code, section 9.

The place where a party defendant carries on business is not a place where he resides, within the meaning of section 9 of the Civil Procedure Code, so as to give jurisdiction to the court within whose local limits such place is situated.

Action on promissory notes under Chapter LIII of the Civil Procedure Code.

The facts of the case sufficiently appear in the judgments of Clarence and Dias JJ.

The defendants appealed from an order refusing them leave to appear and defend.

Wendt (*VanLangenberg* with him) for appellants.

Dornhorst, for respondent.

Cur. adv. vult.

On June 16, 1891, the following judgments were delivered:—

Burnside, C. J.—The sole question which I have to decide is that in which the jurisdiction of the district court has been challenged, and I have no hesitation in saying that the district court had no jurisdiction.

The defendants did not reside within the jurisdiction of the Kandy court. That they carried on business there, is not enough. The provisions of section 9 of the Civil Procedure Code are emphatic. It is the presence of the person of the defendant which renders him amenable to the jurisdiction of the court.

So far, then, as the first note is affected, the defendants should be permitted to defend and take objection to the jurisdiction.

Clarence, J.—Plaintiff sues the defendants on two promissory notes purporting to have been made by defendants in favour of third parties and by the payees indorsed to plaintiff. Plaintiff is proceeding under the summary procedure chapter (Chapter LIII) of the Code, and defendants appeal against an order made upon their application for leave to appear and defend.

The notes declared on are for Rs. 126·38 and Rs. 700 respectively. In respect of the first, the defendants object that the Kandy district court has no jurisdiction. In respect of the second, the defendants desire to set up the defence of forgery. The learned district judge refused to allow defendants to appear and defend except on the terms of payment into court. He recorded that he felt reasonable doubt as to the good faith of the defence for the claim on the second note.

I agree with the Chief Justice that the defendants must be let in to appear and defend, so far as concerns the first note, the defence offered as to that note being certainly sustainable *prima facie*. This note purports to have been made in Colombo, and payable in Colombo. There is no averment that the defendants reside within the district of Kandy, but only that they "carried on business" within that district. That does not satisfy the requirement of clause (a) in section 9 of the Code.

With regard to the other note, I do not think that we should take upon ourselves to interfere with the exercise by the learned district judge of his discretion under section 704.

The order in appeal should be:—

Let in defendants to appear and defend plaintiff's claim on the Rs. 126·38 note.

Let in defendants to appear and defend plaintiff's claim on the Rs. 700 note on condition of paying into court Rs. 700 with interest at 12 per cent from date of action brought. If payment not made within ten days from date of this order, plaintiff may have judgment.

No costs in appeal.

Dias, J.—This is an action on two promissory notes by the indorsee against the makers. The first note A is for Rs. 126·38. It was made at Colombo payable at Colombo at the Bank of Madras. The second note B is for Rs. 700 and was made at Kandy. With regard to the first note, no part of the cause of action accrued within the jurisdiction of the Kandy district court, but there is an allegation in the libel that the defendants are carrying on business as partners in the district of Dickoya which is a place within the jutisdiction of the Kandy court. That allegation, in my opinion, meets the requirements of section 9 of the Civil Procedure Code as to the residence of the defendants. No question of jurisdiction arises with regard to the other note. The plaintiff proceeds under Chaper LIII of the Code, and the district judge held that with respect to the first note the defence set up by the defendant is not *prima facie* sustainable, and as to the second note he held that he had reasonable doubt as to the good faith of the defence, and the district judge permitted the defendants to defend the action on paying into court the amount of both notes, and against this judgment the defendants appeal. Several objections were taken to the regularity of the proceedings. The first is, that the requirements of section 49 of the Code have been not complied with.

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Under section 49 the plaintiff is bound to indorse on the plaint a memorandum of the documents produced, with as many copies on unstamped paper translated into the language of the defendant for whom it is intended. All the defendants in this case are Tamil speaking people, so the copies should have been examined by the secretary and signed by him. A memorandum of the documents is appended to the plaint, and according to the report of the fiscal he served on the first defendant for himself and as attorney of the rest, a translation of the summons together with a translation of the plaint and documents. According to this return all the requirements of section 49 appear to have been complied with. The defendants being partners, the service on first defendant for himself and the rest of the defendants appears to me to fulfil the requirements of section 49. The only defect in the process is that the memorandum and copies of the plaint etc. were not examined and signed by the secretary of the court, but this is a mere technical objection which does not vitiate all the proceedings, especially as the defendants were not prejudiced by the omission. This disposes of the several objections urged in appeal. The district judge ordered the defendants to pay the amount of both notes into court before defending the action. Chapter LIII of the Code gives the district judge a discretion to impose the condition, when he is satisfied that the defence is not *prima facie* sustainable. I would affirm the judgment.

Set aside.

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Present :—CLARENCE, J.

(*June* 9 *and* 25, 1891.)

C. R. Kegalle, No. 94. } UKKU BANDA v. LAPAYA.

Civil procedure—Non-joinder—Debt due to several joint creditors—Service Tenure—Commuted payment—Action by some of several shareholders of a panguwa—*Civil Procedure Code, section* 17,

In the case of a debt due to several creditors jointly, the debtor cannot be sued piecemeal, but all the creditors must join in one action, notwithstanding the provisions of section 17 of the Civil Procedure Code.

The provision of section 17 of the Code, to the effect that no action shall be defeated by reason of the non-joinder of parties, means that when the non-joinder is apparent, in the face of which the court cannot proceed, the court instead of dismissing the action should allow plaintiff to add parties, if application is made in that behalf.

Where two out of three co-owners of a *panguwa* sued the tenants for their share of the commuted payment due in respect thereof—

Held, that there was here a non-joinder of plaintiffs and, in the absence of an application to add the remaining co-owner, the action was rightly dismissed.

The plaintiffs, two in number, averring themselves to be entitled to a certain *panguwa* of a nindagama sued defendants as tenants thereof for the commuted payment due in respect thereof for the years 1888 and 1889. The defendants, among other things, pleaded that a third party was owner of one-third share by purchase from one of the vendors to plaintiffs upon a conveyance prior to that upon which plaintiffs claimed. The learned commissioner found this in defendants' favour and dismissed the plaintiffs' action on the ground that plaintiffs were entitled to only a two-third interest in the land and that, as the services were not divisible, no more was the commuted value of such services.

The plaintiffs appealed.

Browne (*Dornhorst* with him) for the appellants.

VanLangenberg, for the respondents.

Cur. adv. vult.

On June 25, 1891, the following judgment was delivered :—

CLARENCE, J.—The plaintiffs sue the defendants claiming Rs. 5·80 as due by defendants for commuted services for the years 1888 and 1889 in respect of certain service lands of which defendants are admittedly the paraveni tenants. The plaintiffs do not aver that they are lords or owners of the ninda-gama, but merely that they are owners of the "nila-panguwa." A panguwa I understand to be merely one part or tract of the paraveni lands of a nindagama. Passing this by, however, plaintiffs aver that Loku Banda owned the "nila-panguwa" in question, that he died in 1882, leaving him surviving the plaintiffs' vendors his only children and heirs. They aver that the services had been commuted by the Commissioners in 1870 at Rs. 2·90 for the panguwa and that defendants paid this commutation down to 1887. Defendant's answer is evasive as to Loku Banda's ownership of the nila-panguwa. The answer first admits it and then purports to deny it. A traverse must be explicit: therefore I regard Loku Banda's ownership as not in issue.

No evidence whatever was adduced by plaintiffs, but certain documentary evidence was adduced by defendants, who proved an averment made in their answer, that one of plaintiffs' vendors had conveyed his share to a third person before the conveyance to plaintiffs. The commissioner dismissed plaintiffs' action on this ground and plaintiffs appeal.

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In my opinion the appeal fails, section 17 of the Code notwithstanding. I can only read that section as contemplating the continuance of actions when such continuance is possible. There are cases in which the court cannot deal with the subject matter of a suit piecemeal. Apart from the question mooted by the commissioner whether the right to the services for a panguwa is divisible in the way contended for by plaintiffs, as to which I express no opinion, defendants have a right to object to being sued piecemeal for this debt. If plaintiffs sue to-day for their $\frac{2}{3}$ of the debt, the third share-holder may sue to-morrow for his $\frac{1}{3}$. Defendants have a right to have all the three creditors joined in one action and to be sued once for all. I think that the Ordinance contemplated this, when at the end of section 17 it declares that "if the consent of any one who ought "to be joined as a plaintiff cannot be obtained, he "may be made a defendant." That section declares that "no action shall be defeated by reason of the "* * * non-joinder of parties." I take the meaning of that to be, that where a non-joinder is apparent, in the face of which the court cannot proceed, the court instead of dismissing plaintiff's action should allow plaintiff to add parties. Here plaintiffs make no proposal to add the missing co-shareholder, the vendee of one of their vendors, as a party, and therefore I think that I ought not to interfere on this appeal.

There are other points in the case which in the above view it is unnecessary for me to touch on.

[His Lordship then animadverted upon certain charges made against the commissioner in the petition of appeal and concluded by casting the appellants' proctor in costs.]

Affirmed.

———:o:———

Present:—BURNSIDE, C. J. and DIAS, J.

(*September* 15 *and* 22, 1891.)

D. C. Kandy, No. 4,237. } PERERA v. ALLIS.

Cause of action—Warrant of arrest—Execution—Non-payment of commutation tax—Ordinance No. 10 *of* 1861 *and No.* 31 *of* 1884—*Liability of officer executing warrant—Assault—Handcuffing.*

An officer to whom a warrant is issued for the arrest of a person for non-payment of commutation under the Road Ordinance is protected from civil liability in executing the warrant, even though the tax is not actually due and the warrant has been irregularly issued.

But the warrant does not protect him in respect of any assault committed by him in the course of the arrest or any detention longer than is necessary; nor is he justified in handcuffing the person arrested unless there is necessity, the burden of proving which lies on him.

A warrant was issued to the defendant, a peace Officer, by the chairman of the district road committtee, Kandy, for the arrest of the plaintiff for alleged non-payment of commutation under the Road Ordinance for 1890. The plaintiff had in fact paid the tax before the issue of the warrant, but the defendant nevertheless executed the warrant. The plaintiff was arrested at Attabage on Friday, November 21, and according to the evidence he was struck by the defendant when arresting him. The plaintiff was handcuffed and taken to the house of the defendant and there detained, still handcuffed, till the next morning, when the handcuffs were taken off. He was detained the whole of Saturday and was on Sunday taken to Gampola and thence, on Monday November 24, to Kandy, where he was produced before the chairman of the district road committee and ultimately discharged. The plaintiff then brought this action for damages for illegal arrest, for assault and illegal detention. The district judge (*Lawrie*) dismissed the plaintiff's action. He held as follows:—

"In my opinion the defendant did his duty. The policy of the Ordinance under which he was acting is to arrest a man first and hear him afterwards. The 20th section of Ordinance 31 of 1884 prohibits the chairman from issuing a summons or any other description of notice before he issues the warrant of arrest. It is only after a man is brought before him under arrest, that the chairman under section 18 is required to enquire into the charge. As I read the Ordinance the defendant as the officer to whom the warrant of arrest was entrusted had no power to delay to execute it. Even if the plaintiff had produced a receipt of payment of the tax the officer had no jurisdiction to decide whether that receipt proved or did not prove that the plaintiff was innocent of the offence with which he was charged. The defendant was the executive officer bound to carry out a superior order and to arrest the plaintiff whatever proof he might tender that he was not guilty. The Legislature throughout the Ordinance 31 of 1884 treats as criminals and not as debtors all who do not labour or who do not pay commutation. The Ordinance is careful not to protect the ratepayer. In ordinary criminal cases no warrant of arrest can issue unless the magistrate has before him sufficient material on oath: by this Ordinance the power of the chairman to issue a warrant may be exercised (as in this case it probably was exercised) on information wrong in fact and on material which in a criminal case would have been held insufficient. At the time when the Ordinance of 1884 was passed it was the fashion of Government to believe that Government Agents had more capacity for administering justice than magistrates or district judges and the checks which were rightly placed on the issue of warrants by the latter were thought unnecessary restraints on the finer discretion of revenue officers."

The plaintiff appealed.

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Dornhorst for the appellant. The arrest of plaintiff was illegal. He had paid the tax, for default of which the warrant issued, and tendered to the defendant, when he offered to arrest him, proof of such payment, and the arrest subsequently effected was at defendant's own risk. By the terms of section 18 of Ordinance No. 31 of 1884, the person arrested must be taken "without delay" before the Chairman. The delay of three days here was wholly unjustifiable, and for it the defendant is liable in damages. He had also no right to handcuff the plaintiff. An officer handcuffs his prisoner at his own risk, and he must show that this was necessary in order to prevent his escape. *Wright* v. *Court*, 4 B. & C. 596. The defendant here has failed to show any such necessity.

Wendt, for the defendant. It is submitted the defendant is completely protected by the warrant, if he did not exceed his lawful power in executing it. As to this latter point, the district judge finds in his favour. No doubt an officer has to justify the use of handcuffs. Defendant has shown that plaintiff resisted the arrest and assaulted defendant, and that is a sufficient justification. As to the delay, the defendant has shown—and the district judge accepts the explanation—that he took plaintiff before the chairman as early as could reasonably have been expected.

Dornhorst, in reply.

Cur. adv. vult.

On September 22, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—The district judge has forcibly shewn how the plaintiff in this case has been the victim of a harsh law, harshly and illegally enforced against him. It is much to be regretted that such a state of things should be possible, but nevertheless we must administer the law as we find it, however repugnant it may be to our feelings of justice or humanity.

The warrant issued against the plaintiff was grossly illegal, and the plaintiff has his remedy for the unlawful act of issuing it. But it was sufficient to protect the officer who, acting under it, arrested the plaintiff as it directed him to do, and the plaintiff's action must fail in respect of the arrest. But the plaintiff also asks for redress for illegal detention and for being assaulted and handcuffed.

Now, although the defendant was protected by the warrant, he was protected only so far as he acted within the authority given him by it, as well as in conformity with the general law by which the execution of all warrants is governed.

The warrant directed the defendant to produce the plaintiff before the Chairman of the Road Committee at the Kandy Kacheheri, and even this Ordinance itself requires that any person arrested shall be taken without delay before the Chairman of the District Road Committee. It is admitted that the arrest took place on the 21st, and it is in proof that he was not produced before the Kacheheri until the 24th. Now this was clearly not justified by the warrant.

The plaintiff also proves to my satisfaction that he was struck by the peace officer, and I am convinced by the evidence that he was also handcuffed one entire night.

The learned district judge says that there is no law which prohibits an officer entrusted with a warrant from handcuffing the man arrested, and that it is in comformity with the spirit of the Ordinance that no pity should be shown. I will not deny that it may be in conformity with the spirit of the Ordinance, but even this Ordinance does not in words permit it.

The officer executing the warrant must be bound by the general law, and that law is that, if an officer handcuffs a prisoner, he assumes the onus of showing that it was necessary so to do. In this case the defendant has simply denied that the plaintiff was handcuffed: that of itself negatives the existence of any necessity to handcuff him. That he was handcuffed the district judge finds, and I support his finding, and the plaintiff is therefore entitled to judgment for the assault in arresting him, for the illegal detention and for the handcuffing, and I do not think he has been unreasonable in claiming Rs. 200, for which he should have judgment with costs.

If punishment has not fallen on the most culpable shoulders, it is at least satisfactory to know that the plaintiff will be in some way compensated for the outrage to which he was subjected at the hands of the law.

DIAS, J.—The warrant on the face of it is good, and will protect the officer executing it; but the subsequent assault on the plaintiff is not justifiable and the plaintiff is entitled to damages on that account.

Reversed.

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Present:—Dias, J.

(*April* 14, *May* 5, *and June* 2, 1892.)

D. C. Kandy, No. 5,380. } Singho Appu v. Mendis.

Practice—Stamp—Summons unserved—Reissue of summons—Fiscal—Ordinance No. 3 of 1890. Part II.

A summons once issued and returned unserved by reason that the defendant was not to be found does not require, when reissued, to be stamped anew with the duty imposed either by Part II. or Part IV. of the schedule to the Stamp Ordinance, 1890.

Revision.

The facts are fully set out in the following order of the District Judge :—

" To a summons issued from this court to which " the requisite stamps were affixed the fiscal's " marshal (using the uncouth words of the Code) " reported : 'I certify that the service of the " summons marked A could not have been effected " on the defendant herein named as he could not " have been found as will appear from the affidavit " of Nicolashamy server marked B.' The affidavit " bore that the process server had proceeded to the " defendant's house but he was not to be found ; on " inquiry he found that he had been away from " home. On receiving this return, on the motion of " the plaintiff, I ordered the summons to reissue " and the Secretary endorsed on the summons " 'March 4, 1892, extended and reissued returnable " March 15, 1892.' No fresh stamp was affixed.

" The fiscal returned the summons refusing to " serve it, on the ground that it was not stamped " according to law. The plaintiff asked me to in-" form the fiscal that the summons was sufficiently " stamped. I gave the fiscal notice of the motion, " and he attended court and explained his reasons " for the opinion that fresh fiscal's stamps were " required.

" It is conceded that a summons which has not " been served by reason that the defendant is not to " be found may lawfully be reissued without affixing " the stamps exigible under Part II. of the Stamp " Ordinance. The question is, whether new stamps " exigible under Part IV. and usually called fiscal's " stamps must be affixed ?

" From the provisions of section 14, and schedule " G of the Fiscal's Ordinance 4 of 1867, and from " section 66 and Part IV. of the schedule of the Stamp " Ordinance 3 of 1890, it is plain that these fiscal's " stamps are required to defray the expenses to " which the fiscal (or the Government which he repre-" sents and serves) is put to by paying his process " servers. A fiscal (or Government) is not required " to serve process at widely separated places at great " distances unless the party, at whose instance the " process issues, pays, in the shape of stamps, the re-" quired fee. If the Ordinance does not limit the " payment to where service has been successfully " made, there could seem no reason why every request " to serve should not be accompanied by a pre-pay-" ment because, of course, it costs as much to a peon " on an unsuccessful as on a successful errand.

" It cannot be said that the legislature require the " payment only when service was made, because it " requires it in advance, and it does not provide that " the money and the stamps shall be returned if the " fiscal should fail to effect service ; but I am of " opinion that if the plaintiff has paid the fees exigi-" ble under section 14 of the Fiscal's Ordinance " for " the execution and service of process", and under " Part IV. of the Stamp Ordinance for the service of " process, he must pay no more until the service is " made, and that the summons may be extended and " re-issued without fresh stamps until the service is " finally effected.

" I am not dealing with a case in which the plain-" tiff had misdescribed the defendant and has thereby " caused useless trouble ; nor with a case where of " several defendants service had been effected on one " and not on others. There may arise a case in " which the fiscal may properly require fresh pay-" ment ; but this does not seem to be one of those, " and the summons is returned to the fiscal with " instructions to serve it."

On April 14, 1892, the Attorney-General moved that the above order be revised, and it was ordered that the record be sent for.

(May 5.) *Hay,* A. S.-G. for the Crown.

Cur. adv. vult.

On June 2, 1892, the following judgment was delivered :—

Dias, J.—This is a matter in revision. A summons was issued to the fiscal on a duly stamped paper for service. He made his return to the effect that he did not serve the summons, as the defendant could not be found. Subsequently, on the plaintiff's application, the district judge re-issued the summons for service ; but the fiscal refused to serve it as the re-issuing of the summons was not made on a stamp. After hearing both parties the district judge held that an additional stamp was unnecessary.

The Solicitor-General brought the matter before me in revision, and the question is whether a summons, which had already been issued for service,

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required another stamp before it could be re-issued.

The Fiscal's contention amounts to this: that a reissued summons is equal to a fresh summons, and, as such, is subject to the same stamp duty.

Under Part II. of the schedule to the Stamp Ordinance No. 3 of 1890, no summons which has once being issued out of the court, and returned by the officer to whom it was directed, shall, on any pretext whatever, be reissued unless any such process has been returned not served or executed by reason that the party could not be found, &c. From this, it is plain that a summons like the one in question can be issued, *i. e.*, that the original summons can be issued and reissued by the court; and I see no provision in the stamp act which would justify the court in calling for another stamp before reissuing a summons which had already been issued.

The district judge's order is right, and is affirmed.

Affirmed.

———:o:———

Present:—Clarence and Dias, JJ.

(*November* 10 *and* 20, 1891.)

D. C. Kandy, No. 4,288. } Giragama Dewa Nileme v. Henaya.

Buddhist temple—Incumbent—Dewa Ñileme—Right to lease so as to bind successor—Building lease.

The question whether the incumbent of a Buddhist temple can grant long leases of temple property so as to bind his successor must be decided according to the circumstances of each case, the principle being that such dealing with temple property should be consistent with the interests of the temple.

Where the Dewa Nileme of the Kandy Maligawa granted a building lease for 35 years—

Held, that the lease was binding upon the Dewa Nileme's successor in office, who could not therefore treat the lessee or his representative as a mere trespasser but could only seek to terminate the tenancy for breaches of covenant, if any.

The plaintiff as Dewa Nileme and Trustee of the Dalada Maligawa in Kandy sued defendant in ejectment, alleging that defendant was since a certain date in wrongful possession of land belonging to the Maligawa. The defendant justified his possession under a building lease granted in 1865 for a period of 35 years by a former Dewa Nileme to defendant's deceased father, whose heir he alleged himself to be. The plaintiff in his replication admitted the lease, but pleaded that it was not binding upon him, and proceeded further to deny that the buildings had been erected according to agreement. The district judge dismissed the plaintiff's action.

The plaintiff appealed.

Dornhorst, for appellant. The defendant's lease is bad as against plaintiff. A lease by a trustee in the lessor's position only holds good while the lessor continues to be trustee, and does not bind his successor. *D. C. Kandy* 67,167, Ram. (1877) 325. The plaintiff was therefore entitled to ejectment.

Wendt, for respondent. There is no authority for saying that a lease by the trustee is absolutely void as against his successor, and it was not necessary to decide the point in the case cited, the lessor still being trustee. The true principle, it is submitted, is laid down in an older case there followed, *D. C. Kandy* 59,767, Ram. (1875) 185, where it is laid down that the validity of every such disposition of the trust property must depend on its own circumstances. Here the very nature of the building lease necessitated a long term. The lease was a beneficial one to the temple; and besides it is in evidence that plaintiff has himself accepted rent from defendant. He cannot therefore now treat defendant as a trespasser.

Dornhorst, in reply.

Cur. adv. vult.

On November 20, 1891, the following judgments were delivered:—

Dias, J.—The plaintiff is the Dewa Nileme of the Maligawa. He was appointed in 1882, and his predecessor in the office, Dunuwille Dewa Nileme, leased the land in question to the defendant's father, Mutuwa, for a term of 35 years. The deed bears date 27th May, 1865, and it is a binding agreement. In the plaint the defendant is dealt with as a mere trespasser, but in the replication the plaintiff shifted his position and seems to rely on a breach of the agreement between the defendant's father and Dunuwille Dewa Nileme, though in the first paragraph he tried to avoid it, on the ground that his predecessor had no right to lease beyond his own life. It appears from the evidence that the defendant and his father put up some buildings on the plot of land in question, but not such buildings as were contemplated by Dunuwille's agreement. Dunuwille in his life-time took no steps to eject the defendant or his father, and when the plaintiff succeeded Dunuwille he received rent from the defendant for some years. The principle question on which the case turned was whether Dunuwille's agreement of 1865 is binding on his successor the plaintiff. If this question is answered in the negative, the plaintiff is entitled to succeed, subject to any question which may arise as to the defendant's right to compensation.

The right of incumbents and others in the position of the plaintiff to give long leases of temple property

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has been considered by this court more than once. There are two cases reported in Ramanathan's Reports. The first (1877, p. 325) is a very short note of a D. C. Kandy case, from which it would seem that an incumbent cannot create a right over vihare property beyond his own life. The other case reported in Ramanathan (1875, p. 185) is more in point. Whether that was a full court decision or not, I am unable to say, but the judgment of the court was delivered by Mr. Justice Stewart, and the supreme court upholding the opinion of the district court held that a lease for 30 years by a Basnaike Nileme of a temple is not binding on his successor or in office, and the concluding part of the judgment is as follows: "In conclusion, it may "be desirable to point out that the present judg-"ment is not to be understood as declaring that "Basnaike Nilames have not the power in any "case of entering into leases binding on their "successors of longer duration than one or two "years. Every case will greatly depend on its own "circumstances and the urgency of the need for a "departure from ordinary usage, the guiding "principle being that a Basnaike Nilame should "execute his trust, consistently with the interest of "the dewale, as one terminating with himself, "hampering his successor as little as possible."

According to the opinion of the supreme court in that case, every case must be governed by its own circumstances. The facts of that case were very strong against the lease. The Basnaike Nileme gave a lease to his own servant for 30 years at a nominal rent of £10 a year, when the premises could have been reasonably let at £90 a year, and it is not surprising that the district court and the supreme court declined to uphold such a document. In this case bad faith is not even suggested. The contract is a binding contract, and from its very nature requires a longer period of time than a bare tenancy for rent. No one can be expected to put up permanent buildings on a land unless his possession is secured to him for a reasonable length of time, and I cannot say that Dunuwille Dewa Nileme was not acting within the scope of his authority when he gave a building contract to the defendant's father for 35 years. If the defendant's father or the defendant himself had failed to fulfil the agreement of 1865, the plaintiff should have proceeded against them or either of them on that ground, but he chose to ignore the contract altogether and sued the defendant as a mere trespasser. On a careful consideration of the matter, I am of opinion that the action was properly dismissed, and I am for affirming it.

Clarence, J.—The doubt I have had in the case is whether plaintiff should not be allowed to re-enter because of the tenant's failure to build during the first five years of the lease, but inasmuch as the district judge finds that not only plaintiff's predecessor but plaintiff himself has for some years acquiesced in the continuance of the tenancy, I assent to my learned brother's judgment.

Affirmed.

———:o:———

Present:—Burnside, C. J., Clarence and Dias JJ.
(*May* 26 *and June* 9, 1891.)

D. C. Kegalle, No. 6,371. } Sella Naide v. Christie.

Ejectment—Title—Crown grant—Prescription—Possession "previous" to action.

In an action of ejectment plaintiffs claimed title by prescriptive possession, and defendant under a Crown grant. Plaintiffs established in evidence that the land had for a series of years been cultivated by private parties, under some of whom they claimed, and that in Government *wattoors* dated 15 and 24 years before action the land had been described as belonging to private parties.

A judgment in favour of the plaintiffs was affirmed by the supreme court (Clarence J. dissenting)—

By Burnside, C. J., on the ground that although it lay upon plaintiffs, suing in ejectment, to prove their title as against defendant's Crown grant, they had established a prescriptive possession even as against the Crown.

By Dias, J. on the ground that plaintiffs had proved that the land was their own and not Crown property at the date of the grant.

D. C. Colombo, 87,427, 8 S.C.C. 31 considered.

This was an action commenced on November 24, 1889, for ejectment from a certain allotment of land, the plaint alleging an ouster 8 months before action. The plaintiffs claimed title to the land by right of inheritance, and pleaded that they were in possession of the land for more than 30 years. The defendant denied plaintiffs' title and claimed title to the land through a Crown grant dated October 13, 1886. The district judge gave judgment in favour of the plaintiffs, holding that the defendant took nothing under his Crown grant.

The defendant appealed.

Withers, for appellant. There is no proof of any title by inheritance. At to title by prescription, plaintiffs must prove, under section 3 of Ordinance No. 22 of 1871, uninterrupted possession up to date of action. *D. C. Colombo*, 87,427, 8 S. C. C. 31; *D. C. Kandy* 40,390, 1 S. C. C. 11. See also English cases on 2 and 3 Will. iv. c. 71, ss. 2, 4: *Surrey* v. *Piggott*, Tudor's Leading Cases in Real Property 133; *Flight* v. *Thomas*, 8 Clarke and Finally 231. Here

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the action is not brought till 8 months after the alleged ouster, and it is submitted that the plea of prescription therefore fails. Further, plaintiffs' possession, such as it was, was interrupted by one Andris, who 5 or 6 years before action cut a road through the land, and it is submitted that this interruption, though by a stranger, is a bar to title by prescription. See dictum of Lord Campbell in *Davies* v. *Williams* 20 L. J. Q. B. 332.

Dornhorst, for respondent. Title by prescription against the Crown is established by the evidence. It is not necessary that possession should have continued up to the very date of action Ramanathan (1862) 79. The authorities to the contrary cited from the Circular were, it is submitted, wrongly decided. Besides, those cases are distinguishable from the present by the period of time between the ouster and the action. The analogy of the English cases referred to does not apply, because the Act of Will. IV. contains the words "*next* before", which do not occur in our Ordinance. The opinion of Lord Campbell in *Davies* v. *Williams* as to the effect of interruption by a stranger is a mere dictum thrown out in argument and has no authority. Even if otherwise, it does not apply, because our Ordinance specially defines what it means by prescription, and under it possession against the adverse party in the particular action is all that is required to establish title by prescription.

Cur. adv. vult.

On June 9, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—We should, I think, affirm this judgment. The defendant has a Crown grant which in my opinion put the plaintiffs, suing in ejectment, to the proof of their title, and the plaintiffs have, I think, sufficiently discharged the onus which was on them of proving that at the time when the grant was made one of the plaintiffs was in actual possession of and cultivating the land, and that for a prescriptive period, touching even the Crown, the land was in the possession and occupation of private individuals, through whom the plaintiffs claim. It was therefore incumbent on the defendant, who disturbed that title under grant from the Crown, to shew better title in the Crown, and he has not done so.

I must refer to the contention on the part of the defendant by his counsel before us in appeal that the plaintiffs could not rely on prescription, they not having brought their action immediately on being dispossessed. He relied on a decision of this court *D. C. Colombo*, No. 87,427, 8 S. C. C. 31.

If that case supports the defendant's contention, then it would seem to directly conflict with the case cited by the plaintiffs' counsel in Ramanathan (1862) p. 79, in which the law has been distinctly laid down that the prescriptive title created by the Ordinance is not defeated by reason of action not being brought for an invasion of it at the very moment of time that the cause of action arose.

CLARENCE, J.—Plaintiffs sue to eject from about 3 acres of land which the parties agree in styling Horawatte Owitte. Plaintiffs aver an ouster about 8 months before action brought. The plaint avers title "by right of inheritance" from some predecessor not named, and by an amendment of the plaint a title by prescription is pleaded. Defendant does not deny the alleged ouster, but denies title in plaintiffs and claims title for himself under a Crown grant bearing date October 13, 1886.

The fourth plaintiff claims as a lessee under the first and second plaintiffs. The claim of title "by right of inheritance" appears to be as follows: that by inheritance from some predecessors not disclosed in the plaint, the first and second plaintiffs inherited one-half of the land and one Dingiri Naide (who afterwards conveyed to third plaintiff) the other half. At the hearing the first plaintiff deposed that when he first knew the land in his own infancy his own father was in possession of it; and we may assume that first plaintiff claims some share by inheritance from that father. There is no evidence or explanation how the shares claimed for second plaintiff and Dingiri Naide devolved upon them.

The main contest at the hearing appears to have been directed to the question—whether or no, when the Crown purported to convey to defendant, the land was Crown property. For plaintiffs, some witnesses were called and gave evidence as to the condition of the land from the time when they first knew it. Defendant contented himself with putting in his Crown grant. We have not had any argument in appeal upon the question mooted before the Full Court in a case reported 8 S. C. C. 31.

The evidence is that the land is planted with coconuts. The Ratamahatmeya, who is probably the most trustworthy among the witnesses, describes it as planted with coconuts which, when he first knew it, 20 or 22 years ago, were not less than a year old. There is further evidence, which the district judge credits, of cultivation with grain prior to the coconut planting. The first plaintiff says that he remembers its being sown with "Ell-vee" and after that with "Hee-netti," then "Amunu" and

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then again "Hee-netti". This cultivation, he says, lasted 2 years. The land then, he says, was waste for 4 or 5 years. After that the land was once cultivated with "Ell-vee" and "Hee-netti", and then came the coconut planting. Apparently, therefore, the plaintiffs show cultivation extending back something like 7 or 8 years before the coconut planting; and the result seems to be something rather less than 30 years' cultivation before the ouster. It is noticeable, however, that in two Government *wattoors* put in evidence by plaintiffs, bearing date in 1865 and 1874, the land is described as "belonging to" private parties, viz., in 1865, Badalge Naide Ukkurale, and in 1874, Badalge Sella Naide and Dingiri Naide. Although the evidence seems to fall somewhat short of proof of 30 years' cultivation by plaintiffs, and although there is no proof as to what (if any) dues were paid to the Crown for this land, the evidence, that for at least over 20 years the land has been a garden planted with coconuts, and that in 1865 and 1874 the Crown *wattoors* described it as belonging to private parties, goes far to show that when the defendant purported to take possession under his Crown grant he was taking possession of land which was not Crown land.

Plaintiffs, however, have elected to sue on the strength of their own title. The case appears to have been conducted in the Court below with no great skill on either side. The evidence adduced on plaintiff's side seems to be directed to the 1st plaintiff's title and acts of ownership. And I cannot say that the title of the other plaintiffs is made out. I am of opinion that the case should go back to the District Court for further hearing, all costs to abide the event.

Since I wrote the foregoing, we have had the advantage of a re-argument before the full Court. No argument was addressed to us upon the question whether in this Island a Crown Grant carries with it a presumption *prima facie* of title in the Crown, and I desire to express no opinion on the question. We heard also some argument upon the question, whether in order to establish for a plaintiff a title by prescription, under sec. 3 of the Prescription Ordinance 1871, the plaintiff must prove a possession up to the commencement of his action.

In a case about a right of way reported *Ramanathan* (1862) 79, this Court held that the words of the corresponding section of the Ordinance of 1834, "previous to the bringing of the action", should not be construed as meaning "next before the bringing of the action". In a case which came before my brother Dias and myself, reported 8 *S. C. C.* 31, we affirmed a decision of the District Court of Colombo, which proceeded on the opposite construction. The case in *Ramanathan* was not cited before my brother Dias and myself. In the English Act, 2 and 3 Vict. *C.* 71, sec. 4, dealing with easements, the words "next before" actually occur, and there are well known decisions under that Act, to the effect that the plea of enjoyment for the purposes of that Act must come down to the commencement of suit, and that the evidence must show at all events an act of user in the last year. Inasmuch as I am for sending this case back to the District Court for further evidence as to facts, I think it well to express no opinion on this point at this stage. The point is worthy of reconsideration whenever it may be definitely raised. The ruling in the case 8 *S. C. C.* 31 went further than was necessary for the purposes of that case. The plaintiff's claim in that case was clearly not sustained by a sufficient period of enjoyment. I do not assent to all the reasoning in the case reported in *Ramanathan*, but shall be prepared to reconsider the point if necessary hereafter.

DIAS, J.—The four plaintiffs claim the land Horawatte Owita and complain of an ouster by the defendant setting up a right on an alleged grant from the Crown. The defendant justifies under the grant, and the question is, whether at the date of the Crown grant the land belonged to the plaintiffs or their predecessors in title. It appears from the evidence that about 25 years ago the land was planted by the 4th plaintiff with coconuts. He put up a house on the land, and resided in it till the defendant took possession of it under the grant. It further appeared that before the coconut plantation was put on the land it was cultivated with hill paddy and other dry grain, and in 1865 and 1874 the Crown admitted the plaintiff's right by taking the Crown share of the produce. It is quite clear that when the land was sold by the Crown it was private property of the plaintiffs, so the purchaser from the Crown took nothing by his purchase. The judgment is right, and it is affirmed.

Affirmed.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(September 11 and 25, 1891.)

D. C., Kandy, No. 4,169. } RANGAPPA THEWAR v. KUDADUREGE.

Practice—Order upholding claim in execution—Ex parte proceedings—Application to set aside order—Jurisdiction.

An inquiry into a claim to property seized in execution should be made with notice to all parties concerned, including the judgment creditor and judgment debtor.

Where a claim was made to property seized in execution, and the District Judge held an inquiry into the claim without notice to the plaintiff and

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ordered the seizure to be released—

Held, that the District Judge had power upon application of plaintiff and upon being satisfied of the want of notice to open up the proceedings and inquire into the claim anew in the presence of all parties.

Appeal from an order refusing the plaintiff's application to "refix" the inquiry on the ground that it had been made *ex parte*.

The facts sufficiently appear in the judgment of Clarence, J.

There was no appearance of counsel in appeal.

On September 25, 1891, the following judgments were delivered:—

CLARENCE, J.—In this case the plaintiff had judgment against his defendant for a sum of money, and caused the Fiscal to seize certain lands as the property of the defendant. Thereafter the Fiscal repoted that one Punchi Mali had preferred a claim to the property. Upon this report the learned District Judge fixed the day following for an inquiry into the matter of the claim. On that day an inquiry took place. The claimant is noted as having attended; but there is nothing to indicate that the plaintiff either attended or had any notice of the inquiry. After hearing the claimant the District Judge ordered the seizure to be released. This order was made on May 26.

Thereafter, on June, 6, plaintiff applied to the District Judge that the inquiry might be "refixed", on the ground that it had been *ex parte*. The learned District Judge seems to have thought that he had no power to entertain that application, and, accordingly, refused it, and plaintiff appeals.

Any inquiry into a claim to property seized under a judgment should be made in the presence of all parties concerned, including the judgment creditor and the judgment debtor: that is to say, all parties should have notice of the inquiry, so that they may have opportunity of attending the inquiry if they desire. In the present matter we have no positive evidence before us, by affidavit or otherwise, to show that the inquiry was held behind plaintiff's back: but it seems highly probable that it was so held, from the absence of any record of notice to plaintiff, such as we should expect to find if plaintiff had had proper notice. And if that were so, it would have been proper for the learned District Judge, upon being satisfied of this, and if there be nothing further to the contrary, to allow plaintiff's application and give him and the judgment debtor due opportunity of being heard.

Under these circumstances, the proper order to be made in appeal will be, to set aside the order appealed from, and send the matter back to the District Court to be dealt with in the District Court in due course. We make no order as to costs, but leave all costs as costs in the matter of the claim.

DIAS, J.—I am of the same opinion.

Set aside.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(*November* 3 *and* 10, 1891.)

D. C., Kandy, No. 4,213. } MATHES APPU v. HABIBU MARIKAR.

Minors, action against—Practice—Mortgage—Guardian ad litem—Interest of minors in land—Inheritance.

A mortgagor of land died intestate leaving a widow and certain minor children. The mortgagee put the bond in suit, making the widow party to the action "for herself and on behalf of the children", and obtained a judgment for money and a mortgage decree.

In an action by the children against the purchaser under the mortgagee's writ—

Held, that the judgment and decree in the mortgage suit were inoperative against the children, they not having been represented therein by a guardian *ad litem*, and that they were entitled to a decree for half the mortgaged property as against the purchaser.

The facts material to this report appear sufficiently in the judgment of Clarence, J.

The District Judge (Lawrie) dismissed plaintiffs' action, and the plaintiffs appealed.

Browne (*J. Grenier* with him) for appellants.

Dornhorst (*Wendt* with him) for respondent.

Cur. adv. vult.

On November 10, 1891, the following judgments were delivered:—

CLARENCE, J.—Plaintiffs sue to eject the defendant from a certain plot of land at Gampola, and upon the question of title the issue between the parties is a very simple one.

Both sides claim through one Mohotti, who bought this land in 1868, and died intestate about 10 years afterwards, leaving him surviving his widow Christina, and some minor children, which latter are the present plaintiffs. Mohotti was a low-country man who came from the neighbourhood of Henaratgoda and settled at Gampola. Consequently the succession to this land is governed by the Roman Dutch Law, and on Mohotti's death half passed to the widow and the other half to the children, subject of course to any incumbrance which Mohotti might have created.

In 1880, after Mohotti's death one Weliappa Chettysued the widow on a mortgage purporting to have been made by Mohotti in 1877, and had judgment by default of appearance for Rs. 3,900 and interest at 24 per cent. Under that judgment a sale

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took place in 1881, at which the present defendant was declared the purchaser. Defendant obtained a Fiscal's conveyance and entered into possession of the land in 1881, and has been in possession ever since. The plaintiffs, two of whom have now attained their majority and two are still minors, suing by a guardian *ad litem*, now sue to eject defendant, and appeal from a judgment of the District Court dismissing their action with cost.

The defendant's purchase plainly confers title on him to the half share of land, which on Mohotti's death passed to his widow, Christina; but it remains to see how defendant can make title to the half which passed to the children, the plaintiffs. Defendant contends that the plaintiffs are bound by the judgment in the mortgage suit, and that under his Fiscal's conveyance their interest in the land passed to him. This contention, however, cannot be supported. In the first place, the plaintiffs were no parties to the mortgage suit; and, in the second place, defendant has no conveyance of their interest.

In the suit by Weliappa Chetty there was no pretence of making the plaintiffs, Mohotti's minor children, parties to the suit. All that the then plaintiff did was to file a libel declaring on the alleged mortgage, in the caption of which the party defendant is described as :—

> "Christina Hamy of Gampola, for herself "and on behalf of her minor children "Mathes Appu, Singho Appu, David "Singho, Cornelis, and Nona Hamy."

No guardian *ad litem* was appointed for the children. The widow allowed judgment to go by default, and the then Acting District Judge, upon a Fiscal's return that she had been served with the summons, entered up a judgment in these terms: "That plaintiff do recover from the defendant (the widow) out of the estate of the deceased Mohotti, of which she may be in possession, the sum of"—so and so—"that the property specially mortgaged are declared bound and executable."

It is hardly necessary to point out that there is nothing here which could bind the children in any way. No minor can be directly bound by the proceedings in any suit unless he has been properly represented in the suit by a duly appointed and selected guardian *ad litem*. There is no pretence that Mohotti's minor children were represented in this mortgage suit, the only party defendant was the widow, and the mortgage decree, such as it is, could touch only her interest in the land.

Defendant's counsel, at the argument of the appeal before us, sought to argue that these are mere technical matters which should not be allowed to weigh against what counsel are pleased to term the merits of an established mortgage debt; and, indeed, the learned District Judge appears to assume in his judgment that the existence of a motgage debt due to the plaintiff in the mortgage suit is an established fact. But this, with all respect be it said, is a very dangerous fallacy. The safeguards with which the law protects the interest of children incapable of protecting themselves are no mere technical matter. If ever there were a procedure whose observance is to be jealously insisted on, it is this. Nor have we the smallest right to assume, as against these minors, that there was any mortgage debt due. The circumstance that the Chetty got a judgment by default against their widowed mother does not touch them. If the District Judge had been applied to, to appoint a guardian *ad litem* for them, it would have been the duty of the District Court to take care that no such appointment was made except of a person capable and suitable to be entrusted with the protection of the minors' interest. To argue that because the judgment by default was obtained against the widow, therefore the facts so established as against her are to be regarded as established against the minor children, is to fly in the face of both law and equity. We are not now to speculate what might have been the result if the children had been properly made parties to the mortgage suit and represented by a capable guardian *ad litem*. It is sufficient to say the proceedings in the mortgage suit do not touch them.

In sequence to this, we may also point out that the defendant's Fiscal's conveyance is a curious document which it would be difficult to construe as passing to the purchaser anything more than the interest of the widow Christina herself. The operative part of the instrument runs thus :—

> "doth sell and assign unto the said"— so and so—"all the right title and interest "of the said Christina Hamina and on be- "half of her minor children in the said "property, to wit," &c., &c.

It would be difficult to conjecture what, if anything, passed through the brain of the person who drafted this.

We may assume that the learned District Judge has satisfied himself that the minor plaintiffs are now properly represented in this suit by the 1st plaintiff as guardian *ad litem*. No suggestion to the contrary is made. I notice that in the caption to the mortgage suit already referred to the children Mohotti were described as five in number. In the present suit four plaintiffs only sue as the children of Mohotti, and represent themselves as the whole of his children. This is admited in the defendant's

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answer, and so we need to take no further notice of this.

If this be all, it follows that plaintiff, as the children of Mohotti, are entitled to be placed in possession of half the land in question, on the strength of their title derived from their father. A contention, however, is raised by defendant, that he is entitled to compensation for considerable improvements made upon the land during his occupancy. Defendant adduced some evidence upon that point, but the learned District Judge, being of opinion (on grounds which we cannot support) that the plaintiff's case wholly failed, did not deal with that question.

The plaintiffs are entitled to a declaration of title to half of the land, but further than this at present the Court cannot go in their favour. The defendant's claim to compensation must be adjudicated upon, and upon that question the case must go back to the District Court for inquiry. As the plaintiffs have only partially succeeded on the suit and in appeal, I would give no costs on either side up to this date.

DIAS, J.—I am of the same opinion. The four plaintiffs are the children of one Mohotti, who in 1877 mortgaged the land in question to a Chetty. In 1880 the Chetty put up the bond in suit, obtained a decree, and seized and sold the land to the defendant, who entered into possession in 1881. When the Chetty put the bond in suit, Mohotti was dead and the party defendant in the suit was Mohotti's widow. In the title of the suit widow is described as representing her minor children; but there is nothing in the proceedings to shew that the widow was duly authorized to represent her minor children. The plaintiffs are the children of Mohotti, and are not bound by the decree in the mortgage suit to which they are no parties. All that the Fiscal could sell under the decree was the widow's half of the property, and to that extent the Fiscal's sale will give the defendant a good title. There is no foundation for the argument that the matter must be disposed of according to Kandyan Law.

Reversed.

———:o:———

Present:—CLARENCE and DIAS, JJ.
(January 19 and 26, 1892.)

D. C., Galle, No. 476. } WEERAKOON v. NIKULAS.

Administration—Substituted plaintiffs—Action to set aside claim—Civil Procedure Code, section 547.

A judgment creditor having died, persons claiming to be his heirs were substituted plaintiff in his room, and having issued writ seized certain property, which was claimed by a third party. The Court having upheld the claim, the substituted plaintiffs brought the present action under section 247 of the Procedure Code against the claimant, who in his answer took exception to plaintiffs' maintaining the action without taking out administration to the deceased creditor's estate.

Held **(reversing the judgment of the District Court) that the plaintiffs, having been substituted plaintiffs in the original action, and having seized the property as judgment creditors, were entitled to maintain this action to have such property declared executable under their judgment.**

Johannes de Silva obtained judgment in D. C., Galle, 49,689, against the defendant for Rs. 105 with interest. Johannes de Silva thereafter died, and by an order of the District Court, dated August 22, 1890, the plaintiffs were substituted plaintiffs on the record, and judgment was revived, and execution issued against the judgment debtor. Under this writ the Fiscal seized a certain portion of land, and the same was advertized for sale. The land was claimed by the defendants, and the claim was upheld by the District Court. This action was brought to set aside the claim.

The defendants in their answer, among other objections, pleaded that Johannes de Silva's estate being worth over Rs 50,000, the order made in the case substituting the present plaintiffs in the room of the deceased was irregular, inasmuch as the plaintiffs had not taken out letters of adminstration, and that the presents action could not be maintained without such administration.

The District Judge upheld the defendants' objection, and dismissed plaintiffs' action with costs.

The plaintiffs appealed.

Dornhorst for appellants.

Wendt for respondents.

Cur. adv. vult.

On January 26, 1892, the following judgments were delivered:—

CLARENCE, J.—We cannot uphold the District Judge's reasons for dismissing this action. In 1883 Jayewardene obtained judgment against Gunewardene for a sum of money. Jayewardene thereafter died, and, in August, 1890, the present plaintiffs were substituted on the record as parties plaintiffs, and the judgment was revived. The judgment being still unsatisfied, plaintiffs, in September, 1890, caused the Fiscal to seize as property of the judgment debtor certain immoveable property now in question in the present suit, when the 1st defendant on behalf of the 2nd defendant (I quote from paragraph 6 of the plaint, which is admitted in the answer) claimed the premises and stayed the sale. These facts are

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admitted. Plaintiffs further aver that the district court upheld defendants' claim and released the land, and plaintiffs now sue to have the property declared liable to be sold under their writ as assets of their judgment debtor.

The district judge has dismissed plaintiffs' action, upholding an objection taken by the defence, that the action is not maintainable by reason of plaintiffs not having obtained letters of administration to Jayawardene's estate, which is over Rs. 50,000 in value. I do not think that under the admitted circumstances the action is barred by section 547 of the Procedure Code. When the plaintiffs seized this land in execution of the judgment in the original action they did so as the plaintiffs on the record and judgment creditors in that action, and it is not disputed that they were such plaintiffs and judgment creditors. They were, therefore, under section 247, if not barred by lapse of time, entitled to bring suit to have the property declared liable to be sold in execution of their judgment.

The judgment of the district court must be set aside and the case sent back to the district court to be proceeded with in due course upon such issues as are raised in the pleadings. Defendants will pay plaintiffs' costs of their unsuccessful objection in both courts.

Dias, J.—The objection on which the case was dismissed is clearly bad. The heirs of the judgment creditor are the plaintiffs on the record, and they had a perfect right to do all that the deceased judgment creditor might have done to realise the judgment. The order is set aside with costs in both courts.

Set aside.

———:o:———

Present:—Burnside, C. J.

(*May* 3, 1892)

P. C. Nuwara Eliya, No. 6,394. } The Queen v. Flynn.

Criminal Procedure—Witness—Inability to execute bond for appearance before court—Remand—Criminal Procedure Code, sections 181, 182.

Inability of a witness to execute a bond for appearance before a superior court under section 181 of the Criminal Procedure Code is not a ground for remanding him to jail.

Revision.

One Rammala was a witness in a case committed for trial before the district court of Kandy, and being unable to execute a bond for his appearance before the said court to give evidence the police magistrate remanded him to custody under section 182 of the Criminal Procedure Code, the warrant of commitment reciting as follows:—

"And whereas one Ketansiyegedera Rammala, a material witness for the prosecution of the said case, being required to enter into a bond for his appearance before the said court to give his evidence, is unable to execute such bond; by reason whereof it has become necessary to remand him to custody."

The Chief Justice having, upon a visit to the Kandy jail, considered the remand to be illegal, caused the committal to be brought up to be dealt with by the Supreme Court.

Hay, A. S.-G., for the Crown, intimated he could not support the commitment.

Burnside, C. J., held the commitment to be illegal on the ground that the Criminal Procedure Code, section 182, renders only a refusal but not inability to execute a bond, on the part of a witness, ground for remand to jail, and thereupon ordered the man to be discharged.

———:o:———

Present:—Clarence and Dias, JJ.

(*January* 19 *and* 26, 1892.)

D. C. Trincomalie, No. 23,288. } Ismalevai Markar v. Kather Saibo.

Cause of action—Agreement to sell land subject to an usufructuary mortgage—Refusal of mortgagee to be redeemed—Action for damages under the agreement—Penalty.

By a notarial instrument defendant agreed to sell to plaintiff a land belonging to him and then under mortgage to a third party with right of possession, the plaintiff agreeing to redeem that mortgage and pay certain other debts of defendant and to pay the balance purchase money to defendant. The agreement was to be fulfilled within one month of its date. The mortgage was, upon the terms of it, to be on foot for a period of three years, which was still unexpired, and the mortgagee upon the request of plaintiff refused to be redeemed. Thereupon plaintiff sued defendant for the damages agreed upon for non-fulfilment of the contract, the plaint averring that defendant had "in collusion" with the mortgagee induced him not to accept plaintiff's tender.

***Held*, that the mortgagee was not bound to accept the money and release the mortgage till the three years had expired, and that the plaintiff's action failed inasmuch as the plaintiff, having on the face of the agreement express notice of the mortgage, must be taken to have notice of the terms of the mortgage.**

The defendant appealed from a judgment in plaintiff's favour. The facts of the case appear sufficiently in the judgments of the Supreme Court.

Layard, A. A.-G., for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

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On January 26, 1892, the following judgments were delivered :—

CLARENCE, J.—We cannot support this judgment. Defendant owned a piece of land which he had mortgaged to a certain mortgagee upon terms that the mortgagee was to possess the land in lieu of interest and that the mortgage was to be on foot for three years. That term being still unexpired and having in fact nearly a year to run, defendant entered into an agreement with plaintiff to sell the land to plaintiff for Rs. 3,625. This agreement provided that plaintiff should within one month from its date pay off the mortgage, pay a certain other debt of defendant's, and pay the balance of the Rs. 3,625 to defendant; and the agreement stipulated that, at any time within the month, when required by the plaintiff, defendant should accompany plaintiff to the mortgagee in order that plaintiff might redeem the mortgage. Plaintiff thus having on the face of his agreement express notice of the mortgage, must be taken to have known the terms of the mortgage, and that the mortgagee was not bound to accept his money and release the land till the three years had expired. Thus the possibility of the sale within a month of the agreement depended on the mortgagee consenting to allow himself to be redeemed. The mortgagee refused to be redeemed before his time, and so the agreement fell through, and plaintiff sues defendant for Rs. 750, which he claims as liquidated damages under the agreement. The plaint avers, rather indistinctly, that defendant "in collusion" with the mortgagee induced the mortgagee not to accept plaintiff's tender. Defendant was not bound to obtain the mortgagee's consent, and plaintiff's action entirely fails. The fact that defendant, after the month had expired, eventually sold the land to the mortgagee does not alter the matter. Defendant's appeal succeeds, and plaintiff's action must be dismissed with costs in both courts.

DIAS, J.—Defendant, being the owner of a piece of land, mortgaged it to one V. S. Odiyar to secure the payment of Rs. 1,800. The bond is dated May 8, 1886, and secures to the mortgagee the right of possession of the mortgaged property for a term of three years, when the debt should become due and payable. Under this bond the mortgagor was not at liberty to redeem the mortgagee by paying off the debt. Two years after, viz. on the 18th June, 1888, the defendant agreed to convey the land to plaintiff for Rs. 3,625 on certain conditions; that is to say, that plaintiff should pay off the mortgage debt due to the Odiyar within a month, and after deducting a sum due to the plaintiff himself by the defendant pay the balance to the defendant, who should then execute a conveyance to the plaintiff. The plaintiff now sues the defendant for a breach of the above agreement, and claims Rs. 750 as liquidated damages. It appears that the mortgagee, the Odiyar, refused to receive the debt and release the mortgage before the expiration of three years. The Odiyar was not a party to the agreement between the plaintiff and defendant, and he had a perfect right to refuse to accept the payment before the expiration of the three years. The plaintiff knew the condition of the bond, but nevertheless he took upon himself to do an act which he could not do without the consent of the Odiyar; but it is contended that the defendant for his own purposes put up the Odiyar to object to the payment of the debt. This may or may not be, but the Odiyar, who had a right to possess the land for three years, may fairly object to being deprived of that possession before the expiration of the three years. The defendant's undertaking in the agreement is expressed in the deed in these words: "Whenever he (meaning the plaintiff) sends for me, I (meaning the defendant) shall go without any delay along with him to the said Odiyar, and shall be present when he settles that mortgage debt and redeems the aforesaid property." The plaintiff admits that the defendant accompanied the plaintiff to the Odiyar, who however refused to accept the debt.

According to this, the defendant seems to have done all that which he undertook to do, and the plaintiff had no right to expect the defendant to compel the Odiyar to receive the money. I think the plaintiff has failed to make out a case, and his action should be dismissed with costs in both courts.

Reversed.

———:o:———

Present:—DIAS, J.

(*May* 19 *and June* 9, 1892.)

C. R. Panadura, No. 559. } SILVA v. SILVA.

Claim in execution—Claim upheld—Right of execution-debtor to bring action to set aside claim—Civil Procedure Code, sections 241, 247.

A debtor, whose property when seized in execution has been successfully claimed by a third party, is entitled to maintain an action against the claimant under section 247 of the Civil Procedure Code.

The plaint, filed on December 9, 1891, averred title in plaintiff to certain land, and alleged that the plaintiff surrendered the land for seizure and sale in satisfaction of a certain writ of execution, when the defendant unlawfully claimed the land and opposed the sale; that the claim was, on November 27, 1891,

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inquired into by the court issuing the writ, and plaintiff referred to an action to establish his right. The plaint concluded with a prayer that plaintiff be declared owner and defendant's claim set aside. The answer pleaded as matter of law that plaintiff could not maintain the action, which should have been brought by the writ-holder, and also denied plaintiff's title, setting up title in defendant.

The commissioner held that only the execution-creditor or the claimant could institute an action under section 247 of the Civil Procedure Code, and dismissed the action.

The plaintiff appealed.

Dornhorst, for appellant. The plaintiff was entitled to surrender, in satisfaction of the execution against him, this land which was his property. His right has been interfered with by defendant's claim, and the execution remains unsatisfied, with the result that his other property may be attached. He is therefore entitled to have his right declared by the court. He is a "party against whom" the order upholding the claim was made, within the meaning of section 247.

Wendt, for the defendant. The action could only be maintained under the Code, for independently of the Code's provisions relative to claims, the plaint discloses no cause of action. Under the Code, plaintiff as the judgment-debtor could not bring such an action as this. The terms of section 247 make it clear that only the claimant or the judgment-creditor can complain by action of the order on a claim. If the former sues, the object of the action is "to establish the right which he claims to the property in dispute;" if the latter, "to have the said property declared liable to be sold in execution of the decree *in his favour*"—the last words being inapplicable to a judgment-debtor.

Dornhorst, in reply.

Cur. adv. vult.

On June 9, 1892, the following judgment was delivered :—

Dias, J.—This case involves a point of law of great importance. Plaintiff, being the judgment-debtor on a writ of execution, surrendered the land in dispute to fiscal for sale, when the defendant claimed it. The claim was reported to the court, when a summary investigation took place under section 241 of the Civil Procedure Code, and the district judge upheld the claim on the 27th of November, 1891.

Under sections 244, 245, all that the judge need ascertain is, who was in possession at the time of the seizure. If the debtor was not in possession absolutely, the property will be released; but if, on the other hand, the debtor was in possession, the claim will be disallowed. In either case the party aggrieved may institute an action in the usual form within 14 days; if not, the finding of the district judge is conclusive,

The question turns upon the words "party against whom an order," &c., in section 247—whether they take in the judgment-debtor, as well as the judgment-creditor and the claimant. If the judgment-debtor is included, he is bound by the 14 day rule, and cannot, after the expiration of that time, try the title to the property by action.

The execution-debtor and creditor are parties to the action, and section 241 puts the claimant in the same position as regards the investigation of the claim, and that section and the subsequent sections deal with the three parties to the suit, either of whom can institute an action within 14 days; and the execution-debtor (the plaintiff in this case) having instituted this action within the prescribed time, he is, in my opinion, entitled to maintain it.

The judgment is set aside and the case sent back for trial on the merits. The appellant is entitled to the costs of this appeal, all other costs to be costs in the cause.

Set aside.

———:o:———

Present :—Lawrie, J.

(*June* 9 *and* 10, 1892.)

P. C. Avisawella, No. 11,286. } Paulu v. Daniel.

Criminal Procedure—Compensation—Crown costs—Evidence—Criminal Procedure Code, sections 222, 223.

A police magistrate is bound to hear all the evidence the complainant may offer in support of the prosecution before he can make an order for compensation and crown costs on the ground of the complaint being frivolous and vexatious.

The complainant charged the defendant with theft of coconuts, and with his plaint he filed a list of witnesses. On the day of trial the magistrate, after the complainant had given evidence, directed the interpreter of the court to proceed to and inspect the land from which coconuts were said to to have been stolen, and adjourned the trial. On the day to which the case had been adjourned, the interpreter gave evidence, but none of the complainant's witnesses were examined. The magistrate then discharged the defendant and ordered complainant to pay compensation and crown costs on the

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ground that the charge was false, frivolous, and vexatious.

The complainant appealed.

Morgan, for the appellant.

Cur. adv. vult.

On June 10, 1892, the following judgment was delivered :—

LAWRIE, J.—Section 223 of the Criminal Procedure Code gives a police magistrate power to acquit an accused at any stage of the case if, for reasons to be recorded, he considers the charge to be groundless, but a magistrate may not hold that a complaint is frivolous and vexatious, nor order a complainant to pay compensation and crown costs, until (in the words of section 222) he has heard all such evidence as may be produced in support of the prosecution.

Here the magistrate stopped the case, and doubtless he did right to acquit, but he did wrong to condemn the complainant before he had heard all he had to say. It is not extravagant to suppose that if he had heard the complainant's witnesses the magistrate might have been satisfied that, though the evidence was insufficient to convict the accused, still the complaint had been made in good faith and on reasonable grounds, and that it was neither frivolous nor vexatious.

The order to pay compensation and crown costs is set aside.

Set aside.

———:o:———

Present :—BURNSIDE, C. J., and CLARENCE, J.

(*August* 26 *and* 28, 1891.)

D. C. Chilaw, No. A400. } In the matter of the estate of NEINA MOHAMMADO.

Administration—Donatio inter vivos—*Gift taking effect after death of donor—Testamentary disposition—Settlement.*

A deed of gift after reciting that the donor owned and possessed certain lands by virtue of deeds herewith "delivered" proceeded as follows:—"Whereas I do "hereby determine that all the property aforesaid being "divided into three. two-third shares thereof should "go to my son Kader Mohideen, and one-third share to "my daughter Sego Umma I shall during my lifetime "hold and possess the same, and that after my death "the said lands shall become the property of my said "two children or their heirs or administrators, and they "and their heirs and administrators shall divide the "same as herein appointed and uninterruptedly possess "the same for ever as their own * * * * I do hereby further declare that hereafter I cannot revoke "this deed."

Held, that the above instrument did not amount to a testamentary disposition, but was a settlement *inter vivos*, which took effect at once, and that on the death of the donor the value of the property dealt with by the instrument should be excluded in deciding whether the estate of the deceased required administration.

One Neina Mohammado having died, the death was reported to the district court. The value of the estate of the deceased having been reported to be over Rs. 10,000, the district judge directed notice to be issued to the heirs. Thereupon, Kader Mohideen, son of the deceased, presented a petition, stating that by a deed of gift the deceased had gifted all his immoveable property to his children, and that the property left at his death consisted of certain moveable property which was worth less than Rs. 1,000. He submitted that no administration was under the circumstances necessary. The deed of gift was in the form above set forth.

The district judge held that as the property did not pass to the donees until the death of the donor the estate must be administered. The son, Kader Mohideen, being unwilling to take out letters of administration, the letters were issued to the secretary of the court.

Kader Mohideen appealed.

Withers, for appellant. It is submitted that letters of administration are not necessary. The deed is not a testamentary disposition, but a *donatio inter vivos* which became operative at once. [He cited *D. C. Kandy* 90,200, 6 S. C. C. 15.]

Hay, A. S.-G., watched the proceedings for the Crown.

Cur. adv. vult.

On August 28, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—I quite agree that the deed in question cannot be regarded as a testamentary disposition but a settlement *inter vivos* of the deceased's immoveable property, which became operative at the deceased's death, and administration in respect of it is unnecessary. The order, therefore, granting letters in respect of that property should be set aside, with the letters which appear to have been already issued to the secretary of the district court, but I am not prepared to hold that no administration is necessary. The affidavit of the appellant is a most cautious one, and I am by no means satisfied that, apart from the settled property, the estate of the deceased was only worth Rs. 500. I think we should, in addition to setting aside the present order and letters of administration, send the case back that it may be ascertained whether the estate, apart from the settle-

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ment, is of sufficient value to render administration compulsory.

CLARENCE, J.—This is an appeal by a son of one Neina Mohamado, deceased, against an order of the District Court, committing administration of the estate of the deceased to the Secretary of the Chilaw District Court. Appellant contends that deceased by a certain notarial instrument executed by him *inter vivos* disposed of all his immoveable property in favour of appellant and his sister and that the moveable property is less than Rs. 500 in amount. Appellant's contention consequently is, that no letters of administration are requisite. The instrument by which Neina Mohamado dealt with the immoveable property is before us. It amounts to a settlement of the immoveable property of Neina Mohamado for life with remainder to appellant and his sister in shares of two-thirds and one-third respectively, and its operation is not deferred till the settler's death, inasmuch as the instrument expressly declares against power of revocation. Therefore it appears that Neina Mohamado did dispose of the immoveable property *inter vivos*, and the question remains, whether the intestate's remaining property is of an amount needing the appointment of an administrator. Appellant's affidavit is to the effect that, so far as he has been as yet able to ascertain, the property is under Rs. 500. This seems to imply some doubt, and I agree with the Chief Justice that the case should go back to the District Court for inquiry as to the value of the estate, the order from, granting administration to the District Court, being set aside. There can be no order as to costs.

Set aside.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(February 6 and March 3, 1891.)

D. C. Kandy, No. 2,781. } PUSUMBAHAMY v. KEERALA.

Kandyan law—Adoption—Requisites of—Public declaration by adoptive parent.

To establish an adoption under the Kandyan Law there must be evidence amounting to a public declaration of the adoption for purpose of inheritance.

Ejectment.

The land in question belonged to one Pulingurala, who died without issue. The plaintiff asserted title to it through certain collateral heirs of Pulingurala, and the defendant through one Dingiri Menika, whom he alleged to be an adopted daughter of Pulingurala. On the question of adoption the District Judge held against the defendant and gave judgment for the plaintiff. The defendant appealed.

Dornhorst for appellant.

Wendt for respondent.

Cur. adv. vult.

On March 3, 1891, the following judgments were delivered :—

DIAS, J.—This is a very simple matter. The question is, whether or not Dingiri Menika is the adopted daughter of Pulingurala ; if she is, the defendant succeeds, if not, the plaintiff. The District Judge was against the adoption, and he gave plaintiff judgment, and the defendant appeals.

The adoption which the defendant had to prove was an adoption for the purpose of inheritance. The mere taking and bringing up of a child in the house and settling it in life is not such an adoption, and all that has been proved by the defendant was nothing more. This question has been often raised, and was dealt with by the Supreme Court, and we always required strict proof of the adoption by evidence amounting to a public declaration of the adoption for purpose of inheritance. It is hardly necessary to refer to the decisions and opinions, which are many and are the opinions of Judges who were well acquainted with the Kandyan Law on the subject. I would affirm the judgment.

CLARENCE, J.—I agree that this judgment is right.

Affirmed.

———:o:———

Present :—CLARENCE and DIAS, JJ.

(December 4 and 22, 1891.)

D. C., Kalutara, No. 40,428. } SILVA v. PERERA.

Executor—Estate of executor—Will disposing of property in one district—Powers of executor as to other property—Probate—Succession ab intestate—Sale by executor.

In the absence of any special restriction in a will excluding from the executor's power any part of the testator's estate, the executor's power extends to the whole of the estate, though if any part of the estate is left undisposed of by the will such part has to be distributed as under an intestacy.

Therefore, a purchaser from the executor of property. undisposed of by the will, acquires good title as against the heirs or persons claiming under them.

Partition.

The facts of the case sufficiently appear in the judgment of Clarence, J.

The 1st defendant appealed from the judgment of the District Judge.

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Dornhorst for appellant. The District Judge was wrong in limiting the executor's powers to property specifically dealt with by the will. The probate vests the entire estate of the testator in the executor; and if the will is silent as to any particular property, he must distribute that as in a succession *ab intestato*. It has been held that the District Court within whose limits a testator has died has jurisdiction over all his property, notwithstanding that such property is situated within the district of several other Courts. (*In re Awedan Kangany*, 2 *S.C.C.* 97.) But it is submitted that probate is not necessary to validate a conveyance by an executor. The title vests on the testator's death alone. (*Pitchay's case, D. C., Colombo*, 2,298, 1 *C.L.R.* 94; *D. C., Galle*, 53,941, 8 *S. C. C.* 192; *D. C., Kandy*, 3,883, 1 *C. L. R.* 101.)

Wendt for respondent. For the purposes of this case it may be admitted that the probate vested the executrix with the whole estate, and that by a properly framed conveyance she might have made good title to the whole of this land. But it is submitted that the title conveyed to 1st defendant is only good for half the land, inasmuch as the widow did not purport to convey anything as executrix, and all that the conveyance could pass was her moiety as widow in the community with her husband.

Dornhorst in reply, referred to *D. C., Kandy*, 19,124, Ram. (1843-55) 65.

Cur. adv. vult.

On December 22, 1891, the following judgments were delivered:—

CLARENCE, J.—Plaintiff sues to partition a land in Kalutara District, styled Halgama Parangiawatte. Plaintiff avers that 4th defendant is entitled to two-thirds, and that the remainder is owned, a fourth by plaintiff, a half by 2nd and 3rd defendants, and a half by 1st defendant. The 1st defendant answers claiming the whole land.

The dispute between plaintiff and 1st defendant turns on the effect of a will made by one Gunesekere, who died in 1880. It seems to be agreed that Gunesekere owned the land, or, at any rate, all but the two-thirty-thirds which plaintiff allots to 4th defendant. The 1st defendant denies that 4th defendant owns any share, and claims the whole.

Gunesekere made a will which seems to have been drawn for him by a very ignorant or careless notary. The will is signed by his wife as well as himself. He died leaving him surviving his wife and four children, two of whom are 2nd and 3rd defendants and the other two are vendors to plaintiff. The 5th clause of the will amounts to an appointment of the surviving spouse as executor, and probate was granted to the widow. The will directs certainmoney payments to be made; but,as far as concerns special disposition of the testator's property, it deals only with land in Galle District. After Gunesekere's death the executrix purported to sell and convey this land, which is in Kalutara District, to 1st defendant, and plaintiff has a coveyance of a fourth from two of the children. The District Judge held that 1st defendant's conveyance passed nothing to him, being of opinion that the will affected only land in the Galle District, and in that view directed a partition according to the shares set out in the plaint.

We cannot uphold that decision. In the absence at any rate of any special restriction in the will excluding from the executor's power any part of the testator's estate, the executor's power extends to the whole of the estate. There may be parts of the estate as to which the executor will have to distribute as under an intestacy, but the executor's power of sale extends over the whole estate. The sale to 1st defendant is therefore good. Plaintiff's suit fails, and must be dismissed with costs.

DIAS, J.—There is nothing in the will restricting the executor's power to property in any particular district. The sale to 1st defendant is therefore good.

Reversed.

———:o:———

Present:—LAWRIE, J.

(June 2 and 14, 1892.)

C. R., Kandy, No. 1,114. } KALU v. HOWWA KIRI.

Kandyan Law—Diga marriage—Forfeiture of rights of inheritance—Unregistered marriage—Ordinance No. 3 of 1870, sec. 11.

The exclusion under Kandyan Law of a *diga* married daughter from a share in her father's property still attaches to a daughter who goes out in *diga*, even though the marriage is invalid by reason of its non-registration under the provisions of Ordinance No. 3 of 1870.

The plaintiff claimed an undivided share of land by right of inheritance from her father. The defendants,among other things, pleaded that the plaintiff was a *diga* married daughter and had forfeited her rights of inheritance. The parties (who were subject to the Kandyan Law) agreed at the trial that the plaintiff left the parental roof about 13 years before and lived with one Bilinda as his wife, but their marriage was not registered. The Commissioner held that the plaintiff had no right to her father's property, and dismissed the action.

The plaintiff appealed.

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Sampayo for the appellant. Under the Ordinance No. 3 of 1870, which governs in this case, the validity of a Kandyan marriage depends on registration, and therefore the plaintiff contracted no valid marriage, even if there was a marriage according to Kandyan customs, which, however, does not appear. It is submitted that the forfeiture of rights of inheritance under the Kandyan Law is an incident of marriage; and there being no marriage in this instance, the disability did not attach to the act of the plaintiff in leaving the parental roof and living with a man as his wife. The plaintiff is therefore entitled to the share of land claimed.

Wendt for the respondent. It may be conceded that plaintiff's marriage was invalid for want of registration. It is, however, submitted that the forfeiture of the right to inherit proceeded not upon the ground of a valid marriage, but of the daughter's quitting the parental roof to enter another family. Accordingly, in the case of a *bina* marriage, where the daughter continues after a valid marriage to reside with the parents, no forfeiture takes place. The point raised appears to be a new one, and no direct authority is forthcoming.

Cur. adv. vult.

On June 14, 1892, the following judgment was delivered:—

LAWRIE, J.—The exclusion by Kandyan Law of a *diga* married daughter from a share in her father's property did not rest on any theory of the indissolubility of her marriage.

In olden times, a Kandyan woman, married in *diga*, could leave her husband's house whenever she chose, and was liable to be turned out whenever her husband got tired of her; but, though she thus gained only a precarious position by being conducted from her father's house, the legal consequences of such a conducting were fixed. She ceased to be a member of her father's family, and she did not regain her full rights, even though she returned or was sent back in a few days.

A woman who now lives in *diga*, but whose marriage is not registered, is in very much the same legal position as a *diga* married woman was before the Kandyan Marriage Ordinance passed. Her position is equally free and equally precarious.

The Ordinance now gives privileges to those who register their marriages, and especially to their children; but the law as to the rights of daughters married *bina* or in *diga* has not been changed, and the old disability still attaches to the act of being conducted from a father's house by a man and the going with him to live as his wife in his house.

Affirmed.

Present:—DIAS and LAWRIE, JJ.

(June 10 and 21, 1892.)

D.C., Anuradhapura, No. 54. } DISSANAIKE v. DE ZILVA

Civil procedure—Mortgage bond, action on—Summary procedure on liquid claims—Civil Procedure Code, chap. liii.

The summary procedure on liquid claims under chap. liii. of the Civil Procedure Code is not applicable to actions on mortgage bonds.

The plaintiff sued the defendant for Rs. 179, being principal and interest due on a mortgage bond. The plaintiff proceeded under chap. liii. of the Civil Procedure Code. The defendant, through his proctor contended that an action on a mortgage bond could not be instituted under chap. liii. The District Judge over-ruled that objection, and ultimately allowed defendant leave to appear and defend the action. At the trial the District Judge gave plaintiff judgment, and the defendant appealed.

There was no appearance of counsel for the appellant.

De Saram for the respondent.

Cur. adv. vult.

On June 21, 1892, the following judgments were delivered:—

DIAS, J.—This is an action on a mortgage bond, and I am not prepared to say that the plaintiff was right in proceeding under chap. liii., which applies to liquid claims other than those secured by mortgage. For this latter class of cases provision is made in a special chapter, viz., chap. xlvi. After what has already taken place, I do not think that the proceedings should be set aside on the ground that the plaintiff had proceeded on the wrong chapter. The defendant obtained time to file answer, and filed it, and the amount due on the bond is admitted. The defendant consented to judgment being entered for plaintiff to the extent of Rs. 166, but without costs, and the plaintiff agreed to accept the amount offered. The only remaining question is, who is liable to pay the costs. The defendant did not pay the admitted amount into Court, and the District Judge, I think, has correctly disposed of the matter of costs. I will dismiss the appeal with costs.

LAWRIE, J.—I am of opinion that the procedure laid down in chap. liii. is not applicable to actions on mortgage bonds, but the defendant has not been prejudiced by the summary procedure originally adopted. He obtained leave to file answer without finding security

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He has nothing to complain of. He and the plaintiff afterwards agreed on the amount due on the bond—all that remained was the question of costs, which was decided. Against this final judgment no appeal has been taken.

This appeal must be dismissed with costs.

Appeal dismissed.

———:o:———

Present:—CLARENCE and DIAS, JJ.

(December 4 and 22, 1891.)

D.C., Colombo, No. 1,763. } MURUGAPPA CHETTY v. PERUMAL KANGANY.

Promissory note—Signature on blank paper—Authority to fill up—Plea of non est factum—Evidence—Variance—Pleading Bills of Exchange Act, 1882, *sec.* 20.

The signing and delivery of a blank stamp paper in order that it may converted into a promissory note operates as a *prima facie* authority to fill it up for any amount that may be covered by the stamp.

Per CLARENCE, J.—Any agreement restricting such authority must be specially pleaded, and is not provable under a mere traverse of the making of the note.

The plaintiff sued defendant as maker of a promissory note for Rs. 217·87. The defendant, among other things, pleaded that he did not make the promissory note sued upon. At the trial the defendant led evidence to the effect that he put his signature to a blank paper with a stamp on it, and delivered it to plaintiff authorising plaintiff to fill it up as a note for Rs. 204; and it was admitted that the promissory note now sued on was the document so signed and delivered. The document bore a stamp of 25 cents. The District Judge gave judgment for the plaintiff.

The defendant appealed.

Browne for appellant.

Canekeratne for respondent.

Cur. adv. vult.

On December 22, 1891, the following judgments were delivered :—

CLARENCE, J.—I think that upon the pleadings this judgment is right. The plaintiff declares on a promissory note purporting to have been made by defendant in plaintiff's favour for Rs. 217·87 with interest at 25 per cent. Defendant denies making the note. At the trial the defendant adduced evidence to prove these facts:—that he signed the note in blank upon an agreement between himself and plaintiff that plaintiff should fill up the note for Rs. 204·64 and that he paid plaintiff Rs. 150 of that amount. Plaintiff, on the other hand, called a witness to show that the figures Rs. 217·87 were on the note when defendant signed it, and the learned District Judge notes that he sees no reason to be dissatisfied with the evidence for plaintiff. Certainly the appearance of the note rather supports defendant's contention, that the note was signed in blank; but in my opinion the District Judge was right in holding that the defence involves a variance from defendant's plea, which simply denies the making of the note.

The Bills of Exchange Act 1882 (sec. 20) declare that a signature in blank on stamped paper operates as a *prima facie* authority to fill up as a bill for any amount that the stamp will cover; and in that respect the Act is merely declaratory of the old law. If a plaintiff declares in the usual form on a bill or note, it is no variance if he prove that the defendant signed in blank and the blank was filled up afterwards. See, for instance, *Molloy* v. *Delves*, 7 Bing. 428. Here, defendant, upon his plea that he did not make the note, admits that he signed the paper in blank (which of itself would be a *prima facie* authority to fill in for any amount that the stamp would cover) and attempts to prove a special agreement to fill in for a limited sum only, as well as partial payment. Any such special agreement should have been specially pleaded, and the alleged payment likewise. I think therefore that upon the pleadings as they stand the learned District Judge was right; but in view of the appearance of the note, which rather goes against the statement of plaintiffs' witness, Ramen Chetty, that the amount of the note was filled in before defendant signed, I am willing, if my learned brother prefers, to allow defendant opportunity of amending his plea, on payment of plaintiffs' costs of the trial already had and of this appeal.

DIAS, J.—This is an action by the payee against the maker of a promissory note. There was a demurrer to the libel, which need not be considered, as the defendant has answered to the merits denying the making of the note and averring certain payments. At the trial the defendant admitted that he signed a blank promissory note and delivered it to plaintiff, authorizing him to fill up the amount as Rs. 204, being the amount still due to plaintiff on another promissory note, but the plaintiff substituted Rs. 217·87 for Rs. 204. The amount in dispute between the parties is very small. The signing of the note being admitted, the question is, whether under the plea of *non est factum* it is open to the defendant to make the defence he made. The District Judge seems to have misapprehended the point in the case. Under sec. 20 of the Bills of Exchange Act 1882 the

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maker of a bill may affix his signature to a blank stamped paper and deliver it that it may be converted into a bill, and it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover. This, I take it, is the rule when the amount to be filled in is not previously agreed to. In this case the defendant says he only authorized the plaintiff to fill up the promissory note for Rs. 204. This is a question of fact, but there is no finding on it by the judge. The judgment should therefore be set aside and the case sent back for further hearing, with liberty to the defendant to amend his answer on paying the costs as indicated by my learned brother.

Set aside.

———:o:———

Present :—LAWRIE, J.

(*June* 24 *and* 30, 1892.)

P. C. Kalutara, No. 13,078. } LOUIS v. DAVIT.

Criminal Law—Voluntarily causing hurt—Compounding—Withdrawal of case—Power of magistrate to refuse—Ceylon Penal Code, section 314—*Criminal Procedure Code, section* 355.

A party complainant has a right at any time before trial to compound an offence under section 355 of the Criminal Procedure Code and to withdraw the charge; but after the defendant has pleaded it is competent to the police magistrate to refuse to allow the charge to be withdrawn notwithstanding the fact of the offence having been compounded.

The accused were charged with voluntarily causing hurt to the complainant. The evidence for the prosecution was recorded, and the case was postponed to enable the accused to adduce evidence for the defence. On the adjourned day of trial, before the witnesses for the defence were examined, the complainant informed the police magistrate that he desired to withdraw the case as an amicable settlement had been arrived at, but the police magistrate refused to allow the case to be withdrawn, and thereupon proceeded to examine the witnesses for the defence. At the conclusion of the trial the accused were convicted and severally sentenced to 6 months' rigorous imprisonment.

The accused appealed.

Dornhorst for the appellants.

Cur. adv. vult.

On June 30, 1892, the following judgment was delivered :—

LAWRIE, J.—These four accused were charged with having voluntarily caused hurt to the complainant. The only injury of any consequence was that caused by Davit, the first accused. At the close of the case for the complainant he desired to withdraw it because an amicable settlement had been arrived at. The police magistrate, for some reason which he has not given, refused to allow the case to be compounded or withdrawn, and after hearing evidence for the defence he found the accused guilty and sentenced them each to six months' imprisonment. The offence of voluntarily causing hurt under section 314 is one which may be compounded by the party to whom the hurt is caused. As I read section 355, the party injured has a right to compound before trial. But after the accused pleaded the case was in the hands of the court, and in this case the trial had proceeded so far that the complainant and his witnesses had given evidence and had closed the case. I think that it was within the power of the police magistrate to refuse to allow the case to be withdrawn and to call upon the accused for the defence and to give a verdict one way or the other. But when he was informed that the parties had settled, I think he might properly have taken that fact into consideration, and though he found them guilty he should have inflicted a comparatively slight or nominal punishment. I affirm the conviction, but I reduce the punishment of the first accused to a fine of Rs. 20 and of the other accused to a fine of Rs. 5 each.

———:o:———

Present :—DIAS and LAWRIE, JJ.

(*June* 10 *and* 24, 1892.)

D. C. Ratnapura, No. 146. } APPUHAMY v. LOKUHAMY.

Civil Procedure—Intervention—Adding parties—Action for title to land—Claim adverse to both parties—Civil Procedure Code, sections 18, 19.

The plaintiff sued defendant in ejectment, claiming title to a half share of the lands in litigation. The defendant being in default of answering, the case was set down for *ex parte* hearing on a certain day. In the meantime certain third persons, who denied plaintiff's right and alleged title in themselves to the whole of the lands, were upon their application added as parties to the action.

Held, that inasmuch as any judgment either for plaintiff or for defendant would not affect the added parties, they were not interested in any question involved in the action within the meaning of section 18 of the Civil Procedure Code, and ought not to have been added as parties to the action.

Per DIAS, J.—The application to be added as parties was in the nature of an intervention under the old procedure, which was abolished by section 19 of the Civil Procedure Code.

The plaint filed in October, 1891, averred title in plaintiff to an undivided half share of certain lands

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and alleged that, since the death of the owner of the other half share, the defendant, who was husband of the deceased co-owner, had kept plaintiff out of possession disputing his right thereto, and the plaintiff prayed for declaration of title to an undivided half share of the lands and for possession and damages. The defendant being in default of answering, the case was set down for *ex parte* hearing on February 9, 1892. In the meantime, on January 16, 1892, certain third persons submitted a pleading in the form of a petition supported by affidavit, and applied to be added as parties. They in substance denied the title of plaintiff and his alleged co-owner to any portion of the lands and claimed the whole of the lands for themselves. The district judge allowed the application, recording his opinion that the presence of the applicants was necessary in order to enable the court effectually and completely to adjudicate upon and settle the question of ownership to the half share of the lands in dispute.

The plaintiff appealed.

Sampayo, for appellant. The order appealed from amounts to an introduction of the old practice of intervention, which is expressly abolished by section 19 of the Civil Procedure Code, and therefore was wrongly made. Nor is it justified by section 18 of the Code, which makes provision for the adding of parties. That section contemplates parties whose presence is necessary for the adjudication of issues already raised in the action. In this instance, the added parties claim adversely to both plaintiff and defendant, and are therefore strangers to any "question involved in the action". It is submitted that these words of the section refer only to questions directly arising out of the original cause of action. In order to add parties there must be a substantial question in which they have a community of interest with one or other of the parties. the object of the enactment being to prevent the same question being tried twice over. It has been so decided under the corresponding section 32 of the Indian Code of Civil Procedure and under O. xvi, rr. 11,13 of the Judicature Acts. See notes under section 32 in O'Kincaly's edition of the Indian Code. Here no such question exists, and the respondents were therefore wrongly added as parties.

Wendt for respondents. The object of the enactment in the Code certainly was to prevent the same question, such as title to land, being twice tried between different sets of parties, and section 18 therefore permits all parties claiming title to come in. It makes no difference in principle that the respondents claim the whole land, alloting no interest to plaintiff and defendant. They might have claimed only a small fractional share. In the present instance, the plaintiff and defendant had notice of respondents' claim, the latter having previously sued them both in an action which failed for want of jurisdiction. The present would seem to be a collusive proceeding between plaintiff and defendant, which is all the more reason why these parties should be allowed to protect their interests. It is not necessary for them to show that the judgment between plaintiff and defendant would operate as *res judicata* against them.

Cur. adv. vult.

On June 24, 1892, the following judgments were delivered:—

Dias, J.—The provision in the Code as to added parties has been entirely misunderstood by respondents' proctor. His clients are utter strangers to the cause. The plaint does not touch them, and whether the judgment be for the plaintiff or the defendant, the so-called added parties are not bound by it. The proctor was evidently labouring under the idea of the old form of intervention, and brings into court a petition in the nature of a petition of intervention on behalf of his clients denying the plaintiff's right and title. This would have been right enough before the Code, which by section 18 virtually repealed the old form of intervention, and instead of it gave the district judge a discretion to change parties or add new parties to the record, if he should think it necessary. But in this case the so-called added parties take upon themselves the office of the district judge, and add themselves as parties, and file a petition which should not have been accepted. I would set aside the order with costs, and send the case down to be proceeded with in due course.

Lawrie, J.—I do not agree with the learned district judge that the presence of the added parties is necessary to enable the court effectually and completely to adjudicate and settle the question of ownership of half share of the land. Before a third person can be added as a party he must show that he has an interest in the litigation and that he would be prejudiced by a judgment being entered either for the plaintiff or defendant. In this case the added parties have no interest in the question whether the plaintiff was illegally ousted by the defendant. A judgment against the defendant, declaring the plaintiff entitled to, and ordering him to be placed in possession of, half of a certain land could not prejudice the added parties' rights, because it is not pretended that they are in possession of the land, or that any right of theirs would be interfered with.

Again, the proposed third parties must show that their admission would prevent the same question

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being tried twice over. The question which the added parties desire to have tried will not be tried in this case as between the plaintiff and the defendant. In the first place, as between plaintiff and defendant there is to be no trial. The defendant has not filed answer. The case has been fixed for *ex parte* hearing, at which the somewhat complicated questions of fact and law, which are raised by the petition of the added parties, will not be touched on. Another reason why the parties should not be added is that the subject matter of the action is not the same as the subject claimed by the added parties. The plaintiff claims only an undivided half of a land. The added parties claim the whole land, a subject of double the size and double the value of the subject of the original action.

Lastly, persons claiming adversely to both plaintiff and defendant ought not (as a general rule) to be admitted. There may arise cases in which parties adverse to both ought to be admitted, but this is not one of them. The proposed added parties claim a land of which they are not in possession. They say that the land belonged to the children of their sister, that these children died without issue and intestate, and that their mother succeeded under the Kandyan law of *daru uruma*, and that on the death of the mother her brothers (the added parties) succeeded. They admit that their claim to possess has been contested by the plaintiff and defendant. It is a claim which can best be tried in an action in which the added parties are plaintiffs.

Set aside.

———:o:———

Present: DIAS and LAWRIE, JJ.

(*June* 21 *and* 28, 1892.)

D. C. Colombo, No. C 422. } WIJEYEKOON v. GOONEWARDENE.

Tacit hypothec of children over property of surviving parent—Marriage in community—Continuance of community between surviving parent and children—Roman Dutch Law—The Matrimonial Rights and Inheritance Ordinance, No. 15 *of* 1876.

The principle of the Roman Dutch Law, by which the community of property existing between husband and wife was considered to continue between the surviving spouse who remained in possession and the children until a division of the estate was effected, was never adopted in Ceylon, nor was the principle by which the children were given a tacit hypothec over all the property of the surviving spouse for the share inherited by them from the deceased spouse.

The plaintiff, as the only child of one Wijeyekoon by his first wife Josephine deceased, sued the first defendant (executor of Wijeyekoon's will), the second defendant (Wijeyekoon's widow), and the third defendant (the mortgagee under Wijeyekoon of an undivided half of a certain house that had belonged to Josephine), to obtain a declaration of his right by inheritance from his mother to a moiety of the common estate of Wijeyekoon and Josephine, and an account of rents, issues, and profits. The plaint averred that Wijeyekoon and Josephine had been married in community of property, and that, after the latter's death, Wijeyekoon had continued in possession of the common estate until his death in March, 1890. His marrirge with the second defendant was in May, 1892. The plaint further averred that Wijeyekoon in October, 1889, had mortgaged to the third defendant all his "share, right, title, and interest" in a certain house alleged to have formed part of the common estate of Wijeyekoon and Josephine; that third defendant having obtained judgment on his mortgage against first defendant as executor, had seized a moiety of the house in execution and advertised it for sale. The plaintiff prayed for an account of the said common estate, for a declaration of title to a moiety thereof, and for a declaration that the moiety thereof which had belonged to Wijeyekoon and which first defendant as his executor, or the second defendant, had held or taken, and all other property which Wijeyekoon held or possessed at his death, and all property which the second defendant was entitled to or possessed of, were subject to a tacit hypothec or mortgage in favour of the plaintiff and preferential to all other claims or incumbrances to the extent of the amount which should be found due to plaintiff upon the accounting, and that third defendant's mortgage was subject to such tacit hypothec. The plaintiff also prayed that the sale in execution of third defendant's judgment might be stayed till plaintiff's claim was satisfied, and the court granted an interim injunction in these terms.

The defendant in answer, among other things, pleaded, as matter of law, that plaintiff was not entited to the tacit hypothec claimed, and at the trial it was agreed by parties that this question should first be determined by the court and the issues of fact referred to arbitration.

The district judge gave judgment for plaintiff as prayed.

The first and second defendants appealed.

Layard A. A.-G. (*Wendt* with him) for the appellants. It must be conceded that the marriage of plaintiff's parents was in community of property, having taken place two days before the commencement of Ordinance No. 15 of 1876, which did away with such community. It follows that plaintiff in-

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herited from the mother a moiety of the common estate as it stood at her death, and is entitled to one-half of the rents, issues, and profits accruing thereafter. But it is submitted that plaintiff never acquired any such right of privileged hypothec, as it was the main object of this action to establish. Even if such hypothec was given by the Roman Dutch Law, which seems doubtful, that principle never was imported into Ceylon, or enforced in our courts, and no reported case can be found in which it was recognised. It has often been pointed out by this court that the entire body of laws of the United Provinces was not introduced here by the Dutch, but such portions only as seemed adapted to the requirements of the country; and it has been said that even the principle of the community of property was not so introduced, but brought in subsequently by decisions of the courts established by the English. But even assuming the hypothec to exist, it is clear that the second wife's property cannot be touched by it, for she was married after the Ordinance of 1876, and has separate property. Again, no ground whatever was alleged or shown for staying the execution sale. It was a sale of the husband's moiety only; and if the alleged hypothec affected it, the hypothec would follow it into the hands of a purchaser, and could be enforced when plaintiff got his judgment.

Dornhorst (*VanLangenberg* and *de Saram* with him) for the plaintiff. The marriage of plaintiff's parents having been in community, as now admitted, it follows that, the husband not having taken out administration to his wife's estate, but continued in possession of the whole estate, the "partnership" (*societas*) continued between him and the child of the marriage. This was expressly decided in Holland in a case mentioned in the "Consultations of Dutch Jurists" (vol. 1 cons. 105; translated Vand. Rep. Appendix p. li) where it was resolved that the children were entitled to a just half of the common property as it stood at the death of the deceased spouse, with a half of the fruits or profits and rents thereof since the death. This was expressly accepted by this Court in Colombo case (reported Vand. Appendix p. xlvi, and followed in *Ederemanesingam's case*, vand. 264). [He also cited Wesel, *De Connub. Bon. Soc.*, *Tract.* 2, *cap.* 4, *sec.* 86.] For the security of the interest thus given to the children, they have a preferential tacit hypothec over the property of the surviving spouse, and if he have contracted a second marriage, then over the community of the second marriage as well. (Voet *ad Pand.* 20. 2. 23, Berwick's Trans. 338; Van Leeuwen's Commentaries 4. 18. 11, Kotze's Trans. Vol. 2, p. 95; Burge, Col. and For. Laws, Vol. 1. 329, Vol. 3, 396; Sande, *Decis. Frisic.* 3. 12. 23; Pothier *ad Pand.* 2. 56. 3, 4; *D. C. Putlam* No. 2,983, Morg. Dig. 188: *D. C. Kurunegala* No. 1,708, Civ. Min. of 1873.) As regards the stay of sale, it is sufficient to say that the third defendant, the execution-creditor, and the only party interested, has not appealed against the stay.

Wendt, in reply.

Cur. adv. vult.

On June 28, 1892, the following judgment was delivered :—

DIAS, J.—One Wijeyekoon and his wife Maria married in community of goods on June 27, 1877. They had an only son, the plaintiff. The wife died in October, 1878, and the parents not having made any testamentary disposition of their property, the plaintiff, on his mother's death, became entitled to a moiety of the common estate of his parents, moveable and immoveable; but the father continued in the possession of the whole estate till 1882, when he married the second defendant. This marriage took place after the Matrimonial Ordinance of 1876 came into operation, and consequently the second wife did not take any interest in the husband's half of the first community. Here I may advert to a question raised by the defendants as to the date when the Ordinance came into operation. The Ordinance had to be proclaimed before it came into operation, and accordingly a proclamation was published in the Government Gazette of June 29, 1877, i. e. two days after the marriage of the plaintiff's parent. The date of the proclamation was June 23, though it was published on June 29, and it was contended that the proclamation had reference back to its date June 23, and consequently the marriage took place after the Ordinance came into operation. I cannot subscribe to this contention, and it is unnecessary to discuss the matter further, as, in the 3rd paragraph of the answer, the first and second defendants virtually admit that the plaintiff's parents married in community of property. Plaintiff's farther died in 1890, leaving a last will, which was proved by the first defendant, the executor named therein, and he was a necessary party to the action; but what the plaintiff's step-mother, the second defendant, has to do with the case is more than I can understand. The plaintiff's father, after the death of his first wife, mortgaged an undivided half of a property called Mango Lodge, which formed part of the common estate of himself and his first wife, to the third defendant, who obtained a decree and a writ of execution

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on the mortgage, and, through the Fiscal, seized the debtor's interest in the property, and the plaintiff seeks to stay the sale on the ground of a tacit hypothec over the property. The above in substance are the material facts of the case, and I shall now proceed to notice the several claims set up by the plaintiff.

First, the plaintiff prays for an account of the common estate of his parents at the date of his mother's death, as also of the rents and profits of his half of the property received by his father or his executor (first defendant) or his second wife (second defendant).

Secondly, he prays for a declaration that, in respect of his half of the community, he is entitled to a hypothec over his father's half of the community, and over all the property of his second wife, the second defendant. This prayer is rather confused, but the above is its substance.

Thirdly, he prays for a declaration of his right of a legal hypothec over the "Mango Lodge" property which was mortgaged by his father to the third defendant.

Fourthly, for an injunction to stay the sale of the "Mango Lodge" property under the third defendant's writ.

At the hearing of the case it was agreed that the district judge should decide the several points of law raised, leaving the questions of fact to be determined by arbitration. The right of the plaintiff to half of the common estate of his parents, after payment of debts, funeral and testamentary expenses, is not denied, nor do I think it can be denied that the plaintiff is entitled to the rents and profits of his mother's half of the estate, which was in his father's possession after his mother's death, not, however, as the district judge puts it, on the ground of a continuing community between father and son, but on the broad ground that the father had received what belonged to his son. If there ever was any such Dutch law as a continuing community, which is very doubtful (see Vand. Rep. xlix), that law has never been imported into this Colony. The whole of the Dutch law, as it prevailed in Holland more than a century ago, was never bodily imported into this country. We have only adopted and acted upon so much of it as suited our circumstances, such as the law of inheritance in the maritime provinces, community of property, law of mortgage, and so forth; but the Dutch law of continuing community was never adopted by us; and, if I remember right, it was so decided by this court, though I cannot just now put my hand on the authority. Though the district judge adopted the Dutch law, he did not give effect to it to the extent to which it carried him. According to Grotius (Herbert's Trans. p. 117), "The half of everything which accrues to the estate after the death of the first deceased, as well by inheritance as otherwise, comes to the children, and the children are not to be liable for a share of the losses." I do not think it necessary to go further into this matter, as the conclusion of the district judge is right, inasmuch as he does not give the plaintiff anything beyond a half of the community and the rents and profits of that half after his mother's death.

The second prayer of the libel involves a point of general importance. The plaintiff prayed for a declaration of the court that he, the plaintiff, had a right of legal hypothec over his father's half of the community and all property acquired by his father after his mother's death as also over the property of his second wife, the second defendant. This prayer was allowed by the district judge to the fullest extent, and this opinion cannot be upheld for a moment as regards the second defendant, as I fail to see what right or claim the plaintiff has to the property of his step-mother. As to the shortcomings of his father, the plaintiff has his remedy against him or his executor, the first defendant. The second defendant is altogether an independent party. She married after the Marriage Ordinance came into operation, so there was no community of property between her and her husband, and the plaintiff, as I have already said, has failed to satisfy me that he has any cause of action against the second defendant, and, as regards her, the plaint ought to be dismissed with costs.

The next question is, whether a party in the position of this plaintiff has any hypothec at all over the property of his father. This I believe is the first time a claim of this kind has been put forward. In support of this strong proposition Mr. Dornhorst, for plaintiff, cited 1 Burge 329. In this page the writer speaks of the Roman Law generally. In the preceding page he deals with the constitutions of certain of the emperors, and in the page cited he says "a tacit hypothec was given to the children of the former marriage on the property of the parent who married a second time". In support of this he cites the Code which is Roman Law pure and simple, and neither cites a Dutch authority nor says, as he usually does, that what he stated is Dutch law. The other authority cited from Voet 2. 2. 23, 24, is more to the point. But assuming that the Dutch law is as it is said to be, the plaintiff is bound to satisfy us that it has ever been adopted by this country. As I have already shown, the whole of the Law of Holland was never imported into this Colony; no local decision has been cited which would furnish some evidence

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that the Dutch law in this respect has been adopted; and in the absence of any such evidence I must repel the claim set up by the plaintiff. The so-called tacit hypothecs or secret mortgages are not in my opinion to be encouraged and given effect to, unless we are constrained to do so by law. This case is the best illustration of the mischievous consequences of such a law. The third defendant in good faith lends his money on the security of the husband's half of the community, and the plaintiff springs upon him a claim which the third defendant could not by any means discover.

The district judge further ordered that the fiscal's seizure and proposed sale of half of the "Mango Lodge" under the third defendant's writ should be stayed. This he could not do, even if the plaintiff had a legal hypothec over the property. The plaintiff could not prevent a sale under the mortgagee's decree. All that he might have done was to set up a preferent claim over the proceeds. We have swept away by ordinance the old Dutch law of general mortgages, and it is to be hoped that all secret mortgages commonly called tacit hypothecs will follow suit, as they are very much calculated to hamper purchasers and mortgagees of immovable property.

The best course to follow is to set aside the order and make the following order instead:—

1. Declare the plaintiff's right to half of the common estate of his parents as it stood at the death of his mother after payment of all debts and funeral and testamentary expenses, together with half of the rents and profits of his mother's half which came into the hands of his father or his executor, the first defendant. In taking this account due allowance should be made to the father's executor for the maintenance and education of the plaintiff after his mother's death.

2. As regard the second defendant, the action is dismissed with costs in both courts.

3. If the parties are not agreed on the facts, let the case go down for determination by arbitration, and the arbitrators will take the account on the footing above indicated.

4. The plaintiff will pay the costs of this appeal and the costs of the hearing in the district court. All other costs will be at the discretion of the district judge.

Lawrie, J.—I agree.

Set aside.

Present:—Dias, J.

(*May 19, and June 9, 1892.*)

P. C. Matara, No. 15041/15601 } LeMesurier v. Abesakere.

Criminal procedure—Proclamation—Attachment of property—Confiscation—Criminal Procedure Code, sections 62, 63, 64.

Before a police magistrate can issue a proclamation under section 62 of the Criminal Procedure Code there must be sworn information before him that the accused person has absconded or is concealing himself.

When attachment of property is made under section 63 of the Criminal Procedure Code the property becomes forfeited to the crown only at the expiration of the twelve months mentioned in section 64, but no order of court is necessary in that behalf.

The facts material to this report sufficiently appear in the judgment of the Supreme Court.

There was no appearance in appeal.

On June 9, 1892, the following judgment was delivered:—

Dias, J.—Thirteen persons were charged with an unlawful assembly, and some of them appeared and surrendered, but the first accused, Don Samuel, did not appear.

The warrants are all to be found in page 37 of the record. They are printed forms, filled up in Sinhalese by a person who evidently does not know how to write legible Sinhalese. So far as I can make out, the warrant in page 49 is the one against Don Samuel, the first defendant. I see no return appended to this warrant, but I see a journal entry, under date November 17, 1891, to the following effect: "First "accused the alleged principal culprit is said to be "in concealment and evading arrest. Proclaim him. "Case postponed. *Dunuville.*" Where and how the magistrate got this information I am unable to say. But, on December 7, 1891, a proclamation was issued, in which the magistrate says: "Whereas "it has been shown to my satisfaction that the said "V. G. Don Samuel is concealing himself to evade "service," &c.

At the date of this proclamation there was no sworn evidence before the magistrate that Don Samuel was in concealment. All the information then before the magistrate was the mudaliyar's letter of November 14, and apparently, on the information contained in this letter, the proclamation was issued.

The information was not supported by the oath or affirmation of the writer of the letter. Probably the mudaliyar knew nothing of the matter personally, and he wrote his letter on information received by his headman.

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Assuming for a moment that the proclamation was well-founded and duly issued, the next step in the procedure was the attachment of the offender's property under section 63. I see no such attachment in the record; but according to the journal entry some property seems to have been attached, and the assistant government agent moved for an order of confiscation of that property. There is nothing in the Ordinance about confiscation. If the goods attached are not redeemed by the owner in the manner prescribed by section 64, he forfeits his right to them in favour of the Crown, without any order of the police magistrate in that behalf.

Under that section the owner has 12 months' time to redeem, and at the date of the assistant government agent's applications for a confiscation order the twelve months do not seem to have expired.

The proceedings are grossly irregular, and I must quash the proclamation of December 7, 1891, and all subsequent proceedings.

Set aside.

———:o:———

Present:—BURNSIDE, C. J., DIAS and LAWRIE, JJ.

(*June* 10 *and* 29, *and July* 1, 1892.)

D. C. Galle, No. 1,020. } SKYADORIS v. HENDRICK.

Sequestration—District Court—Jurisdiction—Common Law—Injunction—Rules and Orders, 1833—*Ordinance No.* 8 *of* 1846—*Ordinance No.* 15 *of* 1856, *sections* 4 *and* 5—*Ordinance No.* 11 *of* 1868, *section* 24—*Courts Ordinance No.* 1 *of* 1889, *section* 22—*Civil Procedure Code, Chapters* XLVII, XLVIII, L.

The power of district courts to issue writs of sequestration is now limited to cases of fraudulent alienation of property, as provided by the Civil Procedure Code, and they have therefore no jurisdiction generally to issue sequestration for the protection, *pendente lite*, of property the subject of litigation.

So *held* by BURNSIDE, C. J., and LAWRIE, J., *dissentiente* DIAS, J.

The plaint in substance averred that the plaintiff and first defendant jointly purchased certain allotments of land from the Crown, but that no grant had yet been obtained; that since the purchase the first defendant, with the aid of the other defendants, sunk several pits in the lands and dug out several tons of plumbago, which they had removed and appropriated to themselves to the exclusion of the plaintiff, and that they were still continuing to dig for plumbago and prevented the plaintiff from entering the said lands. The plaintiff prayed (1) that the said lands with the pits thereon and the plumbago be sequestered, and (2) for judgment for the value of half the plumbago dug out.

The district court granted a writ of sequestration, which was forthwith issued, and the lands and all plumbago found were sequestered by the fiscal.

Thereupon the first defendant applied on petition by way of summary procedure to dissolve the sequestration, the petition, among other things, alleging that the sale to the plaintiff and defendant had been cancelled and that the lands had been resold to defendant alone, though he had himself not yet obtained a grant. The learned district judge disallowed the application, holding that the court had inherent power by common law to issue such a sequestration, apart from the provisions of the Code. The first defendant appealed.

Dornhorst (*J. Grenier* and *de Saram* with him), for the appellant. This sequestration is expressly issued under the common law, and is therefore wrong. If such a remedy ever existed under the common law, it has been done away with by the Civil Procedure Code, which alone prescribes the procedure now available in our courts. There is no question of a *casus omissus* within section 4, because there is ample provision for sequestration in Chapter xlvii., and for injunctions (Chapter xlviii.) and the appointment of a receiver (Chapter l). It is doubtful whether even under the Roman Dutch procedure sequestration would have been allowed in a case like the present (Voet *ad Pand.* 2. 4. 18.) It has been held by this court that the Code enacts substantive law to the extent of abolishing certain rights well recognised by the Roman Dutch law. (*D. C. Trincomalee, No.* 23,437, 9 S. C. C. 203.) [He also referred to R. and O. 1833, sec. 1 r. 15., Ordinance No. 15 of 1856.] The present is not a case for granting this extraordinary remedy, even if it exists. The plaintiff shows that he has no title to the land, which has since his purchase been resold to the defendant.

Wendt (*Pereira* with him), for the plaintiff. Section 4 of the Code provides that in a *casus omissus* the previously existing procedure should be followed, and it is clear this remedy was open under the old procedure. Chapter xlvii. of the Code does not touch a case like the present. It only provides sequestration for cases of fraudulent alienation, while chapter l expressly regards the appointment of a receiver as additional to sequestration (section 671). Even if it should be held that plaintiff's proper course was to obtain an injunction under chapter xlviii., it is submitted that plaintiff has complied with all the requisites in that behalf. It cannot be doubted that the Roman Dutch law

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did provide for sequestrations like the present. It must be regarded as a power inherent in every court to take into its custody and preserve the subject of litigation until the determination of the rights of contending parties. The case in 9 S. C. C. 203 was not a case of implied repeal of an existing remedy, for the Code (section 19) expressly enacted that no person should be allowed to intervene in an action except in pursuance of section 18, and the person then seeking to intervene had not brought himself within section 18. The fact of plaintiff not having a conveyance does not help the defendant. Plaintiff and defendant purchased jointly, and, though defendant alleges that there was a subsequent resale to him alone, he too has no conveyance.

[Other points were argued, which are not material to this report.]

Dornhorst, in reply.

Cur. adv. vult.

On July 1, 1892, the following judgments were delivered :—

Burnside, C. J.—Whatever jurisdiction may be asserted to have existed in district courts, to protect by sequestration property the subject of litigation *pendente lite*, I cannot find it ever even suggested that the district courts had authority to order a sequestration such as that now under consideration, which has been granted for an indefinite period against property in respect of which no litigation is pending, nor even is it alleged that any money is due, and only upon a prayer that the defendants be decreed to pay a sum of money alleged to be due from the defendants to the plaintiff. The district court had clearly no right to issue such a sequestration, and the order and all proceedings consequent on it should be set aside with costs. I might content myself with saying no more, but as there has been a disagreement between my learned brothers on the general question of the extent of jurisdiction of the district courts in matters of sequestration, I would add I can find no authority for the position that district courts had any jurisdiction to issue writs of sequestration as a remedial measure for the protection of property, the subject of litigation *pendente lite.* Admitting that by the Dutch Law goods concerning which there was a dispute might, by a decree of the judge, be kept in the hands of a third person until the dispute had terminated and then be given over to the party who should be adjudged entitled to them, it yet must be shown that jurisdiction to enforce this law was granted to the district courts. I confess I can find no authority for the position; it is not enough to say that because such a right existed therefore a district court had the power to enforce it. The district courts are the creatures of the Charter and of Ordinances succeeding it. There is nothing which gives them authority, generally, to administer the Dutch Law; and if anything is to be gathered from a careful consideration of the Charter and the Ordinances, it is that it was not intended to invest district courts with any such jurisdiction. Care has been taken to define their jurisdiction in other matters and to regulate with precision the manner in which such jurisdiction is to be exercised. Nothing whatever is said about sequestration, or any similar jurisdiction, whilst on the other hand the Supreme Court has been invested with powers of issuing habeas corpus, mandamus, and injunctions in the nature of sequestration to prevent irremediable injury to property which might become the subject of an action.

This is a special power, and from the Charter it was continued by the Ordinance 11 of 1868, section 24, and from it continued as lately as the Courts Ordinance 1 of 1889, section 22. Had the district court had any such power under the common law, *a fortiori* the Supreme Court would have also had it, and as the Legislature has been careful to confer the powers by express words on the Supreme Court, the conclusion is unavoidable that the district courts had no such power. I do not forget that with regard to injunctions it had been held, even before the passing of the Civil Code, and accepted as law, that although no special jurisdiction had been granted by legislation to district courts to issue injunctions, yet that they possessed the power in right of their general equitable jurisdiction. This, after all, amounts to no more than a mere assertion, partaking of a judge-made invention, out of such material as happened to be readiest, to meet a necessity, like much of our laws of that time, rather than a well founded legal proposition founded on admitted principles; and it is instructive to note that it is at the same time asserted that the Charter itself contemplated the existence of this jurisdiction when it gave the Supreme Court power to issue injunctions to restrain that which may ensue before the party making application for such injunction "could prevent the same by bringing an action in a district court". Surely it is not complimentary to the framers of the Charter to assume that it was in their minds necessary to invest the Supreme Court with an extraordinary power in order to secure the readier remedy in the district court, but above all it is significant that care has been taken by the framers of

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the Civil Code to obtain direct substantive and positive law, giving to district courts the powers which judicial assertion had already assigned to them. Surely, there could be no necessity for this if the law had really been what it was asserted to be. However far these assertions may have gone, with regard to the powers of district courts in relation to injunctions, I do not find that any similar venture had been made with regard to sequestration. It may be that the familiarity with the well-known English proceeding by injunction, on the one hand, and the want of acquaintance with the more obscure and unknown procedure by sequestration, on the other, may have led to the result, but it is certainly corroborative of the contention that no general right to grant sequestration which existed by Dutch Law had ever been exercised by the district courts, when we find that from time to time jurisdiction was given by express law to these courts to enforce fragmentary parts of that law, and this leads to the necessary inquiry what powers of sequestration have been expressly conferred by written law.

The first was that conferred by the Rules and Orders made by the Judges of the Supreme Court in pursuance of the Charter of 1833. These powers were express and applied only to

(1) Sequestration to compel appearance.
(2) Sequestration to prevent fraudulent alienation and further litigation.

It is quite possible, and I think most probable, that it was discovered that the jurisdiction and powers, which it was then sought to confer by rules made under the authority of the Charter, could only be created by higher authority, and consequently the Ordinance 8 of 1846 was passed " for rendering the operation of rules of court contingent on their enactment by the legislature."

Notwithstanding this Ordinance, however, it was not till the passing of the Ordinance No. 15 of 1856, ten years after, that even this limited jurisdiction of sequestration received legislative sanction. By that Ordinance the rule which had been framed purporting to give the right of sequestration on fraudulent alienation was revoked, and the power conferred was that contained in sections 4 and 5, whereby sequestration is made available to prevent fraudulent alienation after suit brought—a proceeding hedged about with many precautions. This Ordinance has in its turn been repealed by the Civil Procedure Code, and certain new provisions enacted with reference to the jurisdiction of the district court in matters of sequestration, but there is no room for the contention, nor do I understand it is contended, that the common law power has been granted by the Code, and as in my opinion all powers granted by written law in that respect have been repealed by the Code, the result is that to the Code and to the Code alone must reference be had for whatever jurisdiction in respect of sequestration may be claimed for district courts.

Dias, J.—On the 3rd of February 1892 the plaintiff filed a plaint supported by an affidavit, and moved for and obtained an order of the court to sequester certain plumbago dug by the defendants from a land of which the plaintiff and the first defendant are joint owners. The plaint sets out that on the 9th September 1890 two allotments of Crown land were put up to sale by public auction, and were knocked down to the plaintiff and the first defendant, being the highest bidders, that the purchase money was duly paid to the government agent, but no grant has yet been issued. The above facts were supported by an affidavit, and the court issued an *ex parte* order in the nature of a writ of sequestration. On the 8th February 1892, the first defendant appeared, and filed a petition with an affidavit and two exhibits, and, under section 377 of the Code, moved for a dissolution of the sequestration.

The matter was discussed on the 19th and 21st February and on the 26th February the district judge declined to disturb the order which he had already issued, and the first defendant appeals.

A long string of objections of a very technical nature was urged for the appellant in the district court and this court, but I do not think it necessary to take notice of any of them. Mr. Dornhorst for the appellant took two objections of a more substantial character, and I shall now proceed to deal with them.

First, that the remedy by sequestration is taken away by the Civil Procedure Code, and is otherwise obsolete. It is not denied that up to the passing of the Code the remedy by sequestration was open to a party litigant during the pendency of the litigation, and the court had power to issue any order, either in the nature of a mandatory injunction, or sequestration, to prevent either of the parties from improperly interfering with the subject in litigation. Such a power is inherent in the court having jurisdiction over the parties and the subject in litigation, as, without it, it is impossible for the court to do justice between the parties. The Code provides for injunctions in certain cases, but it does not deal with a sequestration like the one which was issued in this case, and from this I am called upon to infer that all the powers of the court to issue sequestration orders, except in the cases specified in the Code, are abrogated. I can do nothing of the kind, particularly in view of section 4 which provides that, in every case in which no provision is made by the Code, the proce-

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dure and practice hitherto in force shall be followed.

Secondly, it was objected that the plaintiff's right to the allotments of land in question is not established, but on the contrary his title by purchase is not complete on the face of the plaint and the affidavit, and on that ground he is not entitled to the order of sequestration issued by the court. This is a fair objection on which much can be said on both sides, and accordingly it was very fully and ably argued by the learned counsel who represented the contending parties. It appears that in September 1890 certain Crown lands were put up to sale by the government agent acting on behalf of the Crown, and were sold to the plaintiff and the first defendant as the highest bidders, and, according to the plaintiff, the purchase money was fully paid. This is a complete contract of sale between the Crown and the purchasers, as the Ordinance against Frauds and Perjuries does not affect the Crown (see section 20.) All that is wanting in the case is the grant, which is only evidence of the sale, and which the purchasers may compel the Crown to issue. The first defendant, in his petition, admits the sale averred by the plaintiff, but he says that that sale was cancelled by the government agent, as 9/10th of the purchase money was not paid. But the first defendant does not say who it was who made the default, and I presume that it was made by the purchasers. The first defendant further avers that the government agent, having cancelled the first sale, made a second sale in September 1891, when the first defendant became the sole purchaser. According to the above statement, the issue between the parties is whether the first or the second sale is to stand. This is matter of defence to be taken by way of answer to the plaint, but not matter on which he can resist the order of sequestration. Admitting the first sale, the first defendant avoids it by matters subsequent which can only be dealt with by a trial on proper pleadings. In the court below the plaintiff offered to go to trial at once but the first defendant objected to it, probably for very good reasons. According to the plaintiff, the first is a good sale, and the plaintiff and the first defendant are joint owners of the lands in dispute, and one of them, the first defendant in this case, has no right to take plumbago from the lands without the consent of his co-owner the plaintiff. The digging of the plumbago is not denied, and the first defendant's intention to appropriate it to the exclusion of the plaintiff is manifest from the line of defence taken up by the first defendant, and in this state of things the plaintiff had a perfect right to ask the court for an order on the first defendant to prevent him from appropriating the whole of the plumbago of which, so far as appears, the plaintiff is entitled to half.

On a careful consideration of the whole case I am of opinion that the order appealed from must be affirmed.

LAWRIE, J.—It is not necessary to enquire whether prior to 1856 district courts had power at common law to sequester lands or the rents and profits *pendente lite*, because the Legislature in that year made express provision on the subject, and whether the Ordinance 15 of 1856 gave district judges that power for the first time, or whether it enlarged or curtailed existing powers, is of little consequence. After the passing of that Ordinance, the law regarding the sequestration of lands and rents ceased to be common law and became statute law.

The 4th section of the Ordinance enacted that "if "the property in dispute consists of houses or land "and the plaintiff shall satisfy the court that seques- "tration will tend to prevent new or further litiga- "tion, then and in any such case such issues, rents "and profits shall be sequestered."

The Ordinance 15 of 1856 was repealed by Ordinance 2 of 1889. Parts of the Ordinance of 1856 were re-enacted in Chapter xlvii of the Procedure Code, but the part of section 4 which I have quoted was not re-enacted.

The power of a court to secure property pending a litigation, while it is still undecided to whom the property belongs but when it seems necessary to preserve it, is one for which full provision is made in the Code. Chapter xlvii is devoted to arrest and sequestration before judgment. Chapter xlviii deals with injunctions, and Chapter l deals with the appointment of receivers.

It is conceded that the sequestration in this case was not issued in conformity with nor in exercise of any powers given by these chapters of the Code, and therefore I am of opinion that it was illegal. I would set aside the order of the 26th February and I would dissolve the sequestration with costs.

Set aside.

———:o:———

Present:—BURNSIDE, C. J., and LAWRIE, J.

(*June* 29 *and July* 12, 1892.)

D. C. Colombo, No. C. 1,142. } ANDERSON v. LOOS.

Proctor's lien—Title deeds—Mortgage—Action in detinue.

The plaintiffs, owners of a certain land, having agreed with F to sell the land to him and to take from him a mortgage thereof for the purchase money, delivered the title deeds of the land to defendants as proctors and notaries of F, for the purpose of drawing the conveyance and mortgage bond. The instruments were

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duly drawn and executed, and plaintiffs subsequently repurchased the land in execution of a judgment on their mortgage, but the defendants detained the title deeds from plaintiffs claiming a lien on them for their fees, which were to be paid and were due by F.

In an action by plaintiffs against defendants for the recovery of the title-deeds—

Held that, in the absence of any special agreement or of circumstances indicating a contrary intention, the inference was that the plaintiffs in delivering the deeds did not intend to part with the possession of them absolutely in favour of F, and no right to such possession passed to F even on the execution of the conveyance in his favour, and that therefore neither did the defendants as F's proctors and notaries acquire a lien over the title deeds for the fees due by F or any right to detain them from the plaintiffs.

The two plaintiffs sued the two defendants, a firm of proctors and notaries, for the recovery of certain deeds, to the custody and possession of which the plaintiffs, as owners of Kitulgalle Estate, were entitled, viz: a crown grant of the estate to one Fonseka, a conveyance by Fonseka to the plaintiffs and a conveyance (attested by the first defendant as notary public) by the plaintiffs in favour of one Fyler. The deeds were alleged to be unlawfully detained by the defendants. The defendants in answer admitted plaintiffs' ownership of Kitulgalle Estate, but denied their right to the custody and possession of the deeds, and justified their detention of them by pleading that the plaintiffs, being the owners of the estate, had agreed to sell it to Fyler, and the deeds were delivered by the proctors and notaries of the plaintiffs, the intending vendors, to the defendants, as proctors and notaries of Fyler, the intending purchaser, for the purpose of drawing out and preparing for execution the following deeds, for reward to the defendants, viz: a conveyance by plaintiffs to Fyler, and a mortgage by Fyler to plaintiffs, and the said deeds of conveyance and mortgage were subsequently drawn and prepared by the defendants as notaries and duly executed by the plaintiffs as vendors and Fyler as mortgagor respectively, and thereafter were duly attested by defendants as notaries. The defendants alleged that for their fees in respect of the drawing and preparing of the conveyance and mortgage they were entitled to receive from Fyler the sum of Rs. 310·75, and detained the said deeds for a lien and security for that sum. The defendants also claimed a right of lien in respect of another sum of Rs. 359·37 due by Fyler on general account. They also pleaded that they detained the deeds as security for the said moneys due by Fyler at the request of and with the consent of the plaintiffs.

At the hearing, parties agreed that the court should determine the right of lien claimed on the facts disclosed in the pleadings, it being further agreed by the parties that the plaintiffs had repurchased the Estate in execution of a judgment obtained by them against Fyler on the mortgage. The district judge found for the defendants and dismissed the action with costs.

The plaintiffs appealed.

Wendt (*de Saram* with him) for the appellants. It is submitted that defendants have not made out their lien. The principles regulating a solicitor's lien were long ago clearly laid down by Lord Cranworth in *Pelly* v. *Wathen*, 1 De G. M. & G. at page 23: "The general lien of a solicitor is merely a right to keep back from his client the deeds and papers which he holds as solicitor, until his bill of costs is satisfied. It is a right derived entirely through the client, and therefore, on the obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor." The plaintiffs here had an absolute right to the deeds when they handed them to defendants, and they so handed them, not only in order that a conveyance might be prepared in Fyler's favour (which by itself would have transferred the deeds to Fyler) but that there should also be a mortgage executed for the purchase money by Fyler in plaintiffs' favour. Such mortgage was in fact executed, and plaintiffs have since foreclosed their mortgage and rebought the land. They are therefore now in as strong a position as at the moment when they gave the deeds to defendants, and are entitled to have them back. Then again, the district judge finds that the defendants acted for both plaintiffs and Fyler. Acting for the plaintiffs as mortgagees, it was defendants' duty to protect their interests, and not having given express notice of their lien, must be taken to have waived it, if it ever existed. *Ex parte Snell*, 46 L. J. Ch. 627; *Ex parte Fuller*, 50 L. J. Ch 448; *Ex parte Quin*, 53 L. J. Ch. 302. The district judge has not distinguished between the special lien in respect of R 310·75 and the general lien in respect of R 359·37. It is submitted that the latter certainly cannot be enforced against the plaintiffs.

Dornhorst (*Loos* with him) for the respondents. The argument for plaintiffs proceeds upon the erroneous assumption that a mortgagee in Ceylon is entitled to the possession of the title-deeds of the mortgaged lands. He is not, and therein he differs from an English mortgagee, who has the legal estate and might recover the deeds by action if they were withheld from him. That was the *ratio*

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decidendi in *Ex parte Quin*. The mortgagee in Ceylon acquires no further right in the property than that of bringing it to a judicial sale for the satisfaction of his debt. If the plaintiffs' claim as mortgagees were well founded, a man after incurring costs to his proctor for the conveyance in his favour, might get a mortgage executed by another proctor and so deprive the former of his lien over the deeds. [He cited *In re Llewellin*, L. R. [1891] 3 Ch. 145; *Mackenzie* v. *Macintosh*, 64 L. T. N. S. 331; *Ex parte Calvert*, 45 L. J. Bank. 134, L. R. 3 Ch. D. 317; *Colmer* v. *Ede*, 40 L. J. Ch. 185]

Wendt, in reply. This is not a case of a client seeking to defeat his solicitor's lien by a mortgage executed by another solicitor. The defendants themselves drew up and attested the mortgage in plaintiff's favour, and that is a strong point against them. Whatever the difference between the mortgage laws of England and of Ceylon, the defendants were bound to protect the interests of plaintiffs, who also were their clients.

Cur. adv. vult.

On July 12, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—It is scarcely necessary to point out that this is an action of *detinue* to recover the possession of certain title deeds of an estate of which the plaintiffs are admitted by the defendants to be the owners and which the defendants admit they received from the plaintiffs. Plaintiffs allege that they are entitled to the possession of the deeds by reason of "being such owners", which is pleading evidence and does not estop them from recovering on any other title to the possession of the deeds, and what that other title is the defendants have themselves set up. As I understand the pleadings or perhaps misunderstand them, the defendants do not claim any right to the deeds as against the plaintiffs, from whom they admit they received them, except such as arises in right of a lien which they set up. Looking at the defendants' plea setting up such lien it seems to me to be clear that the burden of proving it lies on the defendants, and if they proved it to the whole extent to which it goes, I venture to think it would not show that they had obtained a lien on the deeds as against the plaintiffs, from whom they admit they got them. This the counsel at the trial treated as the issue between them, which the district judge decided and upon which an appeal was taken and the case argued before us. I do not gather from the pleadings that the defendants wished to contest with the plaintiffs the barren issue whether the plaintiffs as owners of the estate were entitled to the deeds; what they wished decided, and what perhaps would have been more strictly an issue of law on the defendants' statement of facts, and what the parties correctly treated as an issue of law, and what the judge decided as an issue of law, is—On the facts stated in defendants' plea, did they get a lien against the plaintiffs? Now, what is the defendants' statement of facts on which they rely as giving them the lien? They say the plaintiffs had agreed to sell the estate to one Fyler, that the deeds were delivered by the plaintiffs' proctors Messrs. Julius and Creasy to them, the defendants, as proctors of Fyler, for the purpose of preparing for execution a conveyance from plaintiffs to Fyler and a mortgage from Fyler to plaintiffs, that these deeds were drawn by the defendants and duly executed, and that they, the defendants, were entitled to certain fees for that work, and that the defendants detained the deeds on a lien therefor. Apart from any special agreement between the parties (the defendants allege none) this statement of facts raises the common sense inference, of which proof is not required, that the plaintiffs when they delivered the deeds in question to the defendants as Fyler's proctors could not have had any intention to convey to Fyler any right, title or interest in the deeds in question, or in the land to which they relate, which was to exist and be independent of the mortgage which Fyler was to give them over the property. If there was such an intention, the burthen was on the defendants. It is therefore manifest that Fyler could not have created any lien over the one or the other as against the plaintiffs, and if Fyler could not have created a lien, then his proctors upon clear law could not have acquired a lien which their client had no legal right to create. It was argued for the defendants that, as soon as the conveyance to Fyler was complete, the deeds with the estate passed to Fyler and from that moment Fyler had the right to deal as well with the one as the other. This is clearly fallacious. The inference of fact is that the deeds were delivered to the defendants with the object of making Fyler no further owner of the estate than the qualified one of mortgaging it to the plaintiffs, and it would be most unreasonable to assume that the plaintiffs intended to give Fyler the right to encumber his estate or the deeds of his estate in priority to the mortgage: at least, the burthen of such intention, if it existed, lies on defendants. The defendants' contention rests on the fallacy that every owner of an estate is legally entitled to the ownership or possession of the insrumnts of title to it so soon as he becomes owner. That is not so. The

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ownership of the land and the possession of the instruments of title may legally exist separately and depend on the contract and intention of individuals; and, in the case before us, I take it to be beyond dispute that there is nothing to show or even indicate that, when plaintiffs handed the deeds to defendants, they intended to part with the possession of them in favour of Fyler and of Fyler's limited title as owner. The defendants nowhere attempt to say that the deeds came into their hands from Fyler. It was the plaintiffs who delivered them to defendants. But assuming me to be even so far wrong in the conclusion which I have arrived at as to the issue framed in the action, there can be no doubt that the defendants cannot claim a lien to the prejudice of a client for whom they were acting in the very matter in which they were bound to protect him. Here the defendants admit that in drawing the mortgage deed they acted as plaintiff's solicitors, although they were to be paid for their work by Fyler, and they are stopped from interposing any claim of their own which would militate against the absolute security which the mortgage was intended to secure.

If the defendants could not claim a lien in respect of the particular items of fees for the conveyance and mortgage, *a fortiori* they could not claim for a general account, and therefore the plaintiff should have judgment with costs.

With regard to the issue, if issue there was, that the plaintiffs acquiesced in this lien, I can only say that there is no proof of it, and I do not see how the defendants could have relied on that issue in the court below when I find that the district judge and counsel directed their attention solely to the legal questions which I have disposed of.

LAWRIE, J.—The plaintiffs are not entitled to succeed on the strength of the only title set out by them, viz., that they are owners of the estate. The defendants, however, cured the defects of the plaint by a statement of the way in which the deeds came into their hands. On their own showing they have no right to detain the deeds from the plaintiffs.

Set aside.

———:o:———

Present :—BURNSIDE, C.J., and WITHERS, J.

(*August* 2, 1892.)

D. C. Kandy, No. 4,383. } CASSEEM v. PACKEER.

Arbitration—Reference in pending suit—Award—Appeal—Civil Procedure Code, sections 687, 690, 692.

No appeal lies from an order entering up judgment in terms of an award made upon a voluntary reference in a pending suit, even when the party aggrieved wishes not to attack the award on its merits but to question its validity on legal grounds.

The plaintiff sued the defendants on a promissory note. The defendants in their answer denied the making of the note, and alleged the indebtedness of the plaintiff to them in a certain sum, which they claimed in reconvention. On August 6, 1891, on the application of the parties, all matters in dispute were referred to arbitration. The arbitrators, on October 22, 1891, filed their award which gave judgment for plaintiff for a certain sum and costs of action. Thereafter the plaintiff moved that the award filed be made a rule of court and judgment entered in terms thereof. At the discussion of this motion, on December 7, 1891, the defendants objected that the arbitrators had not decided the main issue in the case, viz., the genuineness of the note sued on, and that therefore the award could not be made a rule of court. The district judge, however, upheld the award and ordered judgment to be entered accordingly.

The defendant appealed from the order of the district judge and prayed in their petition of appeal that the same might be set aside and the case sent back for a new trial.

The case first came on before CLARENCE and DIAS, JJ., on March 18, 1892, when their lordships reserved judgment on a preliminary objection taken by the respondent. CLARENCE, J., having left the island, and DIAS, J., having ceased to be a Judge of the Court before any judgment was delivered, the case now came on again.

Wendt, for the appellant.

Dornhorst, for the respondent, took the preliminary objection that this was an appeal from a judgment in terms of an award, and that under section 692 of the Civil Procedure Code no such appeal lay. If defendant desired to attack the award, he should have moved to set it aside, and appealed if his motion was refused.

Wendt, for the appellant. It may be conceded that when a decree has been entered in terms of an award the decree cannot be attacked by appeal on its merits in the way an appellant may attack the judgment of the district judge in an ordinary case; in other words, he cannot question the propriety of the award on the materials before the arbitrator. But the court has recognized the right of a party aggrieved to appeal against the decree and impeach the regularity of the award on such grounds as the absence of a proper reference, the award being out of time, &c. This was ruled under the corresponding provision of the Arbitration Ordinance No. 15 of 1866, where the words (section 28) were much stronger—"the judgment shall be final and shall not be subject to appeal".

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(*D. C. Galle, No.* 42,400, 2 S. C. C. 85 ; *C. R. Ratnapura, No.* 9,727, 7 S. C. C. 99 ; *D. C. Colombo, No.* 89,476, 7 S. C. C. 101.) The appeal here is not so much against the decree as against the order overruling the defendant's objection to the award. The decree followed immediately on the order, and consequently the petition of appeal embraces both.

Dornhorst, in reply. The intention of the Code clearly is that objections to the award should be made before it has been embodied in a judgment. The objector must come forward by petition with a substantive motion under section 687, either to set aside the award or to have it modified or corrected or remitted to the arbitrators for reconsideration. This must be done within fifteen days, after the lapse of which judgment must go as of course in terms of the award. The defendants' objection here was one falling under head (*a*) of section 690, as a ground for remitting the award, and they should within fifteen days have asked the court to remit it. Not having done so they have lost the benefit of the objection. It is not sufficient to urge the objection as a ground for not entering judgment without a substantive application under section 687. [He cited *D. C. Colombo, No.* 89,848, 9 S. C. C. 22.]

The order of the Supreme Court rejecting the appeal was delivered by :—

Burnside, C. J.—We hold that no appeal lies. There was no motion attacking the award. Plaintiff comes into court and asks for judgment on the award, and defendant by way of objection says : I do not wish judgment entered because the award is irregular. He does not affirmatively move that the award be set aside or remitted, as he should have done. I was at first struck by the argument that this is an appeal against the order overruling defendant's objection, but, on consideration, I think it is not. There is no proper objection. It is an appeal against the decree in terms of the award. I would add that my brothers Clarence and Dias, before whom this appeal first came, held the same opinion as I have expressed.

Appeal rejected.

—— : o : ——

Present :—Burnside, C. J., Lawrie and Withers, JJ.

(*January* 29 *and July* 7 *and* 12, 1892.)

D. C. Galle, No. 55,943. } Templer v. Seneviratne.

Practice—Land acquisition—Libel of reference—Claimants—Parties not named in the libel—Intervention—Ordinance No. 3 of 1876, sections 11 and 32—Civil Procedure Code, sections 18 and 19.

In the matter of a reference under the Land Acquisition Ordinance 1876, to which the only claimants who appeared before the Government Agent were parties defendant, and in which the questions submittted were as to the amount of compensation and the respective rights of these parties, the district court inquired into the claims of certain other persons who appeared before it but who did not regularly make themselves parties to the record.

Held, that the district court had no authority to inquire into the claims of persons other than the original claimants, and the proceedings in that respect were irregular.

Per Withers, J.—Inasmuch as by section 32 of the Land Acquisition Ordinance 1876 the proceedings are subject to the practice and procedure in ordinary civil suits, no person can intervene in any such proceeding otherwise than as provided in section 18 of the Civil Procedure Code.

Under the provisions of the Land Acquisition Ordinance No. 3 of 1876 the Government Agent of the Southern Province acquired a certain portion of land for Government, and being unable to apportion the amount of compensation among the four claimants who appeared before him in pursuance of the notice published in the *Government Gazette*, he referred the matter to the District Court of Galle, stating in his libel of reference the extent of the land needed, the names of the claimants, and the amount of compensation which he was willing to give, the libel of reference naming the said four claimants as parties defendant. Thereafter certain other persons appeared before the district court, and were allowed to file a statement of claim by which they claimed an interest in the land adversely to the original claimants. The matter then came on for final determination, when the district judge after inquiry distributed the amount among the original claimants as well as those who subsequently appeared before him.

The first and second defendants (two of the original claimants) appealed.

The case was first argued before Burnside, C. J., and Clarence, J., on January 29, 1892, when the following counsel appeared :—

Dornhorst, for the appellants.

Layard, A. A.-G. (*Browne* with him), for the fourth defendant, respondent.

Browne, for the other defendants, respondents.

Cur. adv. vult.

Their lordshps not being able to agree upon a judgment, the case was sent down for argument on July 7, 1892, before the Full Court, consisting of Burnside, C.J., and Lawrie and Withers, JJ. Counsel agreed to leave the matter to the Court, on the written opinions of Burnside, C.J., and Clarence, J., without further argument.

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On July 12, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—It is not possible to support these proceedings even if the judgment of the district judge was proved to do what is called substantial justice. The proceedings are *ultra vires.*

The libel of reference under the Land Acquisition Ordinance alleged that the Government Agent had been instructed to acquire certain land for the use of the public, that after enquiring into the value of the land he had determined the compensation to be paid therefor to four named claimants, that as they could not agree as to their respective rights he brought the amount into court and prayed that the court would, pursuant to the ordinance, proceed to enquire and determine, first, what is sufficient compensation to be paid to the parties defendant and claimant, and, second, to apportion the amount amongst those claimants.

Upon the libel of reference the learned district judge seems to have ignored the first point for decision, and at once entered upon a roving enquiry as to the rights of a great many people who were no parties to the record and who have never made any claim either before the Governmet Agent or district judge. That the original claimants must be prejudiced is manifest, unless the rules of arithmetic are fallacies.

There is no authority for the proceedings. They are *ultra vires*, and the district judge's judgment is a nullity, and I would set it aside to avoid the future litigation and consequent mischief which it may occasion, and send the case back to be dealt with by the district judge upon the reference as made to him ; but I would give no costs, as no one seems free from the responsibility of having contributed towards the proceedings.

LAWRIE, J.—I agree. Neither the Government Agent and the persons interested, nor the court has by an award settled the amount of compensation, and until that be done, no apportionment can be made.

WITHERS, J.—This case was not reargued in appeal. On November 18, 1890, the Government Agent of the Southern Province referred to the district court of Galle the matter of a claim to a parcel of land which appeared to be needed for public purposes, in pursuance of the provisions of Ordinance No. 3 of 1876, both because he was unable to agree with the four claimants named in his libel of reference as to the amount of compensation to be allowed for the land, and because on his enquiry into the claims of those four persons who had attended in pursuance of the notice duly published by him in the *Government Gazette* questions affecting title arose among two or more persons (clause 11 of Ordinance 3 of 1876). There was no indication in his libel that he had any reason to think that others than the four claimants were interested in the land. See clause 13, letter (*b*), Ordinance 3 of 1876. The amount the Government Agent was willing to award to the four claimants is Rs. 1,138·36.

I gather from the minutes on page 2 of the record that the four claimants were agreed that that amount was sufficient compensation. The only question, therefore, that had to be tried was the amount to be apportioned to the claimants or some or one of them according to their or his respective interests. According to clause 32 of Ordinance 3 of 1876 the proceedings of the district court in a matter of the kind shall be subject to the prevailing rules of practice and procedure. According to clause 19 of Ordinance 2 of 1889, which governed the procedure herein, no person can intervene in any action otherwise than as provided by clause 18 of Ordinance 2 of 1889. The intervention of the additional claimants could not possibly be necessary for the adjudication of the question raised between the Government Agent and the four claimants who had attended in pursuance of the notice.

For these reasons I agree with my Lord the Chief Justice that the district judge had no authority to enquire into the claims of the intervenients. I think his judgment should be set aside, and the case remitted for the purpose of his adjudicating on the claims of the four persons named in the libel of reference.

Set aside.

———:o:———

Present :—LAWRIE, J.

(*June* 24 *and* 30, 1892.)

P. C. Kalutara, No, 13,205. } SILVA v. DORIS.

Rum—Jamaica rum—Imported spirits—Ordinance No. 10 of 1844, section 26.

The provisions of the Ordinance No. 10 of 1844 as to sale of spirits mentioned therein apply to such spirits whether manufactured out of or in Ceylon.

Accordingly, the unlicensed sale of Jamaica rum imported into Ceylon.

Held, to be an offence under section 26 of the Ordinance.

The defendant was charged under the Ordinance No. 10 of 1844 with selling by retail a certain quantity of rum, spirits distilled from the produce of the sugar cane, without a licence. The rum which was sold was Jamaica rum imported from abroad.

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The defendant appealed from a conviction.

Dornhorst (*Pereira*, with him), for the appellant. The scope of the ordinance was to create a monopoly as regards the manufacture of spirits in Ceylon. This is apparent from the sections dealing with distillation, possession, and sale of spirits. The power of licensing also extends only to spirits manufactured in Ceylon. This is confirmed by the preamble to the ordinance, which states its object to be to amend "the law relative to the distillation and sale of arrack, rum, and toddy within these settlements". It is submitted, therefore, that imported spirits, though they may answer in description to the locally manufactured article, are outside the provisions of the ordinance.

VanLangenberg, for respondent. There is no express distinction in the ordinance between imported and locally manufactured spirits. Nor can such a distinction be gathered from the nature of the provisions. It is submitted that the scope of the ordinance was, not to create a monopoly as to manufacture of spirits, but to make fiscal regulations as to their sale, and the control imposed by it is applicable to the imported as well as to the local article.

Cur. adv. vult.

On June 30, 1892, the following judgment was delivered :—

LAWRIE, J.—This conviction and sentence are in my opinion right, and must be affirmed.

I find nothing in the ordinance which puts rum made in Jamaica or elsewhere out of Ceylon on a different position with rum made in the colony.

Affirmed.

———:o:———

Present :—BURNSIDE, C.J., LAWRIE and WITHERS, JJ.

(*July* 7 *and* 26, 1892.)

D. C. Colombo, No. C 1,187. } MOHAMADO CASSIM v. CASSIM MARIKAR.

Executor—Estate of an executor in Ceylon—Specific devise—Title of devisee—Time of vesting—Executor's assent—Notarial instrument—English Law—Roman-Dutch Law.

In a question, under a specific devise of land, as to the necessity of the executor's assent for the validity of the devisee's title :—

Held, per BURNSIDE, C. J.—In Ceylon, if a person dies intestate, all his immoveable property passes to his administrator; but if he leaves a will, only such property as is not specifically devised passes to his executor. Land specifically devised vests in the devisee immediately on the testator's death, by virtue of the devise contained in the will, but the devisee's title is imperfect, the land remaining liable for the testator's debts in due course of administration. The executor's right to resort to property so devised for payment of debts is an interest in land, of which he can divest himself only by deed duly executed.

Per LAWRIE, J.—The title in land specifically devised passes, by virtue of the devise, to the devisee, but that title may be defeated by the creditors of the testator or by the executor in the course of realizing the estate for payment of debts. Until the debts are paid the devisee may be required either to relinquish the land or contribute to the extent of its value towards payment of debts. The devisee's title may be perfected by securing the executor's assent to the devisee. Such assent need not be evidenced by notarial deed, and need not even be express, but may be implied.

Per WITHERS, J.—An executor in Ceylon is a different person from the executor under the Roman-Dutch Law, who had no more powers than the will gave him, and did not represent the testator. An executor or administrator in Ceylon does represent the deceased for purpose of administration, and has the status and powers of a legal representative, and by probate or letters an estate commensurate with those powers, sufficient for administration and limited thereto, passes to him. No assent of the executor or administrator is necessary to pass title to the heirs appointed by the will or the heirs-at-law, for they have this title on the death of the testator or intestate, subject to the suspension of enjoyment during administration and subject to the limited estate or title of the executor or administrator. The executor's or administrator's duties concluded, his powers and estate disappear, and what remains after liquidation is left free enjoyment by the heirs.

Upon a judgment obtained by the first defendant against the second and third defendants (husband and wife) a certain land was seized in execution, when the plaintiff preferred a claim hitherto. The claim after due inquiry having been disallowed, the plaintiff brought the present action under section 247 of the Civil Procedure Code.

The plaint averred that the land in question was the property of one Cader Saibo, deceased, who by his will, which was duly proved, and of which probate was granted, had devised half thereof to plaintiff, burdened with a prohibition against alienation and incumbrance, that upon the seizure in execution the plaintiff made a claim to the land, which was disallowed, and that "by the said wrongful seizure" the plaintiff suffered certain damage. The plaintiff among other things prayed for a declaration of title to an undivided half share of the land.

The first defendant, in his answer, among other things, pleaded as a matter of law that "the plaint disclosed no present interest in the premises, it being therein nowhere alleged that the executors of Cader Saibo's will had assented to the devise to the plaintiff". He further averred that under a judgment against Cader Saibo's executors the land in question was sold and purchased by first defendant, who thereafter transferred it to third defendant, and put her in possession, and that the seizure in ques-

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tion was made under a writ of execution issued by the first defendant against the second and third.

At the trial the point of law was first argued, and ultimately the plaintiff moved to amend the plaint by averring the executor's assent. Thereupon the first defendant further objected that such assent must in Ceylon be manifested by a notarial instrument and that therefore the plaintiff's action could not still be maintained. The learned district judge upheld this contention and dismissed the action.

The plaintiff appealed.

Dornhorst (*Weinman* with him) for appellant. It is submitted that assent to a devise, even if necessary, need not be by deed. Realty in Ceylon being put on the same footing as personalty, the devisee is entitled to shew assent in the ways in which a legatee may prove it in England. Proof of delivery of possession is evidence of assent. (Williams on Executors and Administrators, p. 1,274.) It is also submitted that a devise vests in the devisee directly, without any conveyance by the executor, subject only to the executor's power to resort to the devised property for satisfying debts. *D. C. Kandy No.* 3,833, 1 C. L. R. 101. The executor has only a qualified and not an absolute title. Further, it is submitted that the seizure in this instance was bad, as the judgment on which writ issued was personally against the executors. Executors could not bind the estate even by debts incurred for its benefit. *D. C. Negombo No.* 15,483 8 S. C. C. 198, and *Farhall* v. *Farhall*, L. R 2 Ch. 124, therein cited. The appellant therefore had a sufficient interest in the property to have made the claim.

Layard, S.-G. (*Morgan* and *Sampayo* with him), for respondent. The title to the property of the estate vests in the executors. The earliest reported case is *D. C. Galle* 28.256, Vand. Rep. 273, in which it was held that the English law as to the powers and duties of executors and administrators was in force in Ceylon, with the difference that such powers and duties extend to real as well as personal property. See also *Gavin* v. *Hadden* 8 Moore P. C. N. S. 122.

[BURNSIDE, C. J.—" Powers and duties", but have we held that title vests ?]

If title did not pass, an executor could not dispose of property, which he clearly can. Since the case in Vand. the law has been that title passes to the executor. *D. C. Galle No.* 53,941, 8. S. C. C. 192, in which it was held that immoveable as well as moveable property passed to the executor, and until the assent of the executor was given a legatee could not maintain ejectment, but that the executor alone could sue. Clearly the executor could not sue unless he had title. This was confirmed by *D. C. Kandy No.* 3,833, 1 C. L. R. 101. It follows that the assent of the executor to a devise must be expressed by deed. It is true that in England the assent to a bequest may be by parole or may even be implied by conduct, but that is because title to moveables may be passed by mere delivery and no deed is required. But in the case of real property, since title vests in the executor, he could not, under Ordinance No. 7 of 1840, divest himself of that title except by deed. The gist of the decisions is that the legal estate is in the executor and it must be duly conveyed if not required for payment of debts.

[BURNSIDE, C. J. We have held that heirs could convey good title as against an administrator subsequently appointed. *D. C. Negombo, No.* 14,234, 8 S. C. C. 54.]

It is submitted that that is inconsistent with the ruling already alluded to as to the title of executors. Besides, that is a case of an administrator, in whom the title would vest only on issue of letters, but in case of an executor it passes directly upon death of the testator.

[BURNSIDE, C. J. That is when there is no specific devise.]

It is submitted that there is no distinction in principle, as regards the title of the executor, between the general estate and a specific devise, nor is there such distinction drawn in the decisions cited. In England all personalty passes to the executor, whether specially bequeathed or not, and that being so, in Ceylon all realty as well as personalty must pass to the executor.

[WITHERS, J. Is this not the difference between English law and our law, that under our law title passes to the devisee subject to a limited estate in the executor to sell property for debts ?]

It is submitted under our law as laid down by previous decisions the property does not vest directly in devisees but in the executor, who must give his assent so as to pass title to them. Further, granting that the executor has only a limited estate which enables him to sell, then there has practically been a sale in this case by the executors, for on a judgment obtained against them as executors the property in question was sold by the fiscal.

Dornhorst, in reply. The Ordinance No. 7 of 1840 itself is in favour of the appellant's contention. It enacts what is essential for the validity of a will, and if the will is valid a devise vests in the devisee by operation of the enactment. It is submitted that an administrator or executor is not a trustee with the legal estate. *D. C. Galle* (*Testamentary*) *No.* 2,948, 2 C. L. R. 19. The sale by the fiscal is not an act of administration in the same sense as a sale by executors themselves, and so the contention of the other

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side that the sale is good as an exercise of the executor's power cannot prevail.

Cur. adv. vult.

On July 26, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—This case is one *primæ impressionis*, and we must deal with it on principle rather than on any decided authority.

I think we may admit that this court has ruled that on the death of an intestate his immoveable property passes to his administrator, and I think it only consistent with this principle that in case of testacy, immoveable property, the title to which is not devised or specially appropriated by the will, passes to the executor as against the heir. I myself have so ruled, and I always understood that was the opinion of my brothers; and until the executor or administrator had legally divested himself of the title so acquired, none other could be asserted against it. But as regards immoveable property specially devised, and the title to which under the will is distinctly recognised by special statute law, it seems to me that there can be no authority for holding that the executor took the estate notwithstanding the title already created by the will. This would, in fact, be to repeal the Ordinance No. 7 of 1840, clause 3, without the intervention of the Legislature. I think such a devise does pass the estate in the land devised to the extent of the devise. By English law specially devised property stands on a different footing to other property, and although such a devise does not *a priori* release the property from liability for debt, it postpones its liability in the order of administration. So with specially devised land here, whilst it would be available for the testator's debts only in the order of administration, the title of the devisee would be imperfect only until it had been discharged of that imperfection. How the title is to be perfected in the hands of the devisee is a question which we should decide. It is only in my opinion when the specially devised land is required by the executor for the purposes of administration that he acquires an interest in it, and that interest is an interest in land which can only be divested in the way the law requires. So that it is always safer that the executor should recognise the title of the special devisee and join him in any conveyance he may make. Yet, if property be not required for the purposes of administration, then the special devisee of it would take a clean title unburdened by any right of the executor or creditors. It may be argued that, pending the decision of the question of fact as to the liability or non-liability of such land for debts, the title would be doubtful. No doubt it would, and the title would not be safe till that question had been set at rest, but it would always be open to a devisee to call on an executor within a reasonable time to make his election, and an executor not electing within a reasonable time would be estopped from electing; and it would equally be always open to a creditor in an action against the executor to obtain a decree binding that land to satisfy that debt if he could shew that it ought to be.

Applying this law to the case before us, it appears that the land was specially devised, but there is nothing before us to show that, when Sadayappa got judgment against the executors, it was liable in due order of administration to be sold for the testator's debt to him. No legal presumption can arise, and the mere fact that it was seized and sold is not sufficient. It may be that there was abundant other property, or there may be other circumstances shewing that so far as that writ went the property was not subject to it, and therefore the legal estate acquired by the devisee was in no way affected, and the plaintiff was entitled to succeed.

The judgment of the district judge will be reversed and judgment entered for plaintiff with costs.

LAWRIE, J.—I regret that we should attempt to do justice between the parties on these imperfect pleadings. The plaintiff was allowed by the district judge to amend the libel by averring that the executors had assented to the devise. If that amendment had been made the defendants would have been called on to admit or deny the averment of assent. The amendment, though allowed, was not made, and I do not know whether we are called on to deal with the case as one in which assent was or was not given.

The devise of this land to the plaintiff was made by the testator by a will executed before a notary and witnesses. It fulfilled the requirements of the Ordinance 7 of 1840. That devise in my opinion passed the title to the land to the devisee, taking it away on the one hand from the heirs-at-law and on the other from the executor of the will. Holding this opinion I differ from part of the opinion of my brother Clarence reported in 8 S. C. C. 192.

But though the title passed to the devisee, the land so devised, like the whole property of the testator, was primarily liable for payment of his debts. The title of the devisee was liable to be defeated by the creditors or by the executor in the course of realizing the estate for the payment of debts. Until these were paid the devisee might be required either to relinquish the land, or, if he preferred to keep it, to contribute to the payment of the debts to the extent of its value. As between himself and the executor the devisee might terminate the suspense by obtaining assent to the devise.

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In my opinion such assent need not be signified by a deed notarially executed; it need not be an express assent, for in some cases the assent may be presumed from the conduct of the executor. In other cases (and this is said to be one) the assent may be expressly given either verbally or in writing. The question, in what way an executor can legally give his assent, is a totally different question from whether, assuming the title to the land to be in the executor, he can pass that title in any other way than by notarial deed. It must, at once, be conceded that if the title be in the executor, a deed is necessary; but, as my opinion is that the title passed by the will to the devisee, no transfer is necessary from the executor. I assume then, that the title was in the plaintiff and that the executor assented. The pleadings seem to me to suggest a different question, viz., whether the assent of the executor removed the land specially devised beyond the reach of the first defendant, a creditor of the testator, whose debt was unpaid at the date of the assent.

Here the land was sold by the fiscal in execution of a decree against the executors. Presumably the judgment so obtained against them was for a debt due by their testator. I hesitate to say that under such a judgment a creditor may not levy on any property of the deceased; and if he obtains payment by the sale of land specially devised, it may be that the remedy of the devisee is against the executor or against the other legatees and devisees for contribution.

I feel that the facts of the case are not sufficiently before me. The judgment I should wish to give is to set aside the judgment under review and to send the case back for amendment of pleadings for trial.

WITHERS, J.—I agree with my Lord in deciding that the plaintiff is entitled to judgment rather than the defendants and that the judgment of the court below must be reversed accordingly. If this were an ordinary case, I should say no more. But as the grounds of my opinion do not accord with those of the opinion of the Chief Justice, and as the questions raised are of very great importance, and as the decisions of this court regarding them appear to me irreconcileable, I venture with all respect to state my opinion at some length.

I certainly thought till recent times that by the Roman Dutch Law prevailing in this country the property of a testator, whether real or personal, and whether specifically or generally devised, was transmitted on death by the will to the heirs therein appointed, and that property, both real and personal, of one dying intestate descended on death to his heirs according to law.

The learned Solicitor-General, however, contended that this has never been our law, and in support of his contention cited among other authorities *Gavin* v. *Hadden* 8 Moore P. C. N. S. and a case reported in 8 S. C. C. 192. The passage he cited from the first authority at page 122 runs thus:—"It is stated in the judgment in Ceylon (and the form of the probate and all the proceedings in this case and in the other cases with which they have been furnished show their lordships that it has been correctly stated) that an executor in Ceylon has the same power as an English executor with this addition, that it extends over all real estate just as in England it extends over chattels personal."

I do not think this passage can be construed to mean that the *title* in all property passes to the Ceylon executor in the same way as it does to the English executor.

The second of those authorities certainly supports the learned Solicitor-General's contention. There is no doubt that the Ceylon executor is a different person to the old Roman Dutch Law executor, who had no more powers than the will gave him, and did not represent the deceased testator. Our Ceylon executor and administrator do represent the deceased for the purposes of administration, the probate and letters respectively giving to one and the other the status and powers of a legal representative for that purpose. There must be, of course, an estate commensurate with those powers, and by probate and letters an estate sufficient for administration and limited thereto passes to the Ceylon executor and administrator respectively.

I see no more difficulty in the conception of a limited estate being extracted out of the inheritance and given by operation of law to the executor than I do in the conception of particular estates being carved out of an estate in fee simple.

By the English law the executor's assent is necessary to give *title* even to a special legatee; and if our law is the same, the executor's assent, in order to give *title* to a special devisee, can only be given in the way required by our law, that is, by a duly executed notarial instrument; so it really comes to this, that if a man specially devises parcels of land to several children and there are no claims against the testator's estate, the executor is bound to assign each parcel to a particular devisee by a notarial instrument. What a burden is thereby laid upon the inheritance! However, if all the property of a testatee or intestatee, real and personal, specific and general, passes by probate and letters to a Ceylon executor and administrator as moveable assets do to

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an English executor and administrator, let it be so clearly understood and this law be once and for ever laid down with a precision that can admit of no mistake. As to the property of a man dying in Ceylon intestate, it has been laid down:—

(*a*) That a surviving spouse can liquidate the deceased's estate for actual debts just as well as a legal representative. 5 S. C. C. 70.

(*b*) That the next of kin of an intestate, if all join in the action, can sue to recover the debts owing to the deceased without a representative. 7 S. C. C. 23.

(*c*) That where there are no debts owing to or by the deceased, the next of kin can distribute the property amongst themselves without representation. 7 S. C. C. 78.

(*d*) That next of kin acquire title *on death* and can without a representative unite and dispose of their inheritance to satisfy claims against the estate of the intestate, and pass a *title* to the purchasers in spite of representation *after the sale* in liquidation. 8 S. C. C. 54 and 205.

(*e*) That next of kin of an intestate can recover a judgment for *title* to land. 9 S. C. C. 63.

(*f*) That next of kin of an intestate can redeem a mortgage without representation. 1 C. L. R. 86.

I humbly conceive, then, no assent of the Ceylon executor or administrator is necessary to pass title to the heirs appointed in the will or the heirs-at-law, for they have this title on the death of the testator or intestate subject to suspension of enjoyment pending administration and subject to the limited estate or title of the executor and administrator which I have spoken of before, and an executor's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by the heirs. As to the minor points, I am quite with Mr. Dornhorst in thinking that his clients have sufficient interest in the subject matter of this action to entitle them to bring it, and I cannot say I am satisfied that the premises herein sought to be recovered were sold for a *bona fide* claim against the estate of the admitted owner.

Set aside.

———: o :———

Present:—Dias and Lawrie, JJ.

(*June* 14 *and* 21, 1892.)

D. C. Kegalle, No. C 85. } Dingirihamy v. Menika.

Kandyan Law—Husband and wife—Right of husband in deceased wife's estate—Paraveny property.

Under Kandyan Law a husband is not entitled to any life interest in the *paraveny* property of his deceased wife.

This was a partition suit, the plaint averring that plaintiff and the four defendants were entitled each to one-fifth of the land in question as heirs of Punchihamy deceased. The defendants pleaded that the land was the property of Punchihamy and her sister Menickhamy, that first defendant as heir of Menickhamy was entitled to one-half of the land, and that plaintiff and the remaining defendants were each entitled to one-eighth.

At the trial it transpired in evidence that Menickhamy and Punchihamy were married successively to one Appu Naide, who was thus the father of the plaintiff and defendants and was still alive. The district judge dismissed the action, holding that the title of the parties was subject to a life-interest in favour of their father and the land could not be partitioned during his lifetime.

The plaintiff appealed.

Sampayo, for appellant, cited *Perera's Armour* p. 29 and *Marshall* p. 348.

Van Langenberg for respondents.

Cur. adv. vult.

On June 21, 1892, the following judgments were delivered:—

Lawrie, J.—By Kandyan law a widower has no right of life-rent in the paraveny lands of his deceased wife.

The judgment is set aside and the case is sent back to the district court for decision on the issues raised in the pleadings.

The plaintiff is entitled to the costs of this appeal; other costs to abide the final result.

Dias, J.—I agree.

Set aside.

———: o :———

Present:—Burnside, C. J., and Withers, J.

(*August* 5 *and* 9, 1892.)

D. C. Galle, No. 49,861. } Abeyawardena v. Marikar.

Civil Procedure—Death of sole plaintiff—Substitution of legal representative—Application by way of summary procedure—Motion—Civil Procedure Code, sections 91 *and* 395.

In applications under Chapter XXV. of the Civil Procedure Code the provision of section 405 requiring such applications to be by petition is restricted in its operation to cases where the court has a judicial discretion to exercise in the matter of the application, but

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where, as under section 395, the Court has no discretion, the application should not be by petition by way of summary procedure, but by motion as directed by section 91 of the Code.

Under the Civil Procedure Code the practice of reviving judgments does not obtain, and such revival is not required.

A dual motion to substitute a person in the room of a deceased plaintiff and to revive judgment and issue execution is bad for irregularity, because the applicant must be on the record before he can ask for revival of judgment or for execution.

In this action the plaintiff having died after judgment, the legal representative of the deceased plaintiff applied by motion to have his name entered on the record, and to have the judgment against the defendant revived and writs issued for the recovery of a certain sum. The 1st defendant shewed cause against this motion. The learned District Judge allowed the motion, and the defendant appealed.

Dornhorst (*Wendt* with him), for the appellant, contended that the respondent's procedure was wrong. This was an application under section 395 of the Civil Procedure Code, and ought to be by way of summary procedure under chap. xxiv. Section 395 itself does not mention summary procedure, but section 393 does; and section 405, referring to such an application, speaks of "respondent", a term appropriate to summary procedure. The executor has improperly combined in one motion what should properly have formed the subject of two separate applications.

De Saram, for the plaintiff, argued that the application being under section 395, under chap. xxv., headed "Incidental Proceedings", and not being a step in the regular procedure, but only one incidental thereto, was properly made by motion under section 91. The defendant had full opportunity to be heard, and had suffered no prejudice by the form of the motions.

Dornhorst in reply. Section 91 applies to proceedings before judgment; and even if otherwise, is not appropriate to such an important step as the present.

Cur. adv. vult.

On August 9, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—In this case the plaintiff died after judgment, and his executor applied by motion to be made plaintiff on the record in lieu of his testator. His proctor moved the Court for a notice on the defendants to show cause why he, the executor, should not be made a party on record in the room of the deceased plaintiff, and why judgment should not be revived and writs issued for the recovery of the amount of the judgment with interest and costs. The defendants appeared, and the District Judge proceeded to hear evidence, mainly bearing on the question whether the judgment should be revived and writs issued thereon. The questions, whether the applicant was executor or whether he was entitled to be substituted plaintiff on the record, do not seem to have been contested by the defendants. The learned District Judge thereupon made an order that the applicant be made a party on the record, and also that the judgment be revived and that execution do issue thereon. The defendants appealed against this order. It was urged before us in appeal that these proceedings were irregular—that the application to substitute the applicant as plaintiff should have been by way of summary procedure, and not by way of motion. Section 395 ordains that in case of death of a sole plaintiff the legal representative of the decased may apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the action; and by section 405 it is required that in all applications (excluding that under section 398, which does not touch this matter) for the exercise of the discretion of the Court under this chapter all the parties to the action or such of them as may be affected by the order shall be made respondents on the face of the application. The defendants relied on these two sections in support of their contention. For the application respondent reference was made to the heading of the chapter entitled "Incidental Proceedings", and to chap. xiii. section 91, which ordains every application made to the Court in the course of an action, incidental thereto and not a step in the regular procedure, shall be made by motion, and it was urged that the application now under discussion was an incidental proceeding, and governed by section 91 just quoted. I am not without my doubts as to which is right of the two contentions, but I incline to the opinion expressed by my brother Withers that applications of this kind are not governed by section 405. Be this however as it may, there seems to be a serious objection to this order apart from that already dealt with. It is quite clear that the Code makes no provision for reviving judgments, at least I can find none, and it has repealed the sections of the Prescription Ordinance relating to claims on judgments, and the provision for reviving them. It would seem therefore that there is now no provision for reviving judgments. So far therefore as the order went reviving judgment, it is *extra vires*, and must be set aside. Then again, before an application to issue execution on the decree could be maintained there must be a plaintiff on the record. Now, before the applicant plaintiff was on the record the motion was

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made to issue execution at his instance, and consequently all the proceedings are valueless. Then again, the Code requires that the application for the execution of the decree shall contain many particulars, none of which are embraced in this motion for execution in this case. All these reasons point to but one result, viz., that the order should be set aside. I would not give costs to either party, because neither is free from having contributed to it. The order is set aside without costs.

WITHERS, J.—The dual motion of a party to be allowed to come into the record as executor in the room of a sole plaintiff who has died after judgment and to revive that judgment is bad for more reasons than one. In the first place, there is no longer such a thing as the revival of a judgment; and in the second place, if there was, the applicant must be on the record before he can ask for it. The dual order allowing that motion is equally bad, and must be set aside. Petition by way of summary procedure is not the proper way for the legal representative to apply to the Court to have his name entered on the record in place of a sole plaintiff deceased. Section 405 of the Code applies to cases in chap. xxv. where the Court has a judicial discretion to exercise in the matter of the particular application. On the suggestion of death of a sole plaintiff, of the survival of interest (manifest here), and the status of the applicant as legal representative, the Court is bound to enter his name and proceed with the action. See section 395 of the Code—"shall thereupon enter". As this chapter seems to treat an application of this kind as an incidental step, I am of opinion that the application should be made in the manner indicated in section 91. There will be no order as to costs.

Set aside.

———:o:———

Present:—WITHERS, J.

(*August* 4 *and* 11, 1892.)

P. C., Colombo, No. 19,216. } GUNESEKERA v. MANUEL.

"*Alter*"—*Construction—Chairman, Municipal Council, power of—Ordinance No.* 7 *of* 1887, *section* 209—*Cesspit privy—Dry earth closet.*

Section 209 of the Municipal Councils Ordinance, 1887, provides that all drains, privies, and cesspits within the Municipality shall be under the survey and control of the Chairman, and shall be altered, repaired, and kept in order at the cost of the owners; and that if such owner neglects after notice in writing for that purpose to alter, repair, and put the same in order in the manner required by the Chairman, the Chairman may cause the same to be altered, repaired, and put in order in the manner required.

In a prosecution under section 183 of the Penal Code, for resistance to certain officers empowered to carry out an order made by the Chairman to clean out and stop up a cesspit privy, and convert it into a dry earth closet under the provisions of the above enactment,—

Held, that the word "alter" in the above section of the Ordinance meant varying without effecting an entire change, and did not cover the conversion of a cesspit privy into a dry earth closet, and that therefore the defendant committed no offence in resisting the execution of an order which the Chairman had so made.

The complainant, an overseer of the Municipal Council, charged the defendant under section 183 of the Penal Code with having obstructed him in the discharge of his duties in that the defendant had prevented the complainant and his men from entering into certain premises and cleaning out a privy situated therein upon orders issued by the Chairman of the Council.

It was proved that the Chairman had issued a notice to the owner of the premises under section 209 of the Municipal Councils Ordinance, 1887, requiring him to "alter the cesspit privy in the aforesaid premises by the substitution therefor of a dry earth closet", and giving him notice that in default of his doing so the Chairman would cause the alteration to be effected at the owner's expense. The owner not having complied with this notice, the complainant, under the Chairman's order, proceeded to the premises to have the cesspit privy emptied preparatory to its being converted into a dry earth closet, and was obstructed by the defendant, who was occupant of the premises.

The Police Magistrate acquitted the defendant, and the Attorney-General appealed.

Dornhorst for the appellant.

Wendt (*Sampayo* with him) for the defendant.

Cur. adv. vult.

On August 11, 1892, the following judgment was delivered :—

WITHERS, J.—In this case the Attorney-General appeals from an acquittal, and Mr. Dornhorst argued the case for the appellant.

The accused was prosecuted before the Police Court of Colombo for the offence, punishable under section 183 of the Ceylon Penal Code, of voluntarily obstructing a public servant in the discharge of his public functions. The chief point, as Mr. Dornhorst admitted, is, what is the meaning of the word "alter" in section 209 of the Municipal Ordinance 7 of 1887; and as I cannot agree with Mr. Dornhorst's contention as to the meaning of this word, I shall not address myself to the other grounds urged by Mr. Wendt in support of the order appealed from. Assuming the requirements of that Ordinance to have been fulfilled, I am to

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decide whether it was an offence to prevent a public servant from entering the accused's premises for the purpose of cleaning out, and I suppose stopping up, the cesspool of a privy and providing another necessary in the shape of a dry earth closet.

I do not think it was, because the act interfered with would be, not to alter a cesspool privy, but to substitute a different kind of privy altogether. Now, surely, to alter a thing is to vary it without an entire change; but the intended act of the person employed by the Chairman was to effect an entire change; consequently, the Police Magistrate's order acquitting and discharging the accused must be affirmed.

Affirmed.

———:o:———

Present:—WITHERS, J.

(*August* 4 *and* 11, 1892.)

P. C.. Jaffna, No. 10,008. } MURUGASU v. ARUMOGAM.

Criminal procedure—Judgment—Offence—Charge—Criminal Procedure Code, section 372.

The offence for which a person is condemned, or of which he is acquitted, should be specified in the judgment itself as directed in section 372 of the Criminal Procedure Code, and it is not enough to refer in the judgment to the charge.

The accused in this case was charged by the magistrate with the offence of cheating, in that he had falsely pretended to the complainant that he would sell him a *thali* which was then in pledge with a third party, and thereby induced the complainant to deliver to him a sum of money and certain jewellery for the purpose of redeeming the *thali*.

The judgment as recorded was as follows:—"The accused is adjudged guilty of the charge laid, and is sentenced to pay a fine of Rs. 50."

The accused appealed.

Wendt for appellant.

There was no appearance for respondent.

Cur. adv. vult.

On August 11, 1892, the following judgment was delivered:—

WITHERS, J.—I think this conviction must be set aside. Mr. Wendt, for the appellant, contended that the offence of cheating is not made out by the charge, and I think he is right.

It does not appear from it, or from the evidence either, that the complainant was induced to deliver to the accused some jewellery or some money by the representation of fact, evidently false, that the gold *thali* which he promised to give her in exchange for that jewellery and money was pledged with one Sinnatamby Murugasu, nor does it appear that if the complainant was induced by the promise of the accused to redeem and give her the *thali* in exchange for her jewellery and money, the accused had the intention at the time he made it of breaking that promise.

These elements of the offence of cheating in this case being absent, I do not think that the accused was guilty of more than a breach of good faith and of conduct entailing civil liability. The accused is acquitted and discharged.

I would point out to the Magistrate that his judgment has not fulfilled the requirements of section 372 of the Criminal Procedure Code. The offence for which a person is condemned, or of which he is acquitted, should be carefully specified in the judgment itself, and it is not enough to refer in the judgment to the charge; for if the offence is not carefully specified in the judgment, a person may be very seriously prejudiced who may have occasion afterwards to set up the plea of *autre fois acquit* or *autre fois convict*. The offence so specified must of course be the offence with which the accused has been charged.

Set aside.

———:o:———

Present:—BURNSIDE, C. J., and LAWRIE and WITHERS, JJ.

(*February* 23 *and July* 7 *and* 12, 1892.)

D. C., Badulla, No. 28,689. } SILVA v. OSSEN SAIBO.

Vendor and purchaser—Warranty of title—Sale of land—Covenant to warrant and defend—Implied warranty—Roman-Dutch Law—Construction of deed—Pleading—Demurrer.

A deed of conveyance contained the following covenant:—"I do hereby declare that Idid not act whatever previously to invalidate this sale, and I do agree to settle all disputes that may arise in respect hereto."

Held, that the above covenant was limited to the vendor's own acts and to disputes arising therefrom, and did not amount to a general covenant to warrant and defend title.

In an action by the vendee against the vendor under the above conveyance, the plaint averred that "by the said deed the defendant represented that he was the owner of the said land, and promised to warrant and defend the plaintiff's title to it". It then averred that, a third party having ousted plaintiff from a portion of the land, plaintiff raised an action and gave notice thereof to defendant and called upon him to warrant and defend. The plaint further averred that "in breach of his promise defendant failed to warrant and defend his title" to the portion in question, and it then proceeded to state that "the defendant had no title what-

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ever to the said allotment and his alleged title thereto was absolutely defective—"

Held, per BURNSIDE, C.J., and WITHERS, J., that the above was a declaration on an express covenant for title, which was not contained in the conveyance, and was therefore bad on demurrer.

This was an action by vendee of land against his vendor for damages. The plaint, after setting out that the defendant by a certain deed conveyed to plaintiff a land consisting of three allotments, stated, "by the said deed the defendant represented that he was the owner of the said land and promised to warrant and defend the plaintiff's title to it," that thereafter the plaintiff entered into possession, that subsequently the Assistant Government Agent claimed one of the allotments as the property of the Crown and took possession thereof, and that thereupon the plaintiff raised an action against the Assistant Government Agent of which he gave notice to defendant and called upon defendant to warrant and defend plaintiff's title to the said allotment. The plaint further averred, that "in breach of his promise defendant failed to warrant and defend his title to the said allotment," and it then proceeded to aver that the defendant had no title whatever to the said allotment, and his alleged title thereto was absolutely defective".

The defendant demurred to the plaint, *inter alia*, on the grounds that the plaint disclosed no cause of action, and that the allegation as to the promise to warrant and defend title was at variance with the deed of conveyance, which contained no such promise or covenant.

The covenant in the deed of conveyance, which was a Sinhalese document, ran as follows:—"I do hereby declare that I did no act whatsoever previously to invalidate this sale, and do agree to settle all disputes that may arise in respect hereto."

The District Judge overruled the demurrer, and defendant appealed.

Layard, A.-A.-G. (*Sampayo* with him) for appellant. The plaintiff declares upon an express covenant for title. The deed of conveyance, which is made part of the plaint, does not contain such a covenant. The agreement expressed in the deed to settle all disputes must be taken to be limited to the vendor's own acts. It is submitted that the demurrer should have been upheld.

Dornhorst (*VanLangenberg* with him) for plaintiff. It is submitted that the action is not one wholly based upon an express covenatn. The plaintiff in effect seeks to recover the purchase money paid for the land, the defendant's title to which, as the plaint avers, was absolutely defective. Under the Roman Dutch Law there is an implied warranty in every sale, and a vendee can always sue his vendor for absolute want of title: 2 Burge 554; *D. C., Kandy* No. 28,383, 2 Lorenz 120.

[There were other points argued by counsel, which are not material to this report.]

Cur. adv. vult.

The appeal first came before Burnside, C. J., and Clarence and Dias, JJ., on February 23, 1892. But Clarence, J., having left the Island before the judgments were delivered, the case was relisted for argument, and came on before Burnside, C. J., and Lawrie and Withers, JJ., on July 7, 1892, when counsel agreed to leave it to the Court for decision without further argument.

On July 12, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—The plaintiff in his libel alleges that by deed produced with the libel and pleaded as part of it the defendant sold and conveyed to the plaintiff certain land; and by the said deed the defendant represented that he was the owner of the said land and promised to warrant and defend the plaintiff's title to it.

I do not think there can be any doubt—indeed it is not questioned—that the libel referred to an express covenant and one undoubtedly alleged to be contained in the recited deed. The cause of action he alleges is, that a certain official on behalf of the Crown ousted him, that he brought an action to regain possession, that the defendant failed to defend his title, and that he was obliged to compromise his action, as in fact the defendant never had any title to the land, it being the property of the Crown. To this libel the defendant demurred—or to use the more prolix words of the Code, "answered on legal grounds"—alleging that the libel disclosed no cause of action and that the averment in the third paragraph of the libel, to the effect that by the deed of transfer, which is pleaded and made part of the libel, the defendant promised to warrant and defend the plaintiff's title to the land conveyed thereby, was at variance with the said deed, which contained no such promise or covenant. This objection raised a simple issue of law, one that must be decided from within the four corners of the deed which was before the Court. By words of express covenant, which appear in the deed, the defendant has especially limited the covenant for title to his own acts. He says:—"I do hereby declare that I did no act whatever previously to invalidate this sale, and do agree to settle all disputes that may arise with respect hereto."

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I am sure that no lawyer going through the deed would venture to say that it contained any express contract upon which an action would lie, the covenant which I have quoted clearly extending only to encumbrances created by defendant himself. The district judge himself does not venture to say that any express covenant for title is contained in the defendant's contract of sale, but proceeds in an elaborate judgment, theorising about the defendant's liability under what is called Roman-Dutch Law, to hold that there is an implied contract of warranty under the Roman-Dutch Law in the defendant's contract of sale whereby the defendant was liable to the plaintiff, and he dismissed the demurrer on that ground.

Now suppose, for the sake of argument, we follow where others have not feared to rush in, and suppose we come to the same conclusion, would that entitle the plaintiff to judgment on the express contract which he has set up in this action? The learned counsel for the plaintiff himself did not pretend to contend that the libel could be supported, unless we were prepared to read it as referring to an implied contract rather than in its plain and unmistakeable language.

The practice, which is a growing one, of giving judgments one side or the other on issues which the pleadings do not raise, and which neither the parties themselves nor their legal advisers ever contemplated or anticipated, however it has been fostered, has no doubt given us much legal dicta, dependent on mere speculations involving more or less bad or useless law. The result has been chaos and confusion. The plaintiff's libel discloses no cause of action, and the action should be dismissed with costs.

It will be time enough, when the question of the applicability of Roman-Dutch Law is properly before us, to seek to gather some principles which may be practically applied to the affairs of the life of the present day; but I do not hesitate to assert, on the research which I have made, that this alleged doctrine of implied warranty in every sale, if enforced in its integrity, would involve results so grotesque and ridiculous as could not be accepted by any one, who may even pretend to set it up, as touching the title to land among the peasantry of this Colony. In my opinion the judgment should be set aside and judgment entered for defendant with costs.

Lawrie, J.—It is not necessary to discuss or decide the question whether by the law of this Colony there be an implied covenant for title in all contracts of sale in which there is no express covenant. It is certain that a vendor may exclude all questions of implied warranty either by expressly stating that he does not warrant or that he limits his liability to his own acts or to the acts of some other named predecessor in title. Here the vendor was not silent. He made an express, though limited, covenant for title, and it is on that covenant that the action is laid. We are all agreed that the case turns on the construction to be put on the express covenant in this deed of sale.

The libel runs: "By the said deed the defendant "represented that he was the owner of the said land "and promised to warrant and defend the plaintiff's "title to it." That is not a candid nor correct statement of the covenant in the deed. It runs thus: "I "do hereby declare that I did no act whatever pre-"viously to invalidate this sale and I do agree to "settle all disputes that may arise in respect hereto."

Mr. Justice Clarence, in a draft judgment prepared before he left the island on leave, wrote, "Can we re-"gard these latter words as a covenant for title? "Although not without some hesitation I think we "ought to regard them so. If there be a doubt we "should construe the words rather against than for "the vendor, and I think that though the words are "rather vague the intention is that the vendor should "by settling all disputes about the land settle them "satisfactorily for the purchaser."

That was the view taken by the district judge, and I might agree to that construction of the words "I agree to settle all disputes that may arise in respect hereto", if these stood alone and if they were the only covenant for title contained in the deed, but in my opinion the clause must be read as a whole and that as a whole it contains only a covenant against the vendor's own acts. The disputes which he promises to settle are disputes arising from his acts, not from the acts of others.

On this ground I agree with your Lordships that the action must be dismissed.

Withers, J. This case was not re-argued in appeal. The defendant in my opinion is clearly entitled to judgment.

The plaintiff declared on an express covenant for title which is not contained in his conveyance. There is no count on the covenant implied in Roman-Dutch Law that the purchaser of land should have free and full possession of his property. Even if there was, it is very questionable whether the plaint discloses a good cause of action for damages for breach of such a covenant. It becomes unnecessary to discuss the points of law elaborated in the judgment of the district judge.

Reversed.

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Present :—BURNSIDE, C. J., and WITHERS, J.

(*August* 13 *and* 16, 1892.)

D. C. Kalutara, No. 68. — In the matter of an application for the appointment of a next friend. FERNANDO v. FERNANDO.

Civil Procedure—Minor, action by—Application to have next friend appointed—Plaint—Civil Procedure Code, Chapter XXXV.

An application for the appointment of a next friend under Chapter XXXV of the Civil Procedure Code must be accompanied by the plaint in the action intended to be brought, in order that the court may exercise its judgment as to whether it is to the interest of the minors that the action should be brought.

This was an application by one Harmanis Fernando to be appinted next friend of his two brothers who were minors. The application set out that the minors were entitled to a portion of a certain land; that the respondent had taken possession of the entire land whereby it became necessary to institute an action against him to recover possession of the same with damages; that the petitioner was the brother and guardian of the two minors and was of sound mind and full age and his interest was not adverse to that of the minors and that he was the fittest person to be appointed next friend. The respondent appeared and objected to the petitioner being appointed next friend, contending that administration to the deceased father's estate should first be taken out. The district judge granted the application and the respondent appealed.

Dornhorst, for the appellant.

Wendt, for the petitioner.

Cur. adv. vult.

On August 16, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—The order appealed against in this matter must be set aside. It is manifestly an injudicious order to allow the applicant who owns only three-fourteenths of the land to involve two minors in litigation as to the whole land for which the other owners who are adults are no parties, the minor's mother being one of them, and it is contrary to practice to appoint a next friend of minors to prosecute a suit until the libel itself is before the court in order that the court may exercise its own judgment on the important question whether the minors should be exposed to the expenses which may be incurred on their behalf. If it became necessary to institute an action the administrator is the proper person to bring it, for although we have held that a minor may obtain a declaration of his rights as a minor to participate in the estate of his father without administration, I know of no case where a minor has been allowed to sue for damages to the estate where an administrator should have been appointed. In this case there does not appear any reason why administration has not been taken out. The order and proceedings upon which it is granted are set aside with costs.

WITHERS, J.—This order must be set aside. The application should not have been entertained without a plaint accompanying it, shewing on the face of it that there was a good cause of action, that it was a proper case to dispense with a legal representative, and that it was to the interest of the minors that the action should be brought.

Set aside.

———:o:———

Present :—BURNSIDE, C. J. and WITHERS, J.

(*August* 26 *and* 30, 1892.)

D. C. Colombo, No. C 87. — PULLENAYAGAM v. PULLENAYAGAM.

Civil Procedure—Costs—Execution—Costs due in interlocutory proceedings—Writ against person—Decree—Civil Procedure Code, sections 298, 299, 353.

An interlocutory order for costs is an order for the payment of money within the meaning of section 353 of the Civil Procedure Code and is enforceable in like manner as a decree for money, and if the costs exceed Rs. 200 in amount, writ against the person may be sued out for their recovery even before the termination of the case.

The facts of the case sufficiently appear in the judgment of WITHERS, J.

The fifth defendant appealed from an order of the district judge discharging the plaintiff from arrest in execution for the recovery of the costs of a previous appeal.

Dornhorst (*Wendt* and *Sampayo* with him) for the appellant. An order for costs is a decree and is enforceable as such. It has been held that an order for costs alone is a decree for a "sum awarded" within the meaning of section 299 of the Code. *D. C. Kandy, No.* 2,510, 2 C. L. R. 15, and the costs taxed in this instance being above Rs. 200, execution against person was properly issued. It was held in this very case, reported 9 S. C. C. 122, that a decree for costs is seizable as a debt under writ against the party to whom such costs are awarded. Further, section 353 of the Code expressly provides that every order made by a court for payment of money, not being a fine, shall have the effect of a decree for the payment of money and enforceable in like manner as a decree for money. It is submitted that an

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order for costs is an order for the payment of money and is therefore enforceable by execution against the person.

Morgan (*Alwis* with him) for plaintiff. Apart from any consideration of the nature of an order for costs, the appellant was not entitled to issue execution against the person in this instance, because the amount of costs does not in fact exceed Rs. 200. The costs in question are those of a previous appeal, which as taxed by the Registrar are less than Rs. 200, but to this the plaintiff has added a separate set of costs taxed in the district court, purporting to be costs of the appeal. [BURNSIDE, C. J.—Did you ask for a revision of the taxation?] No, but all costs of an appeal can only be taxed in the Supreme Court, and it is submitted that it was open to the plaintiff, in shewing cause against the motion to commit, to object that the writ was for a larger amount than was due. [BURNSIDE, C. J.—Your remedy was to have the bill of costs revised before the writ issued.] Again, it is contended that although it has been held that an order for costs is executable by writ against person, that decision must be limited to final decrees for costs and not for costs in interlocutory matters, which was the case in this instance. See also section 209 of the Code which provides for the court making orders for costs "when *disposing of* any application or action." It is submitted that writs for costs can only issue at the final termination of the action. Otherwise there may be many writs against the person and a party may be arrested many times during the course of an action, which is not only intolerable but not contemplated by the law. Even if interlocutory costs can be recovered pending the action by writ against property, a person cannot be arrested in execution at that stage. Section 298, which provides for the issue of writs against the person, speaks of "judgment creditor" and "judgment debtor", terms which are inapplicable in any stage of the case before judgment.

Dornhorst, in reply. As regards the amount, the question is whether the writ included anything beyond "costs of appeal." It does not matter in which court they were taxed. The portion of the costs taxed in the district court was that incurred there in respect of the appeal, such as stamps for the petition of appeal, security bond and notices and for other matters incidental to the perfection of the appeal, which must necessarily be taxed in the district court. These are therefore properly included in costs of appeal. Again, it is submitted that a party need not wait until the final termination of the case to issue execution for costs, more especially when they are appeal costs. *D. C. Colombo* No. 85,291, 8 S. C. C. 109. It is noteworthy that the appeal, out of which the costs in question arose, was one taken in respect of an attempt on the part of plaintiff himself to enforce a writ for interlocutory costs. Further, section 353 previously referred to is a general provision and covers orders for costs whether interlocutory or final. It is submitted that if an order for costs can be enforced by writ against property, as appears to be conceded, there is no reason why it cannot be enforced by writ against property.

Cur. adv. vult.

On August 30, the following judgments were delivered :—

WITHERS, J.—In an appeal from an order in certain incidental proceedings arising out of an action in the court below a litigant was so far successful in this court as to secure an order for his costs in appeal. These were ultimately taxed to an amount exceeding Rs. 200, and execution against the property of the party ordered to pay the costs in appeal proving fruitless, his body was arrested under a writ against person. On June 14, application was made to commit the party arrested. On July 6, cause was shewn against his committal and in the result the application was refused and the man was discharged. The learned district judge has ruled, in short, that a writ in execution of an interlocutory order for costs exceeding Rs. 200 cannot be sued out against the person. The question for us to decide is, is that ruling right? We think not, and for these reasons. By section 353 of the Civil Procedure Code, which apparently was not brought to the notice of the learned judge in the discussion before him, it is laid down that every order made by a court in any action or *proceeding* between parties for payment of money, not being a fine, shall have the effect of *a decree for the payment of money* and in default of payment according to its terms shall be *enforceable* upon the application of the party at whose instance it was made in *like manner as a decree for money*. Now, the implied terms of an order to pay costs are to pay the sum duly taxed forthwith just as a decree for money is payable when no time is fixed for payment. "Proceeding" in that section clearly takes in interlocutory proceedings.

Again, by section 209 an order for the payment of costs is a decree for money within the provisions of section 194 as to payment by instalments.

A decree, according to the definition of the term in the Code, is a final decree in an action, and a final decree for money in an action is enforceable in the first instance, (see section 217 (A), by a writ against property, and if exclusive of interest after judgment and costs the sum decreed to be paid exceeds Rs. 200

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it is enforceable against the person in the circumstances indicated in section 298.

This court has already decided that a final decree for costs only, if the costs exceed Rs. 200, is enforceable against the person, and section 353 before referred to shows that there is no difference between a final decree and an interlocutory order for payment of money, other than a fine as regards the mode of levying execution. Counsel before us argued that items were improperly included in the taxed bill of costs so as to make it exceed the amount of Rs. 200. In this there was an alternative remedy. His client might have appealed from the taxing officer's certificate, or when brought up under writ against person he might have paid into court what he considered sufficient to satisfy the writ and asked the court for a declaration to that effect and for his discharge, on shewing that the difference in the writ was in excess of the order founding it.

The order of the court below must be set aside with costs.

BURNSIDE, C. J.—I agree. I did not think a doubt could exist that an order to pay costs was enforceable as any decree of the court for the payment of money might be enforced, if the amount exceeded Rs. 200. It is possible that section 353 of the Code, which is conclusive on the point, was not brought to the notice of the learned judge.

Set aside.

———:o:———

Present:—BURNSIDE, C. J. and WITHERS, J.

(*August* 19 *and* 22, 1892.)

D. C. Kurunegala, No. 20. } PUNCHIRALA v. PUNCHIRALA.

Civil Procedure—Intervention—Added parties—Parties improperly added—Admissibility of defendant's documents—Documents not specified in list —Claim in reconvention—Civil Procedure Code, sections 50, 51, 52, 54, 58, 111, 112, 113.

Since the Code came into operation, intervention in a pending action can only be permitted in pursuance of and in conformity with the provisions of section 18.

Where, therefore, certain parties were added as defendants to a pending action, upon their own application, they not being parties who ought to have been joined or whose presence was necessary to enable the court effectually to settle all the questions involved in the action, and, a trial was had upon issues settled, by consent, as between them and the plaintiff and as between the plaintiff and the original defendants, resulting in a judgment for plaintiff against both the original and added defendants—

The Supreme Court, upon appeal by the parties so added, quashed all the proceedings at the trial as between them and the plaintiff, affirming the decree against the original defendants who had not appealed.

A defendant who claims a judgment in reconvention, is bound by the provisions of sections 50 and 51 of the Code requiring a plaintiff to specify in a list annexed to his plaint and to produce in court the documents on which he relies, and a document not so specified or produced is not admissible in evidence without the express leave of the court under section 54.

This was an action for a declaration of title to land, and for possession. The plaint averred that the plaintiff was entitled to an undivided half share of the land under a deed of sale executed in September 1888 by one Kiri Menika in plaintiff's favour, and that defendants had ousted plaintiff from the land and were in wrongful possession. The defendants in their answer denied Kiri Menika's right to any share of the land, and set up title through Kiri Menika's sister Punchi Menika, alleging that she was entitled to the whole land and that since her death her children and grandchildren had been in possession of the same; that Kiri Menika had possessed in lieu of this land another land called Karande Cumbura; that the first defendant was the father of Punchi Menika's children and, most of them being minors, he had leased the land to the second defendant. The answer also took exception to the plaint on account of the non-joinder of Punchi Menika's children, (the owners, according to plaintiff, of a moiety of the land.) The case came to a hearing on November 18, 1890, when plaintiff and defendants agreed upon certain issues which were accordingly framed by the district judge, and the trial adjourned to March 24, 1891. Thereafter, the trial was again several times adjourned, and on October 30, 1891, the children of Punchi Menika were added as defendants, under circumstances fully set out in the judgment of WITHERS, J.

At the trial, and upon the close of the added defendants' case, their proctor tendered in evidence, first, certain marriage registers for the purpose of proving that Kiri Menika had been married in *diga* and Punchi Menika in *bina*; and secondly, a certified copy of a lease, in order to show that Kiri Menika when giving evidence had sworn falsely as to the payment of the consideration. The admission of these documents was objected to by plaintiff on the ground that they had not been included in any list of documents filed with the added defendants' answer, and no notice of them had been given to plaintiff before the trial. The district judge held that the combined effect of sections 58 and 113 and Form No. 16 of the Civil Procedure Code was to

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impose upon a defendant (as well as a plaintiff) the duty of filing a list of documents on which he relied, and of bringing them into court upon appearance to the summons. He therefore rejected the documents tendered, holding also that the lease in question had not been proved.

Judgment was given for the plaintiff as prayed, with costs against the defendants, both original and added.

The added defendants appealed.

Dornhorst for the appellants.

Wendt for the plaintiff.

Cur. adv. vult.

On August 23, 1892, the following judgments were delivered :—

WITHERS, J.—This is an action by a person alleging himself to be a co-owner with others to the extent of an undivided half share of a particular land against two strangers for declaration of title to an undivided half share of the land and for possession, on the ground that three months before action was brought he, plaintiff, was ousted from the land by the defendants, who, he says, have ever since remained in the exclusive occupation of the land to his damage of Rs. 30.

The plaintiff discloses a purchase from one Kiri Menika in September, 1888 ; but what her estate was in the land he is not careful to state. In the answer, however, Kiri Menika's title to any share of the land is expressly denied as well as plaintiff's asserted possession. These denials are followed by a very remarkable defence put into the mouth of the 1st defendant, who says in effect: "Though the land is not mine, I have leased the whole of it to the 2nd defendant, who is in possession of it. The land belongs to my children, who have been in possession of it since the death, 12 years ago, of their mother, Punchi Menika, who owned it at her death. In bar of plaintiff's claim I plead the prescriptive title of my children. Plaintiff cannot maintain this action in the absence of his 'admitted co-heirs' ", meaning, I suppose (as plaintiff derives his title, not from descent, but from a conveyance) the persons named in the third paragraph of the plaint as his co-tenants.

All this stuff being the plea of a wrong-doer, if plaintiff proves ouster and anterior possession, he is entitled to succeed, for actual possession as owner is presumptive proof of property, and avails against a wrong-doer. If the ouster is a pure fiction, his claim merits dismissal. Actions on sham issues cannot be too rigorously suppressed: they foster perjury and vexatious litigation.

On November 18, 1890, the proctors agreed to certain issues of law and fact, which were framed by the learned Judge accordingly. Two of them briefly stated are as follows—

1. Was Kiri Menika co-owner and in possession of half the land in question at the date of plaintiff's conveyance? Or were Punchi Menika and her children?

2. Did Kiri Menika have and possess another land called Karende Kumbura in lieu of this land of Punchi Menika's, if the latter's?

Now, these issues could only arise out of a contest between the plaintiff and his vendor Kiri Menika and the person named Punchi Menika in the answer; but at that time there was no such contest. The issues were quite foreign to this action, were improperly framed, and should never have been agreed to.

March 24, 1891, was appointed for the trial of the settled issues; but, owing to the "absence of plaintiff's proctor from town", the trial was adjourned to May 14, 1891. Then followed adjournment after adjournment till October 30, 1891.

In this month the "added defendants" came upon the scene, attracted possibly by the issues between the two sisters trailed across the plain path of the record. The 1st "added" defendant (upon what materials I have failed to discover) is appointed guardian *ad litem* to two infant sisters and the infant child of a deceased brother for the purpose of being " added as parties to the case and establishing their right to the land in dispute"—so runs the order of appointment.

That was the 2nd of October, 1891. On October 19, the guardian *ad litem* applies to have his wards and himself added as parties to the action; and on October 30, his application was granted and the added defendants were required to file answer on or before November 4 next, and the trial of the case was postponed to December 9, 1891.

The District Judge has not recorded his reasons for thinking that the added defendants ought to have been joined, or that it was necessary to have them before the Court to adjudicate on the questions involved in the action; and it is quite impossible to divine those reasons, for the questions involved in the action touch no one but the parties to it, and are simply: Did the original defendants oust the plaintiff; and if so, can he show sufficient title to recover possession of the land he has been excluded from?

If this was a partition suit, or if the original defendants had justified under the added defendants as owners of the entire land I could have understood the appellants being let in as defendants. But the result of the action, decided on the simple issues arising out of it, cannot possibly affect the added

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parties. What answer the added parties could be expected to make to a plaint which does not aim at them directly or indirectly it is hard to conjecture, and of course the District Judge could not compel the plaintiff to amend his plaint so far as to allege a cause of action against new parties when he had no cause of action at all against them.

On February 15, 1892, the trial began. The old issues were retained as between plaintiff and the original defendants, and new ones apparently settled between the plaintiff and the added defendants and recorded on a paper marked X, which I cannot find. They are, however, recited in the judgment at p. 79, and are :—

1. Was the land paternal or maternal property ?

2. Was Kiri Menika married in *diga* and Punchi Menika in *bina*, or were they both married in *bina* ?

In the end the learned Judge finds that plaintiff was never in possession of the land in question, but that up to some two years before his purchase from Kiri Menika, his predecessors in title, that is, virtually Kiri Menika herself, had acquired a prescriptive title to an undivided half of the land, and that plaintiff's vendor, Kiri Menika, was entitled by descent from her mother to an undivided half of the land in question, to which accordingly he declares plaintiff entitled.

Had the added defendants been properly joined in this action, I should not be disposed to say this finding was wrong, or interfere with the decree. But if we allow the decree to stand, it seems to me that we shall only be encouraging litigation on perjured issues and re-introducing the license of intervention which prevailed before the Code. As regards the original action, so to call it, it is manifest that the issue of ouster was a false one ; and on that ground alone, as I said before, I think the plaintiff's action against the original defendants should have been dismissed.

Then, if I am right in my opinion that the added defendants were allowed to intervene otherwise than in accordance with the provisions of sec. 18 of the Civil Procedure Code, how can this Court sanction what the law declares shall not be permitted ?

We cannot do so, and must quash all the proceedings of the trial between plaintiff and added parties, making the latter pay their own costs.

The points raised as to the documentary evidence tendered by the added defendants are too important to be passed over in silence.

As these defendants claimed judgment for the entire land, that amounts to a claim in reconvention. A claim of the kind in reconvention cannot be supported by documents on which the defendant intends to rely if he does not enter them in a list to be annexed to his answer, unless by express leave of the Court they are received in evidence (see sec. 54 of the Code). A plaint and counter plaint must be governed by the same principles.

It was, however, competent for the added defendants in this case to tender, after due proof, documents, if any, produced for cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff (see the saving clause of that sec. 54), the more so as the added defendants were not summoned under sec. 58 of the Procedure Code to produce documents relating to the merits of the plaintiff's case. The Code unfortunately does not say what is to happen, if a defendant so summoned (and he *shall* be so summoned) to produce the documents mentioned in sec. 58 does not do so and attempts to procure their admission as evidence at the trial, unless secs. 111 and 112 of the Procedure Code go beyond the scope of chapter xv. and preclude their reception except for good cause shewn.

It may be that if, having documents of the kind in his power or possession, a defendant when summoned to produce them fails to do so, he will not be suffered to read them in evidence unless for good cause shewn ; but no such summons was taken out by the plaintiff in this case. The original defendants not having appealed from the decree in plaintiff's favour, that must stand, but the proceedings of the trial between plaintiff and the added defendants must be quashed, the latter paying their own costs in appeal and in the Court below. Decree varied accordingly.

BURNSIDE, C. J.—I can add nothing.

———:o:———

Present:—BURNSIDE, C. J., LAWRIE and WITHES, JJ.

(*August* 30 *and September* 2, 1892.)

D. C., Colombo, No. C 2,273. } ASSAUW v. BILLIMORIA.

Civil procedure—Proctor—Petition of appeal—Signature by one proctor for another—Advocate's signature—Civil Procedure Code, sec. 755.

A petition of appeal of a defendant, commencing : "The petition of appeal of the defendant by his proctor" who was named—was signed "for" that proctor by another and was also countersigned by an advocate—*Held*, that the signature of one proctor for the other was bad, but that the petition of appeal having also been signed by an advocate fulfilled the requirements of sec. 755 of the Civil Procedure Code.

The defendant appealed from a judgment given against him.

The facts material to this report appear in the judgment of Burnside, C. J.

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Dornhorst for the appellant.

Wendt, for the respondent, took the preliminary objection that the appeal was not properly before the Court. The petition of appeal was not signed by the defendant's proctor on the record, but "for" him by another proctor, whose authority so to sign did not appear, and the petition did not therefore fulfil the requirements of sec. 755 of the Code. He also cited *D. C., Kegalle*, No. 6,299, 9 *S. C. C.* 65.

Dornhorst for appellant. One proctor can always appear and act for another in his absence or under some emergency. In the case *D. C., Kegalle*, No. 6,299, the petition of appeal was that of the party himself, though it was also signed by a proctor for his proctor, and was properly rejected as it was not taken down by the Secretary of the Court. Here the petition is that of the proctor of the party, and is signed for him by a brother proctor. This Court has laid down that one proctor may appear for another: *D. C., Colombo*, No. 81,616, Civ. Min. March 29, 1887. In that case an objection was taken to one proctor representing another upon a motion, and the Supreme Court observed:—"This objection is founded upon a complete misconception. No party can change his proctor without leave of Court; but there is no reason why a proctor who for some reason or other is prevented from attending Court on some particular occasion should not avail himself of the assistance of some other gentleman of his profession in the same way that one advocate may represent another." The signature for one proctor by another, whose status as proctor the Court must recognise, is sufficient proof of authority. Besides, the proxy in this case gives to the proctor the power of substitution. [Burnside, C. J.—But this is not nor does it purport to be a case of substitution.] In any case the signature of the advocate is sufficient as provided in sec. 755 of the Code.

Cur. adv. vult.

On September 2, 1892, the following judgment was delivered:—

Burnside, C. J.—The defendant in this suit has appealed. The petition of appeal is in this form: "The petition of appeal of the abovenamed defendant and appellant by John Neill Keith his Proctor states as follows," and the signature to the petition thus:—

"Walwin LaBrooy,
for J. N. Keith,
Proctor for defendant.

Walter Pereira,
Advocate.
21-4-92."

Mr. Wendt, for the plaintiff, objected to the appeal being received, quoting the words of sec. 755 of the Code as follows: "All petitions of appeal shall be drawn and signed by some advocate or proctor or else the same shall not be received." I presume that what the Legislature meant was, that on the face of the petition it should appear to have been signed by one or the other, proctor or advocate, and if it did so purport it would be sufficient, though not conclusive of the fact of "drawing" as well as of signing, but it would be open to any one asserting the contrary to establish that it was neither signed nor drawn as required. The important requirement of the Code is the signature. I do not interpret the words "drawn by" as meaning that the original conception, as well as manual draft of the petition should be that of the advocate or proctor. If the petition itself bears the proper signature of advocate or proctor the necessary presumption would arise that the proctor had drawn it, or the advocate had drawn or settled it, and had thereby made it his own, in the same way as regards all other pleadings, with this exception that an advocate who draws or settles is not required to sign them, whilst the proctor is. Now, we have held that the proctor who signs the petition must be proctor on the record authorised to do every act in the cause until his authority has been revoked in the regular way and a new appointment made; and I pause here for myself to say I repudiate any suggestion or authority which would give countenance to the position that one proctor may sign another Proctor's name for him, and that his right to do so should rest on the bare assertion one way or the other of the parties themselves. I cannot conceive anything more calculated to prejudice and endanger the interests of suitors or to jeopardize the fair fame of honourable members of the profession and subject it to the acts of others less scrupulous. Now, whilst in the body of the petition it purports to be by the petitioner's Proctor, John Neill Keith, it is in fact not signed by him, but by somebody else, who signs "for" him, and does not claim to be, and who may or may not be, a proctor, and there is nothing to show that he was authorised by Mr. Keith to sign for him. Such a signature we cannot recognise. But the petition is signed and properly signed by an advocate. The Ordinance is satisfied if the authentication is by advocate *or* proctor, and I am prepared to hold that although the authentication by one of them may be bad, yet if that of the other is good the Ordinance is satisfied. The apparent object of the law is to guard against frivolous or vexatious or insufficient appeals, and I think that it is sufficiently secured under our interpretation of the section in question.

The appeal should be heard.

Lawrie and Withers, JJ., agreed.

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Present:—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(July 21, and 26 *August* 30, and *September* 2, 1892.*)*

P. C., Colombo, No. 3,760. } FERNANDO *v.* IAMPERUMAL.

P. C., Colombo, No. 165. } SELESTINA *v.* PERERA.

Maintenance—Refusal to make maintenance—Appeal—Ordinance No. 19 *of* 1889, *secs.* 3, 14, *and* 17.

No appeal lies against the refusal of a Police Magistrate to make an order for maintenance under the Maintenance Ordinance, 1889.

Each of these cases was an application by the complainant party under sec. 3 of Ordinance No. 19 of 1889 for an order on the defendant to pay a monthly sum by way of maintenance. In each case the Police Magistrate, after investigation, refused to make the order asked for, and dismissed the application, holding, in the one case, that the prosecutrix, the wife, was not acting *bona fide*, and in the other, that it had not been satisfactorily proved that defendant was the father of the child in question.

The complainants appealed.

The cases first came before Burnside, C. J., on July 21, 1892.

In case No. 3,760:—

Dornhorst for the appellant.

Pereira, for the defendant, took the preliminary objection that no appeal lay.

In case No. 165:—

Wendt for the appellant.

Dornhorst for the defendant.

BURNSIDE, C. J., reserved the question, whether an appeal lay, for the consideration of a fuller Bench; and the appeal accordingly came, on July 26, before Burnside, C. J., and Lawrie J. By arrangement between counsel the cases were argued together.

Pereira for the defendant. No appeal lies against an order like the present, where the Police Magistrate declines to make an order on the defendant to pay an allowance. Under sec. 17 of the Maintenance Ordinance, the right of appeal is given only against orders made by a Magistrate under secs. 3 and 14. Sec. 14 merely gives the right of appeal to the complainant against an order refusing to issue summons, while the only order which sec. 3 contemplates is an order on defendant to pay a monthly allowance. No other appeal is allowed by this Ordinance. Even if the general right of appeal is to apply, the Magistrate's refusal to make an order amounts to an acquittal (for it is ground for a plea of *res judicata*, *P. C., Kandy*, No. 10,709, 1 *C. L. R.* 86), and it is only the Attorney-General who can appeal.

Wendt for the complainant. Sec. 17 was intended to give an appeal against every possible order a magistrate might make on such a prosecution. Sec. 14 deals with the refusal to issue process after summary examination of the complainant, while sec. 3 provides for a final order, one way or the other, after full inquiry. Such final order need not necessarily be the one asked for, viz., an order to pay an allowance, but may be the contrary order, refusing to direct such payment. In either case the appeal is competent. The decision that *res judicata* might be pleaded to a second prosecution does not, it is submitted, give the order the effect of an acquittal. Proceedings under this Ordinance are in their nature civil, though instituted in the Police Court; and the restriction on appeals, imposed by the Criminal Procedure Code, is not applicable.

Cur. adv. vult.

Their Lordships not being able to agree upon a judgment, the case came on for argument before the Full Court, consisting of Burnside, C. J., Lawrie and Withers, JJ., when counsel agreed to take the decision of the Court without further argument.

Cur. adv. vult.

On September 2, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—I have no doubt whatever that this appeal cannot be supported, and I think there is much reason that it should not be. The only order which a magistrate is empowered to make under sec. 3 of the Maintenance Ordinance is to "order such person (father of child or husband) to make a monthly allowance", &c. If the magistrate, make such an order then "the party dissatisfied with it" has the right to appeal against it. But if he makes no order, there is nothing to appeal against.

In this case the Magistrate says: "The application is dismissed." I construe that to mean: "I make no order." Consequently, no appeal lies. But if it be said the Magistrate's order is a definite order beyond his powers, then I answer, if an appeal lies, it must be under the general law, giving the general right of appeal from Police Courts to the Supreme Court, and such appeal must be governed by the general law; and as the order amounts to an acquittal, the appeal must be by the Attorney-General.

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LAWRIE, J.—In this application under the Maintenance Ordinance 1889, the Magistrate, after hearing evidence, pronounced the following final order:—"I do not think that it is satisfactorily proved that the defendant is the father of the child. The application is dismissed."

My lord the Chief Justice and my brother Withers are agreed that the appeal against this order must be rejected. I am unable to concur. I would hear the appeal on its merits. For reasons which I shall afterwards give, I am of opinion that the right to appeal against a dismissal is expressly conferred by sec. 17 of the Maintenance Ordinance; but at present I shall assume that it is not so conferred. The Ordinance 1 of 1889, sec. 39, following the Charters and the older Ordinances, confers on the Supreme Court appellate jurisdiction which extends "to the correction of all errors in fact or in law committed by any Police Court".

This express enactment conferring jurisdiction cannot be repealed or even limited by mere implication. Jurisdiction expressly conferred by the legislature can only be taken away by equally express enactment.

The Maintenance Ordinance is silent as to the general powers of the Supreme Court: it reiterates and emphasizes the right to appeal from certain orders. Assuming that the order now appealed against is not one of these, it seems to me that the omission to reiterate the general law, that this Court has jurisdiction to correct all the errors which a Police Court may commit, in dealing with applications under the Maintenance Ordinance, does not affect nor diminish the powers expressly given to us. The rule *expressio unius est exclusio alterius* does not, in my opinion, apply.

Another question is, assuming that this Court has jurisdiction to review in appeal the order, is this an acquittal of an accused, and as such must the appeal be at the instance of the Attorney-General under sec. 404 of the Criminal Procedure Code? I think not, because my opinion is, that the Maintenance Ordinance expressly gives the right of appeal against a dismissal, and for this reason it gives a right of appeal against all orders made by a Magistrate under sec. 3. That section gives the Magistrate power, on cause shown, after due proof, to order a defendant to make a monthly allowance. Such a power necessarily includes the power, on cause shown, after due enquiry, to refuse to make the order. The Magistrate is bound to decide one way or the other. He must dispose of the case. Whichever way he decides, it is equally a decision under the section of the Ordinance which gives him power to decide; and in my opinion, a judgment dismissing an application because the proof is insufficient is as much an order under sec. 3 as a judgment to make a monthly allowance, because the proof is sufficient.

WITHERS, J.—This is an appeal from a refusal of the Magistrate after an examination of the complainant and her witnesses to order the husband to make his wife, the complainant, a monthly allowance. Can we entertain the appeal? In my opinion we cannot. The right of appeal is not a right of common law, but of statute; and what does our statute 19 of 1889 say? It says, in sec. 17, that any person who shall be dissatisfied with any order made by a Police Magistrate under sec. 3 or 14 may appeal to the Supreme Court. The order under section 3 is an order requiring a husband to make his wife, or a father his child, a monthly allowance. The order under section 14 is a refusal to issue a summons after examination of a person who applies to the Police Magistrate for an order of maintenance or for a warrant to enforce an order of maintenance.

Save these two orders, no order in proceedings under this Ordinance can be appealed from.

Appeal rejected.

———:o:———

Present:—BURNSIDE, C. J., AND WITHERS, J.

(*August* 19 *and* 26, 1892.)

D. C., Kandy. No. 4,967. } WATSON v. ALLAGAN KANGANY.

Promissory note—Stamp—Note payable on demand—"Postage Revenue Five Cents" stamp—Admissibility of note in evidence—Ordinance No. 3 of 1890, sec. 5—Proclamation of August 1, 1890.

Since the Stamp Ordinance No. 3 of 1890, and the Proclamation of August 1, 1890, issued thereunder, a promissory note payable on demand, bearing a stamp of the denomination "Postage Revenue, Five Cents" is not duly stamped, and is inadmissible in evidence.

This was an action on a promissory note payable on demand, and dated October 24, 1890. The stamp affixed to the instrument was a "Postage Revenue Five Cents" stamp. The defendant in his answer took exception to the promissory note as not having been duly stamped.

The note when tendered in evidence at the trial was objected to by defendant. The District Judge overruled the objection as to the validity of the note, and entered judgment for the plaintiff with costs.

The defendant appealed.

Dornhorst for the appellant. It is submitted that this document was not duly stamped, and was wrongly admitted in evidence. By section 5, sub-section 1

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of Ordinance No. 3 of 1890, the Governor was empowered by notification to require special stamps to be used for particular instruments. The Notification of August 1, 1890,* issued under this section, while it permitted certain documents to be stamped with the "Postage Revenue" stamp expressly excluded promissory notes from the category. Therefore, it is submitted that this note was not properly stamped and was not admissible in evidence.

There was no appearance for the respondent.

Cur. adv. vult.

On August 26, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—The important question in this case was, whether the promissory note sued on by the plaintiff, and tendered in evidence at the trial, was properly stamped. It was a note payable to the payee on demand; and it had been stamped with a postage revenue stamp of five cents, The defendant had warned the plaintiff of the objection in his answer, in which he pleaded to the sufficiency of the stamp. Notwithstanding this patent objection, at the trial the plaintiff tendered the note in evidence, and although again objected to, the learned District Judge admitted it, and gave judgment with costs for the plaintiff, and the defendant has appealed. I am sorry that I cannot follow the learned Judge in treating an objection to the sufficiency of a stamp as a "petty refinement". The law has said, it shall not be lawful to use stamps other than the special stamps provided for particular instruments. It has also declared that no instrument shall be pleaded or given in evidence, or be good, useful, and available in law unless it is duly stamped "in accordance with law". Now this instrument is not stamped in accordance with law. The stamp used on it is a postal revenue stamp; and if it had been contended that

* NOTIFICATION.

It is hereby notified for general information that the Governor of Ceylon, with the advice of the Executive Council, in pursuance of the power in him vested by sub-section 1 of sec. 5 of "The Stamp Ordinance, 1890," requires that the special stamps set forth in the left-hand column of the Schedule hereto shall be used for the particular instruments described opposite to the said special stamps in the right-hand column of the said Schedule:—

SCHEDULE.

Description of Stamp.	Description of Instrument.
Stamp with the word "Judicial" printed thereon	For all instruments in respect of which the stamp duty is fixed in Parts II., III., and IV. of Schedule B to Ordinance No. 3 of 1890.
Stamps with the words "Warehouse Warrant" printed on them	For the Warehouse Warrants and duplicates mentioned in Part V. of Schedule B to Ordinance No. 3 of 1890.
Stamps with the words "Foreign Bill" printed on them	For all Foreign Bills in respect of which the stamp duty is fixed in Part I. of Schedule B to Ordinance No. 3 of 1890.
Stamps with words "Ceylon Stamp Duty" printed on them	For all instruments in respect of which stamp duty is fixed by Schedule B to Ordinance No. 3 of 1890 other than those for which special stamps have been hereinbefore notified and other than those for which stamps bearing the words "Postage Revenue Five Cents" are permitted to be used as hereinafter notified.

It is hereby further notified for general information that the Governor, with the advice of the Executive Council, has directed that the stamps bearing the words "Postage Revenue Five Cents" may be used both for postage and for the instruments subject under the Ordinance No. 3 of 1890 to stamp duty of five cents specified in the annexed list.

List referred to.

Acknowledgment of a debt exceeding Rs 20 in amount of value, written or signed by or on behalf of a debtor in order to supply evidence of such debt in any book (others than a Banker's Pass Book) or on a separate piece of paper, where such book or paper is left in the creditor's possession.

Inland Bills (other than Promissory Notes), Drafts, Cheques, or Orders for the payment on demand of any sum of money to the party named therein, or the bearer, or to order.

Broker's Notes, each copy.

Cart or Boat Note, for the conveyance of goods for hire, by cart or boat along any road, river, or canal, when the distance to be traversed by such cart or boat shall exceed one mile outside the limits of any Municipality or Local Board,—on the original and each copy thereof.

Certificate or other document evidencing the right or title of the holder thereof, or any other person, either to any share, scrip, or stock in or of any company or association, or to become proprietor of any share, scrip, or stock in or of any company or association.

Delivery Order in respect of goods; that is to say, any instrument entitling any person therein named to the delivery of any goods lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such instrument being signed by or on behalf of the owner of such goods, upon the sale or transfer of the property therein, when such goods exceed in value Rs. 20.

Receipt or discharge given for or upon payment of money amounting to Rs. 20 or upwards.

Shipping Order for the conveyance of goods on board any vessel.

By His Excellency's Command,
E. NOEL WALKER,
Colonial Secretary.

Colonial Secretary's Office,
Colombo, August 1, 1890.

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the Governor in Council had, as he may have done, permitted postal revenue stamps to be used for commercial instruments, it was on the plaintiff to show it. We are bound to take judicial notice of Proclamations in this respect; and we find that although it has been permitted to use postal revenue stamps for certain instruments, promissory notes of this description have been expressly excluded from the list. I think it would be very unfortunate if in a Colony like this we encouraged or permitted that looseness in the application of the stamp laws which has become almost a part of the practice and procedure of our minor courts; and I make bold to say that it is a matter of extreme importance if the Legislature says that a blue stamp shall be used on a particular instrument that we should not adjudge that a green one will do as well. Nor can I see that it is ridiculous that a distinction should exist in the colour or shape of stamps indicating particular instruments. On the contrary, it appears to me to be orderly and sensible, and calculated to prevent frauds on the revenue and in the stamping of instruments. But whatever our own opinion may be, it is the Legislature who has prescribed it, and that should be sufficient for us.

The note in this case was valueless, and should not have been admitted in evidence; and the plaintiff's action must be dismissed with costs in both courts, except defendant's cost of his claim in reconvention, which he has not attempted to prove, and which he (the defendant) will pay.

WITHERS, J.—This is a class of defence which may not be very creditable to him who pleads it; but, if it is a legal one, it must be sustained. When this note was tendered in evidence it was properly objected to. It cannot avail the holder. If the officer of the court had brought to the court's notice the impropriety, so to call it, of the stamp on the note when it was produced with the plaint to be filed, the note would have been rejected, and much expense and disappointment saved.

Reversed.

———:o:———

Present:—BURNSIDE, C. J., and LAWRIE, J.

(*December* 1, 1891, *July* 26, *and August* 5, 1892.)

D. C., Galle, No. 394. } SANDO v. ABEYGOONEWARDENE.

Ejectment—Title to land—Mortgage—Conveyance of land by mortgagor to assignee of mortgage decree—Prior sale of land against mortgagor under writ—Judicial sale.

A mortgagor of a certain land, against whom judgment and mortgage decree had passed in a suit upon the mortgage bond, by a private conveyance, in which the mortgagee joined to signify his consent, sold the land to an assignee of the mortgage decree in satisfaction of the mortgage. Previous to this sale the same land had been sold under a simple creditor's writ against the mortgagor to a purchaser, who duly obtained a fiscal's transfer and entered into possession.

In an action in ejectment by the purchaser under the private conveyance against the purchaser at the Fiscal's sale;—

Held, that the former had no title to the land as against the latter.

The 1st defendant, by a bond dated July 26, 1882, mortgaged a certain land to the Oriental Bank Corporation, who subsequently assigned the bond to one Dias. Dias put the bond in suit, and, having obtained judgment on the bond and a mortgage decree, assigned the same to plaintiff by deed dated December 16, 1890.

By deed also dated December 16, 1890, the 1st defendant, with the consent of Dias, signified by his joining in the deed, conveyed the land to plaintiff in satisfaction of the judgment and decree against him. The plaintiff, averring this title, and also alleging that the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th defendants were in unlawful possession of the land, brought the present action for possession and for a declaration of title to the land.

The 7th defendant, among other things, denied plaintiff's title, and pleaded that under writ issued against the 1st defendant in a certain action the said land was on September 13, 1888, sold by the Fiscal and purchased by one Clara Amarasinghe, who having obtained a Fiscal's transfer dated December 6, 1888, conveyed the said land to 7th defendant by deed dated January 17, 1889, and that he, the 7th defendant, was ever since in possession thereof.

The other defendants raised various defences, which are not material to this report.

The District Judge gave judgment for the plaintiff as against the 2nd, 3rd, 5th, and 7th defendants, holding that the assignment of the mortgage decree and the sale of the land to him by the mortgagor gave him a right to it against the 7th defendant. He dismissed the action as against the 4th, 6th, and 8th defendants, on the ground that no cause of action was proved against them.

The 2nd, 3rd, 5th, and 7th defendants as well as plaintiff appealed.

Withers for the 2nd, 3rd, 5th, and 7th defendants.

Pereira for the 6th defendant.

Morgan for the 8th defandant.

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Dornhorst (*Wendt* with him) for the plaintiff.

Cur. adv. vult.

July 26, 1892. CLARENCE and DIAS, JJ., before whom the appeal was first heard, having directed that the case should be set down for the Full Court, the appeal came on for argument this day before BURNSIDE, C. J., and LAWRIE, J.—WITHERS, J., who had when at the Bar appeared at the first hearing of the appeal, now taking no part in the case.

J. Grenier (*Sampayo* with him) for the 2nd, 3rd, 5th and 7th defendants, cited *D. C., Galle*, No. 54,324. Civ. Min. April 30, 1892.*

Senathiraja for the 6th defendant,

Morgan for the 8th defendant.

Dornhorst (*Wendt* with him) for the plaintiff.

Cur. adv. vult.

On August 5, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—This action was originally brought against eight defendants: the 1st and 4th have dropped out of it. The libel prayed that 1st defendant be cited to warrant plaintiff's title to the premises specially described; beyond that the suit takes no further notice of him, and it also prayed that 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th defendants be cited to show cause why the plaintiff should not be declared entitled to the premises, and put and placed in quiet possession, and for damages and costs. The premises referred to are: (*a*) a garden with certain buildings and an oil mill thereon called Gederawatte, and (*b*) a field adjoining called Owita Cumbura.

The 4th defendant did not appear, and the plaintiff seems content to take no further steps against him. The 2nd, 3rd, 5th, and 7th joined in one answer defending the action. The 6th filed a separate answer disclaiming title. The 8th also filed a separate answer defending the action.

The learned District Judge has given judgment for the plaintiff as respects the garden and buildings and mill thereon, with costs against the 2nd, 3rd, 5th and 7th defendants. He has dismissed the plaintiff's claim in respect of Owita Cumbura, and he has condemned the plaintiff in the costs of the 6th and 8th defendants. The plaintiff as well as the 2nd, 3rd, 5th, and 7th defendants have appealed.

I will now deal with the judgment as it effects the respective appellants.

The 6th defendant by his answer disclaimed title, and I can find no appeal against that part of the judgment which awards him his costs. The judgment is therefore affirmed, and the 6th defendant is entitled to no appeal costs.

By his answer the 8th defendant disclaimed title to the garden and buildings thereon. He asserts a claim to the Owita derived from a Fiscal's sale, but he admits he has no Fiscal's conveyance, and he denies possession. Plaintiff has proved nothing against

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* *Present*:—CLARENCE and DIAS, JJ.

(*March* 15 *and April* 30, 1889.)

D.C., Galle, No. 54,324. } SILVA v. NICHOLAS.

CLARENCE, J.—The only reason apparent for any interference with this judgment is, that the plaintiff's action has not been dismissed, the District Judge having merely entered up a nonsuit. The defendants, however, have not appealed.

In 1883 the owner of this land, Hendo, mortgaged it to plaintiffs, who afterwards got judgment on their mortgage with the usual mortgagee's decree, and thereafter assigned the benefit of their judgment to Carol s. For some reason or other the property was never sold by Fiscal's sale in execution of this mortgage decree, but a sale was effected by auction in September 1887, at which plaintiffs became the purchasers. Meanwhile Hendo had made a lease in favour of the 1st defendant. These, omitting details which need not be noticed, are the substantial facts; and plaintiff's complaint is that 1st defendant is in possession under his lease, and prevents plaintiffs from getting possession under their purchase.

Upon the pleadings plaintiff show no right to eject the 1st defendant. Had the property been sold under the mortgage decree, very different considerations would have applied. Plaintiffs do not, however, in their libel aver any facts which clothe them with any right under the mortgage. They merely aver that the holder of the mortgage decree for the purpose of having the mortgage debt paid and discharged "caused the defendant to have the said share of land &c., sold by public auction", and they further aver that the purchase money was appropriated in payment of the mortgage debt. In point of fact all that plaintiffs purport to show is, that the mortgagor sold and conveyed the land to a purchaser, the plaintiffs, and that the mortgage was thereafter paid off and extinguished. There is no suggestion of anything keeping the mortgage alive in favour of the purchasers and no suggestion of any conditions of sale at the auction. Plaintiffs' efforts at the hearing seem to have been to show some parol agreement on the part of the lessee.

It is unnecessary upon this appeal to enter into any consideration of other matters alluded to in the judgment of the District Judge, as for instance, the connection between 1st defendant's lease and a previous lease. Nor need we enter upon any speculation as to the motives which actuated plaintiffs and those associated with them in a somewhat notably circuitous course of action. Plaintiffs' action fails because plaintiffs are not clothed with any right under the mortgage, and this appeal must be dismissed with costs.

DIAS, J. agreed.

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him, and should not have joined him in the action. The judgment, therefore, dismissing the action in respect of the owita was right; but the 8th defendant should have no costs occasioned by his pleas on which he has been virtually beaten. So much therefore of the judgment as adjudges costs to the 8th defendant will be set aside and the defendant will have no costs in either Court.

This brings us to the appeal of the 2nd 3rd, 5th, and 7th defendants. They contest the plaintiff's title to the garden and the buildings on it, and they set up their title as follows:—The 1st defendant owned the whole of the premises, and in 1882 mortgaged them to the Oriental Bank Corporation, who in April, 1890, assigned the mortgage to Jacob Dias, who, in August, 1890, obtained a judgment and mortgagee's decree. In December, 1890, Jacob Dias assigned his judgment to plaintiff, and at the same time plaintiff took a conveyance of the premises from 1st defendant, the mortgagor. Plaintiff avers that the last seven defendants keep him out of possession since his purchase.

In April, 1888, the buildings in the garden were put up to fiscal's auction under a money judgment against 1st defendant, and 3rd defendant was declared the purchaser. The 3rd defendant, however, has obtained no conveyance; and, consequently, he has nothing whatever to oppose to the plaintiff's title under his conveyance from 1st defendant, whose title has not been divested. So far, therefore, as concerns the buildings on the garden, plaintiff has established his right to be put and quieted in possession of them as against the 3rd defendant and as against the 2nd defendant who claims through 3rd defendant. Judgment against them should be affirmed, only so far however as it affects the buildings; and inasmuch as the plaintiff has only partially succeeded against these two defendants, he should only have costs to that extent; but inasmuch as it would be most difficult to separate the costs with any degree of correctness, each party will bear their own costs in both Courts.

Then as to the 4th, 5th, and 7th defendants. In September, 1888, the garden itself was put up to fiscal's auction in execution of the judgment just mentioned, and bought by one Clara Amarasinha, who got the conveyance in December; 1888, and in 1889 she conveyed to 7th defendant, and 7th defendant is now in possession. On these facts, it is plain that plaintiff has no right whatever to eject 7th defendant from possession of the garden.

The mortgage decree was not binding on 7th defendant, as he was no party to it, and the plaintiff can only recover in ejectment on the strength of his own title. Now, whatever rights he may have as mortgagee to obtain a conveyance to perfect his title, it must not be disputed that in an action like this the plaintiff cannot treat the sale by the fiscal as conveying nothing to the 7th defendant's vendor. It certainly conveyed the mortgagor's right, title, and interest, subject however undoubtedly to the right of the mortgagee, and until that title is defeated, there is an hiatus in the plaintiff's title.

It would have been different had matters been reversed and the plaintiff been in possession, and the 7th defendant seeking to eject him, or had the plaintiff in this suit prayed for a mortgagee's decree, so as to estop the 7th defendant from setting up the barren legal title which is in him, and obtained from the mortgagor. Here the plaintiff claims a declaration of title, and virtually to eject the 7th defendant, who undoubtedly has a title, however barren it may be, and liable to be defeated. It is not necessary that we should touch the question whether the mortgage is merged in the judgment—all we decide, in setting aside that part of the judgment affecting the garden, is that the title of the mortgagor had passed under the fiscal's sale to the 7th defendant's vendor and was in him and the plaintiff's title to bring ejectment is in that respect imperfect, as imperfect as that of the mortgagor's would have been, for the same purpose, after the fiscal had sold his right, title and interest in the mortgaged premises.

The judgment of the District Judge must therefore be set aside and judgment entered for 7th defendant in respect of the garden, and we would have given him his costs; but in view of the answer, charging fraud, which he and others set up without any attempt to prove it, each party, plaintiff and 7th defendant, will pay his own costs.

With respect to the 5th defendant, why he was brought into the action is not apparent, and why he joined in the answer and defended the action is not manifest. He does not attempt to justify under the 7th defendant; and I think for that and the other reasons already given plaintiff and 5th defendant should also each bear his respective costs in both Courts.

LAWRIE, J.—I agree.

———:o:———

Present:—WITHERS, J.

(*August* 25 *and September* 1, 1892.)

C. R., Gampola, No. 649. } WIJEYESINGHE V. RYAN.

Clerk—Wrongful dismissal—Domestic servant—Notice—Action for a month's wages in lieu of notice.

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A clerk as such is not a "domestic servant", and is not entitled before dismissal to a month's notice or a month's wages, unless the terms of his engagement were on the footing of the custom as to month's notice or month's wages usually governing contracts of domestic servants with their employers.

This was an action brought by the plaintiff for wrongful dismissal from the defendant's service. The plaint averred that the plaintiff entered the service of the defendant in the capacity of tea maker and clerk on a monthly salary of Rs. 40; that he was paid his salary up to December 17, 1891, and was then wrongfully discharged without due notice, and that by reason of such wrongful discharge he was entitled to receive the sum of Rs. 40 for a month's wages from December 17, 1891. The defendant denied that the plaintiff was wrongfully discharged or that any sum was due to him as wages, and averred that the plaintiff left of his own free will. The Commissioner gave plaintiff judgment for the amount claimed, and the defendant appealed.

Dornhorst for the appellant.

Wendt for the plaintiff.

Cur. adv. vult.

On September 1, 1892, the following judgment was delivered :—

WITHERS, J.—I do not think plaintiff is entitled to succeed in this action. He claims Rs. 40, which was the sum paid him monthly as a tea factory clerk, as if he was a menial servant engaged on the customary terms of a month's notice or a month's wages. Now, he was not a domestic servant; and he now here alleges that the terms of his egagement as a clerk were on the footing of the custom usually understood to govern the constracts of domestic servants with their employers in respect to the determination of service. Then, was he kept out of employment in consequence of the alleged wrongful dismissal, and so deprived of the wages he would have otherwise earned? He neither alleges that, nor proves it. Again, was he ready and willing to continue in defendant's service after December 17, 1891, in the same capacity and on the same terms as theretofore? He does not allege this, nor to my mind does he prove it. Defendant, in paragraph 5 of his answer, says in effect that plaintiff took umbrage at the measures defendant was taking for the protection of his interests, and said he was unwilling to remain any longer in his service, and asked to be paid up and discharged. The evidence satisfies me that this was the case, and that is quite fatal to plaintiff's claim.

For these reasons the learned Commissioner's judgment must be set aside and plaintiff's action dismissed with costs.

Set aside.

Present :—BURNSIDE, C. J., and WITHERS, J.

(*August* 26 *and* 30, 1892.)

D. C., Colombo, No. 1,944 C. } MEERA LEBBE MARIKAR V. BELL.

Landlord and tenant—Lease—Tacit hypothec for rent—Interruption by lessor of lessee's enjoyment—Re-entry—Cancellation of lease.

A lessor has a lien for rent due upon the goods of the lessee brought upon the demised premises; but he cannot, by way of preventing the removal of the goods and so preserving his lien, enter the premises and exclude the lessee therefrom. Such entry and exclusion constitute an interruption by the lessor of enjoyment of the demised premises, discharging the lessee from liability for future rent, and entitling him to annulment of the lease and to damages.

The plaintiff as lessor sued the defendant as lessee of a house to recover Rs. 300 rent for the three months between August 15 and November 15, 1891, upon a lease for two years dated August 6, 1891. The defendant in answer admitted the rent to be due; and by way of claim in reconvention alleged that on November 16 the plaintiff had unlawfully entered upon and taken possession of the demised premises and since continued in such possession. The defendant claimed Rs. 2,000 damages, and a cancellation of the lease, and asserted a right to set off against the rent due a sum of Rs. 200 paid in advance to plaintiff as rent for the last two months of the term. The plaintiff in reply alleged that shortly after institution of this action (which was commenced on December 1) he found that defendant was removing his goods from the premises in order to defeat and deprive the plaintiff of the tacit hypothec which in law he had over them; and the plaintiff therefore to conserve his hypothec placed extra locks upon the outer doors of the said premises.

The District Judge held that plaintiff had a right to prevent the removal from the demised premises of the *invecta etillata* over which he had a tacit hypothec; that defendant might at any time have got permission to remove by paying down the arrears of rent, and was therefore not entitled to damages. He gave judgment for plaintiff as prayed, and dismissed the claim in reconvention.

The defendant appealed

vanLangenberg for the appellant.

Dornhorst (*Loos* with him) for the plaintiff.

vanLangenberg in reply.

Cur. adv. vult.

On August 30, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—This is an action for three months' rent payable on a lease for two years, in

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which is contained a clause of re-entry in these words: "If the said monthly rent or any part thereof shall be in arrear and unpaid for the space of ten days after any of the days on which the same shall become due, it shall be lawful for the said lessor to cancel and determine these presents and eject the tenant from the premises."

The defendant admitted that the rent was due, and he pleads that the plaintiff unlawfully entered upon and took possession of the premises and kept the defendant out of possession, and he asks for cancellation of the lease and for damages in reconvention, and also to set off Rs. 200, which he had paid in advance for the rent of the two months at the end of the term, against the rent admitted to be due. The plaintiff replied denying that he took possession or is in unlawful possession of the premises. He alleges that the defendant being indebted to him for rent as claimed in this action was removing goods from the premises in order to defeat and deprive the plaintiff of the tacit hypothec which the plaintiff had over the goods on the premises, and in fraud of the plaintiff's rights the defendant continued to remove the goods and the plaintiff *believes did actually remove al or the greater part* of his goods, and the plaintiff therefore to conserve his said hypothec placed extra locks upon the outer doors, The plaintiff also denied the right of the defendant to obtain a cancella ion of the lease or to set off the rent paid in advance. These are the pleadings; and upon the face of them it cannot fail to strike one's curiosity to discover how the plaintiff could conserve a hypothec over goods by locking up the room from which they had been in his own belief previously removed. I do not believe such a power is given by Roman-Dutch Law. The facts, as disclosed in the evidence, are substantially those alleged in the pleadings; and the District Judge gave judgment for the plaintiff for the rent due, and dismissed the defendant's claim in reconvention, holding that the plaintiff had a right to prevent the removal of any property from the demised premises till the arrears of rent were paid. The defendant has appealed. Without going into the recondite mysteries of Roman-Dutch Law, and theorising about the *jus retentionis* under a tacit hypothec, it may be freely admitted that in this case the landlord had a lien for rent due and a right to distrain on the property of his tenant on the demised premises—quite as extensive a lien or right to protect it as any claimed for the landlord under the imperfectly understood mediæval theories which have been invoked; but he has no right whatever to lock up the house of his tenant, and exclude him from the beneficial enjoyment of the leased premises, either to enforce his lien or to prevent the tenant from removing the goods from the premises, nor can he if he makes a distress for rent exclude the lessee from any part of the demised premises. Granted therefore that even to enforce his *jus retentionis* and to maintain his tacit hypothec he had the right to distrain these goods, it remains to be shown by what law he might lock up the house and keep the tenant dispossessed and evicted. The learned counsel who argued this case for the respondents, with his wonted earnestness and ingenuity, urged that the plaintiff had the right under the covenant to re-enter and terminate the lease as the covenant for payment of rent had been broken. I would be prepared to grant him that right, although it is said that by the aforesaid Roman-Dutch Law he cannot do so except by judicial process. I would prefer to adhere to the English Law by which the people themselves believed that they were bound. But if I assented to that proposition, then the re-entry of the landlord, no doubt, terminated the lease, and the plaintiff has asserted in his pleadings that the lease has not been, and that the defendant has no right to have it terminated. The clear law on the matter is that the defendant owes the plaintiff three months' rent, that the plaintiff, in entering upon the premises and excluding the defendant therefrom, committed an eviction which justifies the defendant to claim damages, and a declaration that the tenancy and the right to rent has terminated, and that the plaintiff had received from the defendant Rs. 200 as rent which he is not entitled to retain. Under all the circumstances I do not think defendant is entitled to any exemplary damages. He should have paid his rent: I would give him Rs. 25 damages, and I would decree that the tenancy had terminated and no right to further rent exists; and I would decree that the plaintiff pay the defendant the sum of Rs. 200 already paid by the defendant to plaintiff in lieu of rent. After deducting the sum of Rs. 225 in reconvention, judgment would therefore be given for plaintiff for Rs. 75, each party paying his own costs in the Court below, and the plaintiff paying the costs of appeal.

WITHERS, J.—Whether a local landlord can re-enter on demised premises under a proviso for re-entry, and without judicial sanction, or whether, without such sanction, he can distrain for rent on the premises, are questions which it is unnecessary to discuss, because in my opinion the conduct of the plaintiff in this action was not in exercise of either right.

I have no doubt that by our law a substantial interruption by the landlord of the enjoyment of demised premises discharges a lessee from any liability to pay rent (except of course what has accrued

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due) and entitles him to claim an annulment of the contract of lease and damgaes, if any, for the interruption. It cannot be contended that the padlocking of the doors by the landlord, in the manner described, was not a substantial interference with the lessee's ordinary and lawful enjoyment of the demised premises.

For this reason I concur in my lord's judgment.

Varied.

——:o:——

Present:—LAWRIE, J.

(*September* 8 *and* 22, 1892.)

C. R., Colombo, No. 616. } BABAPULLE V. DOMINGO.

Appeal—Order under Small Tenements Ordinance, 1882—Appealable time - Mode of reckoning - Practice —Notice to quit—Ordinance No. 11 of 1882, sec. 8— Civil Procedure Code, sec. 754.

An appeal against an order made under the Small Tenements Ordinance, 1882, must be lodged within five days of the order, and such time must be reckoned in the manner prescribed for appeals from Courts of Requests by sec. 754 of the Civil Procedure Code.

In the case of an ordinary monthly tenancy from month to month, a notice given on January 30 and requiring the tenant to quit "at the end of February next",—

Held, a good notice.

Application under the Small Tenements Ordinance, 1882.

The landlord appealed against an order discharging his rule, on the ground that the tenancy had not been legally determined, inasmuch as the notice to quit was defective for not fixing the date on which the tenant was to quit. The facts are sufficiently disclosed in the head-note and the judgment.

The order was pronounced on July 2, and the petition of appeal was lodged on July 11, which was the fifth day if the day of the order and of filing the petition and Sundays and holidays were excluded.

Wendt for the landlord, the appellant.

vanLangenberg, for the tenant, took the preliminary objection that the appeal was out of time. Sec. 8 of the Ordinance No. 11 of 1882 required the petition of appeal to be filed within five days (exclusive of Sundays and holidays) of the order. So reckoning, this appeal was presented on the sixth day, and was therefore too late.

Wendt for the appellant. Sec. 8 after limiting the five days' time, enacts that appeals under this Ordinance shall be "governed in all other respects by the same rules as are applicable to appeals from judgments of Courts of Requests." This, it is submitted, brings in the provisions of sec. 754 of the Civil Procedure Code, which now regulates appeals from Courts of Requests; and if the computation therein prescribed be adopted, the present appeal is just in time.

[Counsel also argued as to the sufficiency of the notice to quit.]

Cur. adv. vult.

On September 22, 1892, the following judgment was delivered:—

LAWRIE, J.*—The first question is, whether this appeal is out of time.

It is out of time unless the day when the decree was pronounced and the day when the petition was presented be counted. Sec. 754 of the Code enacts that the petition of appeal, where the court is a Court of Requests, "shall be presented within a period of seven days from the date when the decree or order appealed against was pronounced exclusive of the day of that date itself, and of the day when the petition is presented, and of Sundays and public holidays."

It is conceded that this sec. 754 did not repeal or alter sec. 8 of the Small Tenements Ordinance No. 11 of 1882, which provides that appeals shall be filed within *five* days (exclusive of Sundays and holidays) of the order or judgment complained of and be governed in all other respects by the same rules as are applicable to appeals from judgments of Courts of Requests. With some hesitation, I hold that these last words bring in the provision of the Code as to the day of the judgment and the day of the presenting of the appeal as an extension of the more limited words of the Small Tenements Ordinance, so that the only difference as to time between an appeal from an ordinary Court of Requests judgment and one under the Small Tenements Ordinance is that in the latter the appeal must be presented within *five*, in the former within *seven*, days, the rule as to calculating when these days begin and end being the same in both. I therefore hold that this appeal was in time.

The remaining question is on the merits. This was a case of monthly tenancy. The defendant was entitled to a month's notice. On January 28, 1892, the landlord gave the tenant written notice to quit and deliver possession of the house at the end of February next.

The Commissioner discharged the rule, holding that the tenancy was not legally determined, inas-

* His lordship intimated that he had consulted WITHERS, J., who concurred in his judgment.

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much as the notice did not specifically fix the date on which the tenant was to quit. I am unable to sustain this order. The end of a month means the end of the last day, until then the month is not out. The notice is unambiguous: the tenant was to quit on February 29.

I set aside the judgment and send the case back to the court of requests for judgment on the merits.

Set aside.

--- :o: ---

Present:—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(*September* 2 *and* 9. 1892.)

D. C. Badulla, No. 246. } MENACHY v. GNANAPRACASAM.

Claim in execution—Order conclusive to what extent—Claim disallowed as too late—Vendee of claimant—Civil Procedure Code, sections 242, 243, 244, 245 *and* 247.

An order made under section 245 of the Civil Procedure Code, disallowing a claim to land seized in execution, is conclusive against the claimant, not only as to possession but as to title, unless within fourteen days he institutes an action to establish his right to the land. Such order is equally conclusive against any subsequent transferee from the claimant, and is a bar to any action by such transferee for the recovery of the land.

So held by BURNSIDE, C. J., and WITHERS, J.

Per LAWRIE, J.—The order is conclusive only in respect of the particular seizure made, and as between the claimant and the purchaser under such seizure. If such seizure be released, the order will not estop the claimant from again asserting a right against a new seizure.

This was an action for the recovery of certain land and damages. The plaintiff claimed the land by right of purchase from one Ramen Chetty under deed dated February 26, 1891. The defendant in his answer averred that the land was his own property, he having purchased it at a sale in execution against one Ramasamy under writ issued in D. C. Badulla, No, 28,794, and having been put in possession by the fiscal on October 2, 1891. He further pleaded that the plaintiff could not maintain the action inasmuch as the plaintiff's vendor, Ramen Chetty, had unsuccessfully claimed this land as his own when it was seized under the writ issued in D. C. Badulla, No. 28,794, and had not brought his action within fourteen days after the dismissal of his claim.

It appeared at the trial that Ramen Chetty's claim in the Badulla case had been entertained by the court and a day fixed for inquiry into it. On that day the claimant was not ready to proceed, and the court dismissed his claim without inquiry.

The district judge dismissed plaintiff's action, holding that the order disallowing Ramen Chetty's claim was one which became conclusive against him on his failure to bring an action under section 247 of the Civil Procedure Code, and that the order bound the plaintiff who claimed under Ramen Chetty.

The plaintiff appealed.

VanLangenberg, for the appellant. The question is whether, when an order is made under section 245 disallowing a claim and the claimant does not bring an action within 14 days as required by section 247, he is precluded ever after from bringing an action in ejectment against the purchaser at the fiscal's sale. It is submitted sections 244 and 245 are clear that the only issue at a claim investigation is, who was in possession at the date of the seizure? The order made is open to review in the action contemplated by section 247; it is conclusive, subject to the result of such an action. If no action is brought, then it is not open to the claimant to question in any future action the finding of the court as to who was in possession at the date of the seizure. For instance, it might prevent him from pleading a prescriptive title. But the question of *title* as distinguished from *possession* can be raised in any subsequent action. A further question arises, whether the particular order in this case is the order allowed by section 245. It is argued that the order here is practically an order rejecting the claim and refusing to investigate. There has been no investigation as required by section 244. The district judge said the claim was not made in time, and he therefore refused to go into it. It is submitted that the conclusive effect provided in section 247 does not attach to this order.

Sampayo, for the defendant. Possession is not the only question involved in a claim: the court has also to be satisfied that the claimant had an interest in the property at the time of seizure (section 243 of the Code). The plaintiff's vendor had claimed under the very title which he subsequently transferred to plaintiff, and the estoppel under section 247, which operated against the claimant, was equally effective against his privy the plaintiff. It is submitted that the conclusive effect of an order under sections 244 and 245 is not as to the fact of possession at the time of seizure, but as to the liability of the property in dispute to be sold in execution as against the claimant. Where a claim is rejected, that is conclusive that the property is that of the execution-debtor and not of the claimant. If, as is contended, an unsuccessful claimant who has not brought an action within fourteen days of the order on the claim, can still bring an ordinary action in ejectment against the purchaser in execution, the whole object of the provisions of the Code with regard to claims will be defeated. As to the particular order in this

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instance, it is submitted that the order need not be made after investigation so as to bring it under the operation of section 247. The court, under section 242, need not investigate a claim if made too late, and, when a claim is rejected on such a ground, the order must necessarily be made under section 245 and therefore is one within the operation of section 247.

VanLangenberg, in reply.

Cur. adv. vult.

On September 9, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—Several questions arise on this appeal which we must dispose of.

The first is one of fact, viz., was an order made such as is contemplated by the Code under the provisions relating to "claims to property seized." I take it that from the record we must conclude that the vendor of the plaintiff in this action did put in a claim to the property, the subject of this action which had been seized by the plaintiff in execution in another action against the defendant in that action, and that the district judge under section 242 of the Code did make no investigation into the merits of the claim, holding that the claim had been unnecessarily delayed and passed an order disallowing the claim. The first question of law arising on the fact which we have thus found, is, was that an order having the same effect as an order adjudicating on the claim after investigation under sections 244 and 245? I do not think we should hold otherwise. The object of section 242 evidently is to prevent frivolous claims for the purpose of vexation or delay being made and then abandoned with no other result than the obstructive one which the claimant intended. An order, therefore, made without investigation on default and permitted by section 242, must be treated as an order on the merits and having the same effect.

The next question is, what is the effect of an order on the merits and whom does it affect as *res judicata?* I am free to confess that the wording of sections 244 and 245 of the Code gives strong grounds for the contention which was so ably urged on us by Mr. VanLangenberg, that the order itself only affected the question of possession and was conclusive only in respect of the possession of the property at the time of seizure, and that an order releasing property from seizure or disallowing a claim in no way operated on the right of property in the thing claimed. To give the Code this restrictive operation seems to me to deprive the summary process, which it provides, of any usefulness, and in fact to introduce rather a procedure of delay and obstructiveness which it was intended to avoid, besides standing in direct contrast with the provision of section 247. By that section, notwithstanding the order, the party against whom it is passed may institute an action to establish the right which he claims to the property in dispute, or to have the property declared liable to be sold in execution of the decree, and, subject to the result of such action, "the order shall be conclusive." The answer to the question of what it shall be conclusive is—of that which otherwise the action would disturb, viz: the claimant's right to the land or the execution creditor's right to sell it as the property of his debtor. I therefore conclude that the order is more than a mere judicial declaration as to possession, but that it is a judicial finding of the right of property in the thing claimed to the extent of it being liable in execution to be sold as the property of one person against the other claiming property in it. Applying, therefore, the law as I have stated it to be to the case before us, the order of the district judge was an order on the merits, and it operated as *res judicata* against the claimant, that the execution debtor had such property in the land as rendered it liable to be by the plaintiff sold as his property, and that such sale conveyed good title as against the claimant and had the same effect as against the present plaintiff who was his vendee and privy in estate.

The judgment of the district judge must therefore be affirmed with costs.

WITHERS, J. concurred.

LAWRIE, J.—The property in question was seized in execution under a writ against Ramasamy at the instance of Gnanapracasam on September 25, 1890. It remained under seizure until January 10, 1891, when Ramen Chetty claimed it. The claim was disallowed on January 26, 1891, because the claimant was not ready on that day and the district judge refused to give a postponement, because the claimant had delayed so long to make his claim. The claimant Ramen Chetty did not institute an action within fourteen days, and I agree that the order disallowing the claim became conclusive as between Ramen Chetty and his privies on the one part, and the execution creditor on the other, so far as regarded the seizure and the title to be acquired by the purchaser at the fiscal's sale following on that seizure.

I do not feel it to be necessary to decide that the order had a more extended effect. If, after seizure and after an unsuccessful claim, the judgment creditor relinquishes the seizure, or if for some cause no sale takes place under it, I am not at present prepared to say that on a fresh seizure a claimant may not again come forward and make a claim. If between the two seizures circumstances had changed, if the claimant had meanwhile cured

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the defect in his title or had acquired a new title by purchase or if he had meanwhile got into undoubted possession, I am not sure that the Ordinance prevents him from making a new claim. His right to do so might seem equitable, if his claim had been disallowed without any investigation having been made.

Here, however, the land was sold by the fiscal under the same seizure which the claimant had sought unsuccessfully to set aside. The present contest is between the purchaser at that sale in execution and a purchaser from the claimant. It is not said which of these two sales was prior, and nothing turns on priority of registration. It is also not said that the seizure was registered under section 238 of the Code so as to make the private alienation void.

The plaintiff who purchased in February, 1891, from Ramen Chetty seems to have got into possession and while in possession the defendant the purchaser at the fiscal's sale was put in possession by a fiscal's officer in October, 1891. The plaintiff was then ousted. Hence this action to eject the defendant and for damages. The claim for damages was not dealt with by the district judge and as no special point was made in the argument by the appellant, I conclude that we need not disturb the judgment on that ground. The defendant purchased at the fiscal's sale, though I must note that he does not allege nor prove that he has obtained a transfer. The order disallowing the claim of the vendor to the plaintiff is conclusive as between him and the defendant who claims under the judgment-creditor.

I agree to affirm the judgment under review.

Affirmed.

———:o:———

Present :—Withers, J.

(*August* 25 *and* 30, 1892.)

P. C. Panadura, No. 7,214. } Assistant Government Agent, Kalutara v. Aaron.

Timber—River drift—" Land" — Forest Ordinance No. 10 of 1885, section 46.

The term " land" in section 46 of the Forest Ordinance, No. 10 of 1885, means a defined space of land and does not include a river-bed or a high road.

Appeal against a conviction on a charge of removing timber without a license, in breach of section 46 of the Forest Ordinance, No. 10 of 1885.

The facts material to this report appear in the judgment.

There was no appearance of parties upon the appeal.

Cur. adv. vult.

On August 30, 1892, the following judgment was delivered :—

Withers, J.—In my opinion the mere act of removing timber does not constitute the offence of which the accused have been convicted. There must be evidence of the land being crown or private from which the timber has been removed without a permit; it may be the land where the timber was felled or stacked or where the tree was blown down. Here it would appear that the timber was river drift and that the accused hauled it out of the water to land, no doubt intending to appropriate it.

But " land" in section 46 of the Forest Ordinance means a more or less defined space of land and not a river-bed or a high road.

Set aside.

———:o:———

Present :—Burnside, C. J. and Withers, J.

(*August* 26 *and* 30, 1892.)

D. C. Kegalla, No. 128. } Siriwardene v. Banda.

Practice—Action ordered to abate—Case " struck off" —Res judicata—Lis pendens—*Minor, conveyance of land by—Repudiation—Prescription—Interruption by previous action—Civil Procedure Code, sections* 402, 403.

An action, instituted before the date when the Civil Procedure Code came into operation, was after that date " struck off, no steps having been taken for more than a year and a day."

A subsequent action having been brought on the same cause of action—

Held, that the " striking off" of the previous action did not amount to an order abating the action, under section 402 of the Code, and was therefore no bar, under section 403, to the new action.

The owner of certain land gifted it by deed to his minor son B, and died in 1873, when administration was taken out to his estate. The administrator sold and conveyed the land to the defendant in 1876 and put him in possession. B, still being a minor, in 1881 conveyed the land to defendant in confirmation of the administrator's conveyance, but in 1884, after attaining majority, conveyed it to the plaintiff, without however executing any express repudiation of his previous conveyance. B's conduct in the administration proceedings, during his minority, was such as in the opinion of the court estopped him from questioning the administrator's title.

In an action of ejectment—

Held, that B's conveyance of 1881 was not void, but voidable only by B by express repudiation after attaining majority, and that the mere execution of the conveyance to plaintiff did not amount to such repudiation, and plaintiff's title therefore failed.

Action in ejectment.

The facts sufficiently appear in the judgment of Burnside, C. J.

The district judge dismissed the plaintiffs' action with costs, and the plaintiffs appealed.

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Wendt, for the appellant. The district judge has decided against the plaintiff on two grounds, both of which cannot be sustained, viz., that the order "striking off" the old action was a bar to the present action, and that Punchy Bandara, plaintiff's vendor, had divested himself of title (prior to his conveyance to plaintiff in 1884) by the deed of June 6, 1881, in favour of his brother. As to the first ground, it is submitted that even if the procedure of the Code applied to the old action, the order did not purport to be made under section 402, that the action do abate. Such an order is not an order of course, but one in the discretion of the court, and the order "striking the case off" has no meaning under the Code. As to the second ground, the deed on which defendant relies does not avail him. It is not in his favour, but in favour of Bandara's brother, who is no party to the action, and who so far as appears makes no claim whatever upon it. It is, moreover, void as against plaintiff's conveyance from Bandara, which was for valuabe consideration and has the advantage of prior registration. In addition to these grounds, Bandara was a minor in 1881, and his conveyance to plaintiff amounts to a repudiation of that to his brother if repudiation were necessary.

Dornhorst (*VanLangenberg* with him) for the defendant. As to the order in the old action, it is submitted that though the district judge employed the phraseology adopted in practice anterior to the Code, the intention clearly was that the action should not be further proceeded with. The order is therefore a bar. The appellant is on the horns of a dilemma: if the old action abated, he is estopped by section 403; if it did not, it is still pending, and *lis pendens* could be pleaded in abatement. As to the title, it must be taken that upon administration being taken this property vested in the administrator, and his sale in 1876 makes good title for the defendant. The defendant has ever since been in possession adversely to plaintiff and his vendor and has thereby matured a prescriptive title too. Bandara in a deed of May 3, 1881, to which he was a party, recites that he had then attained majority, and the present action was not brought till July 1891 more than ten years later. There has never been a formal repudiation by Bandara of his conveyance of 1881. Bandara and his vendee the plaintiff cannot, after the former's conduct in the testamentary proceedings, question the title passed by the administrator, The proceeds of the sale to defendant were shown in the administrator's accounts, to which Bandara, appearing by a curator, took various objections on other grounds which were dealt with and the accounts passed, and the sale was not in any way questioned.

Wendt, in reply. It is sufficient to say, in answer to the argument of *lis pendens*, that there is no such plea on the record. The plea is a special one expressly based on the terms of section 403. The title in this land never passed to the administrator. The deed of gift of 1865 operated immediately to vest title in the donee; and, indeed, the administrator himself only dealt with the property in ignorance of the deed of gift, which he subsequently discovered among the donor's papers. The proceeds sale may have appeared in the administrator's accounts, but the district judge expressly finds that the objections never were finally disposed of or the accounts passed. As to the prescriptive title, it is averred in the plaint and not traversed, that in 1876 Bandara was 14 years of age. He would therefore not attain majority till 1883. No mere recital in the deed of 1881 could make him a major if he was not one in fact, and if he was in fact a minor, the recital even cannot bind him. The present action has therefore been brought in time, even leaving the abortive action of 1889 out of consideration.

Cur. adv. vult.

On August 30, 1892, the following judgments were delivered:—

Burnside, C. J.—This is an action of ejectment brought by the plaintiffs to recover from the defendant certain land of which the plaintiffs admit the defendant to have been in possession since 1876, upwards of sixteen years. These are the short facts. The land was the property of one Mudianse Ratemahatmeya. He died in 1873, having, as it is said, previously gifted the land to his then minor son Bandara who, it is alleged, then succeeded his father in title and that this son in April, 1884, sold the land to the wife of the plaintiff. The defendant says that on the death of the Ratemahatmeya administration of his will was taken out, that this land had not been specifically devised, and that the administrator with the leave of the court sold it to the defendant, who entered upon and ever since has been in possession, and that in the year 1881 Bandara himself sold the land and made a conveyance to him on June 6, 1881. The facts of the above transactions are not so much in dispute, as the legal bearing of them. The defendant also pleads prescription and claims by adverse possession since the sale to him by the administrator for the full period of ten years immediately preceding this action which was commenced in March, 1891. The determination of

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this issue must depend on the date on which Bandara came of age, if the property did really pass to him from the father. For the plaintiff it was urged that the land had become the property of Bandara but that the deed from Bandara to the defendant in 1881 was void and passed no title, as he, Bandara, was then a minor and that the deed from Bandara when he became of age to the plaintiff in 1884 was operative to convey the title which remained in Bandara notwithstanding the deed of 1881, but in any case that the deed of 1884 took priority to that of 1881 by reason of previous registration.

It appears that previous to bringing this action the plaintiff had brought another action to the same effect in this court, which not having been proceeded with the district judge ordered to be struck off the roll, and the defendant alleged that the action thereby abated, and he pleaded it as *res judicata* to this action. There are incidental points in the case which will appear and be dealt with as I go on. The learned district judge has given judgment for the defendant and the plaintiff appeals.

On the point lastly mentioned the learned district judge holds for the defendant, and that the order of the district judge in the previous suit barred this action. I cannot agree with that holding. The order was a worthless one, having no effect whatever. The Code gives no power to a district judge in default of proceedings for a year to order a case to be "struck off", as was ordered in this case. What the Code directs is that an order may pass that the action shall "abate" and no such order was passed. The defendant's plea of *res judicata* therefore fails. It was, however, urged for defendant that if the action had not abated by the order, it was pending, and, therefore, was an answer to this action as *lis pendens*. To which the reply is that the defendant has not pleaded it as *lis pendens* but as *res judicata*.

The crucial question seems to me to be whether the sale and conveyance by the administrator in 1876 was good and valid to pass the property which it purports to dispose of. I cannot see why it did not. If the deed to Bandara be regarded as a deed of gift and not a testamentery instrument, there is the fact that administration was duly granted upon it and that Bandara, plaintiff's vendor, had recognised and dealt with the administrator as such, and the plaintiff is estopped from contesting the *bona fides* of this administration in the same way that his vendor was estopped. If the deed be a testamentary disposition, *cadit quæstio*. Wether this was a special device or not, the administrator took the estate and dealt with it in administration, and I do not find it contested that he had the right to do so in the regular course of administration. Of course if Bandara took direct from his father, it was quite competent for him to have executed the deed to the defendant in 1881, and such a deed would not have been void as contended for by the plaintiff but only voidable, adn it could have been avoided only in the regular manner. But I do not think that the mere execution of the second deed in 1884 to the plaintiff *de jure* avoided the first. I can find no expression of such an intention or anything beyond the mere disposal of the same property as giving colour to this contention, and I must regard the two deeds simply as conveying an adverse interest under the Registration Ordinance. For whatever purpose, therefore, the second deed might be effectual, the prior registration of it gave it priority over the defendant's deed. I have no hesitation in ruling that Bandara took no estate which could defeat the title which the administrator dealt with as in him as administrator in 1876, and that the two deeds of 1881 and 1884 from Bandara to the defendant and the plaintiff respectively were not worth the paper which they spoiled, and the defendant's possession under his title in 1876 enured to him to give him a good paper title, and he had obtained as well a title by prescription under it at the time this action was brought in 1891. I take no heed of the bringing of the other action. Whatever of interruption it created could only avail in that suit and have no relation to this.

The judgment of the district judge should be affirmed.

Withers, J.—I agree in affirming the judgment and I think it a sufficient ground for my concurrence with the Chief Justice to say that Punche Banda was estopped by his assent to the administrator's disposal of the land in question from denying his right to do so, that assent not being followed by an act of repudiation upon his coming of age, when he was of course fully aware of the circumstances of that disposition and his own confirmatory disposition to the defendant at a later period in June, 1881. The conveyance in 1884 to the second plaintiff was no such act of repudiation.

Affirmed.

———: o :———

Present:—Burnside, C. J., Lawrie and Withers, JJ.

(September 2 and 9, 1892.)

D. C. Colombo, No. C 1,250. } Lenohamy v. Samuel.

Cause of action—Declaration of title to land—Ouster—Pleading—Evidence.

Where an action for declaration of title to land is based upon an ouster, and both the title and the ousters are put in issue—

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Held, that the action must fail unless the ouster is proved, and that it is not competent for the court, upon a fictitious cause of action, to decide the mere question of title.

In this action the plaintiffs, claiming title to an undivided half of a certain land and assigning the other half to the defendants, alleged that the defendants had ousted them from the land and were in exclusive possession thereof since the ouster, and prayed for a declaration of title and for damages. The defendants, admitting the plaintiffs' title to certain fractional shares of the land, denied that they were entitled to half as claimed and they also denied the alleged ouster.

The plaintiffs' claim to half depended upon the question whether they were the children of one Appuhamy and his wife Bachcho. The evidence led at the trial was directed to this question, the issue of ouster being ignored. Upon the evidence the district judge held that the plaintiffs were entitled to the half they claimed, and gave judgment accordingly.

The defendants appealed.

J. Grenier, for the appellants. The plaintiffs have failed to prove the cause of action alleged by them, and their action must therefore fail. They alleged that three years before action the defendants had "unlawfully and wrongfully ousted them from the said premises", and they prayed for a declaration of their title to an undivided half share. The evidence does not establish any such ouster, and the judgment settling the title as between the parties cannot therefore be supported.

Wendt, for the plaintiffs. There is sufficient evidence in proof of the disturbance of plaintiffs' possession alleged. But if that evidence is wanting, it is because parties in the court below confined their attention to the dispute as to title, which was raised on the pleadings. The issue as to dispossession was not pressed, because perhaps the defendants, having claimed the whole land for themselves, were not prepared to deny that they took possession of the whole land. And the district judge says in his judgment that the only question in the case was one of title. Where parties have thus by consent narrowed the grounds of the contest between them it is submitted a court of appeal will not go beyond those grounds and decide on a matter which, though formally in issue on the pleadings, was not contested at the hearing. This court has moreover held that in an action of ejectment, to which the present action is similar in principle, a plaintiff may, upon proof of title in himself and possession by defendant, recover judgment if defendant fails to prove a superior title, notwithstanding that the plaintiff may have averred an ouster and failed to prove it. (*D. C. Matara*, No. 85,494, 9 S. C. C. 7.)

[Other points were argued, which are not meterial to this report.]

Cur. adv. vult.

On September 9, 1892, the following judgments were delivered :—

WITHERS, J.—The plaintiffs, alleging that they are the tenants in common with the defendants of a certain land to the extent of a moiety thereof, say that they entered into possession of the land *qua* their said shares, and that after entry the defendants ousted them from the land some three years before action brought and have ever since then been in exclusive possession of the premises.

The defendants admit the right in plaintiffs to certain fractional shares of the land, i. e., first plaintiff to one-sixteenth, third plaintiff to one-thirty seconds, four, five, seven, eight, and nine plaintiff to one-one hundred and sixtieths each, claim the remaining interests themselves and expressly deny the plaintiffs' entry into possession of the land and their ouster of the plaintiffs therefrom.

To the principal issue of ouster or no, no one paid the slightest attention, judge or counsel. The learned judge himself makes bold to say at the commencement of his judgment that the only question in this case is whether the first plaintiff and her sister Ketcho were children of Appuhamy and Bachcho or of Baba Appu and Bachcho, quite ignoring the main question of ouster.

At the trial, devoted exclusively to the question of title, there was no suggestion of evidence of entry by plaintiffs and ouster by defendants. The first plaintiff at the close of the examination in chief says: "I go occasionally to the land in dispute to get my share of the produce." If she receives it, where is her cause of action? If she does not receive it, where is her entry? It is only too clear that this was a purely fictitious cause of action, and this being so plaintiffs' action failed.

This court has repeatedly laid down that it will not entertain speculative actions based on fictitious issues which only encourage perjury and litigation. If a party has never been in possession of land to which he claims title with right of immediate possession, he should only say so, and he must state his title clearly and prove it accordingly.

The plaintiff's proper remedy was, no doubt, to be sought in a partition suit, which, though he had never been in possession, he had a perfect right to institute, if he was a co-owner with right to immediate possession of his share. For my part I decline to discuss

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the so-called issue of title in this action. I think the judgment ought to be set aside and the plaintiffs' action dismissed with costs.

LAWRIE, J.—The district judge records that the only question which he tried in this case was whether the plaintiffs were the descendants of Appuhamy and Bachcho. The other issues raised by the pleadings were not tried. All concerned seem to blame for this; and instead of dismissing the action I would set aside the judgment under review and send the case back for a new trial, pointing out to the district court and the parties the mistakes which they respectively have made.

BURNSIDE, C. J.—It is not open to legitimate contest that, before any question of title could be raised in the form of action which the plaintiffs have elected to bring, the plaintiffs were bound to prove that they had been in possession and that the defendants had committed some act of trespass on them, be it ouster or otherwise. The plaintiffs do not bring ejectment and thereby say,—you are in possession of our land, land to which we have good title, and you keep us out of it. They say,—we were in possession, and you disturbed that possession. The defendants say,—you were not in possession, and we never disturbed you. Before the plaintiffs can touch the defendants' admitted possession and put the defendant to proof of title which they have asserted in defence, the plaintiffs must show that the possession was obtained as against them, the plaintiffs, by the means asserted, trespass or ouster. It is painful to feel that the interests of suitors are jeopardized by the want of professional knowledge on these primary matters, but a greater evil results from admitting questions of title to land being disposed of on fictitious causes of action or by some haphazard procedure, on the specious ground that it leads to substantial justice. If litigants appeal to the law, their disputes should be settled by recognized rules, or what is the use of trained judges?. What is called substantial justice on one side too often inflicts most substantial injustice on the other. The plaintiffs have disclosed no cause of action. If they simply desired a declaration of their interest in the land and the ossession of it, ample means are provided for that purpose in a partition suit.

The plaintiffs' action must be dismissed with costs.

Set aside.

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Present:—BURNSIDE, C. J. and WITHERS, J.

(*September* 9 *and* 13, 1892.)

D. C. Kandy, No. 4,646. } UKAMBUWE V. JUNGHAMY.

Prescription—Adverse possession—Interruption by pending action—Kandyan Law—Revocability of deed of gift—Ordinance No. 22 *of* 1871, *section* 3.

The institution of an action for the recovery of land against a party in adverse possession does not if unsuccessful, interrupt such possession. During the pendency of the action such possession is in suspense, and time is not gained by the occupant against his adversary. But if the action is abandoned or lost, the period of its pendency ensures to the benefit of the party in possession.

Ejectment.

The plaint averred that Ratwattewalauwe Meddu-ma Kumarihamy was the original owner of the land in question, and by her deed of April 8, 1869, conveyed it by way of gift to her son Wagodapola Tikiri Banda, and subsequently by her deed of December 19, 1872, revoked the gift. Thereafter, the Kumarihamy, by deed of October 9, 1875, sold and conveyed the land to plaintiff. The plaint further averred that one Abeyratne Ratwatte had been in possession at the date of plaintiff's purchase, and plaintiff having instituted an action No. 90,146 against him to recover possession, compromise was effected in 1885, whereby Ratwatte yielded up possession to plaintiff. The defendants were alleged to have ousted plaintiff in 1889. The defendants pleaded that the Kumarihamy's deed of 1869 was a deed of sale and not of gift and was therefore irrevocable. They denied any possession on plaintiff's part and set up a sale in execution against Tikiri Banda in November. 1880, at which Ratwatte had purchased and subsequently mortgaged the land to one Fraser. Ratwatte having been adjudicated insolvent, his assignee sold the land and conveyed it to the mortgagee, Fraser, in 1887. The defendants justified their possession under Fraser. Fraser was subsequently added as a party defendant to the action, and, besides relying on the title above set out, set up a title by prescription.

The district judge held the deed of 1869 to have been revocable and to have been properly revoked, following the decision of the Supreme Court dated July 4, 1878, in D. C. Kandy, No. 68,449, which was an action by the present plaintiff in respect of other lands conveyed by the deeds of 1869 and 1875. On the question of prescription the district judge (*A. C. Lawrie*) held as follows:—

" The defendants have not led evidence to prove " such possession as would give them a prescriptive " right to the land, apart from the title, the root of " which had been declared by the Supreme Court to " be bad. The defendants, perhaps, trusted to the " admission in the plaint as to the possession, which " admission they thought shifted the burden to the " plaintiff. The plaintiff alleges that the defendants' " predecessor in title was in possession from at least

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"1875 till 1885, but the plaintiff says he then interrupted that possession by raising the action No. 90,146 against Ratwatte in 1882, and that in 1885, by an arrangement between him and Ratwatte, the plaintiff obtained the possession. That the plaintiff did raise the action No. 90,146 is proved by the production of the record, and on that the plaintiff relies as proof that the defendants' possession though continuous was not undisturbed and uninterrupted. The plaintiff has not proved the arrangement in 1885, nor has he proved that he then entered into possession. It seems indeed almost certain that he did not then get possession. The defendants are now, and have probably been in possession all along. So far as appears, the possession has been undisturbed and uninterrupted by a title adverse to the plaintiff, but it has not been *undisputed*. The action No. 90,146 raised the question of right.

"It was decided as long ago as 1854 (*D. C. Kurunegala No.* 12,911, Ram. (1854) 54) that the raising of an action interrupts prescription, and this decision was followed in 1856 in a C. R. Chavakacheheri case (Thomson, vol. II. p. 187; Nell's *Courts of Requests*, 253). In 1877 (Ram. p. 133) the Supreme Court, Clarence and Dias, J. J., observed that the court had repeatedly held that the institution of a suit is an interruption. I do not know of any later decisions on the point. It is therefore settled law that the raising of an action interrupts prescription. I venture to think that these decisions are wrong. They may be according to Roman Dutch Law, but our law of prescription rests on ordinances which abrogated and repealed the Roman-Dutch Law, and our ordinance speaks of undisturbed and uninterrupted possession. It does not speak of undisputed possession. In my opinion, if the possession has not been interrupted or disturbed, the possessor acquires a right notwithstanding any number of abortive law suits. I do not wonder that Creasy, C. J., in *D. C. Jaffna, No.* 9,601 (Ram. (1862) 189) said this was a question on which he entertained great doubt. But while I am respectfully of opinion that the decisions are wrong, I am bound by them in holding that the title of the defendants is bad, and that their long possession does not avail them because of the institution of the action No. 90,146. I must give judgment for the plaintiff for the land with costs."

The added defendant appealed.

Dornhorst, for the appellant, contended that the deed of gift of 1869 was not revocable. It purported to be a sale and not a mere donation. The judgment declaring it to be revocable did not estop the appellant, and it certainly went much further than any previous decision of this court. In any case, the added defendant was entitled to judgment on the ground of prescriptive possession. The institution of the action No. 90,146, did not bar prescription, it not having culminated in a judgment for the plaintiff. A merely abortive action could not avail as against the party in possession. The district judge should therefore have given effect to his own opinion.

Wendt, for the plaintiff. The judgment in No. 68,449 is at least a very strong authority as to the revocability of the donation, having been pronounced in respect of the same deed. The deed, although purporting to be a deed of sale, was in reality a deed of gift, as the purchase money was remitted to the grantee in the deed itself. As to the appellant's prescriptive title, it is badly pleaded, the plea not alleging that his possession was undisturbed and adverse. The district judge's ruling as to the interruption was right. [In addition to the cases mentioned in the district judge's judgment, he cited Marshall's *Judgments*, title *Prescription*, 3, 9; Burge, *Col. and For. Laws*, vol. III. pp. 24, 26.]

Dornhorst, in reply.

Cur. adv. vult.

On September 18, 1892, the following judgments were delivered:—

Withers, J.—The decisions relating to the revocability of Kandyan deeds of gift are too hard for us, and I fear we must subscribe to them. The custom most unreasonable now, whatever it may have once been, of revoking deeds of gift which do not contain an express power of revocation and which do contain covenants for everything which make for good title and quiet possession and absolute freedom of disposition, deeds too which are not retained by the donors but are handed to the donees with possession of the lands granted in them, has been converted into law by this Court. I am ashamed to think I must hold this to be a revocable deed of gift; and what the consequences may be of this legalised custom are exhibited in this case—the possible defeat of dispositions of property bought and sold in good faith at public and private sales, after a course of expensive litigation.

Happily in this case, I think we can assure to the defendant, who was properly added herein, the title he has acquired by possession according to statute. It is true that his plea on this behalf was not good and might well have been demurred to, but a defective

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statement in a pleading, if not otherwise excepted to, may be cured by verdict, and I think the added defendant is entitled to a verdict of possession under the statute. The plaintiff admits that the added defendant's predecessor in title, Abeyratne Ratwatte, was in possession of the land in dispute at the date of his purchase from Kumarihamy in October, 1875, that Ratwatte was still in possession of the land in February, 1882, when plaintiff brought his action of ejectment and after he, Ratwatte, had acquired the land in November, 1880, at a judicial sale in execution of a judgment against Tikiri Bánda, the donee under the revoked deed of gift.

The plaintiff's alleged entry into possession after a compromise of his case against Ratwatte in 1885 was expressly denied by the added defendant, and no attempt to prove it was made by the plaintiff. The learned judge would himself have given judgment for the defendant on this plea but for the opinion which to his mind was forced on him by judgments of this Court to the effect, as he seems to interpret them, that an action of ejectment against a person in possession interrupts that possession and snaps the continuity of it. But I do not understand any decision to go that length. Possession is interrupted, *i. e.*, held in suspense, by an action, and so long as that action subsists time is not gained by the occupant against his adversary pending the same. But if the action is abandoned or lost, and the defendant remains in possession, the temporary gap of time opened during the proceedings closes again and the period of interruption by the suit enures to him for whom time and adverse possession are creating a prescriptive title.

I think the judgment should be set aside and judgment be given for the added defendant with costs.

BURNSIDE, C. J.—I desire to say one or two words whilst agreeing with my brother WITHERS, that the added defendant should have judgment on the issue of prescription. Had it been necessary in this case to review the decisions on the law of the Kandyans as to the revocability of deeds of conveyance of lands, I should not have hesitated to submit the question again for the consideration of the Full Court, to decide whether some of those decisions, and particularly that relied on for the plaintiff in this case, had not gone too far, and secondly, it is not because prescription may have been interrupted by a suit that therefore its continuity is entirely broken and adverse possession must begin afresh from the interruption, in order that prescription may be perfected. The suit only affects prescription so far as the suit itself is concerned, and the interruption is only available with respect to it.

Reversed.

Present:—BURNSIDE, C. J., and WITHERS, J.

(*October* 11 *and* 13, 1892.)

D. C. Colombo, (Testamentary) No. 5,001. — In the matter of the estate and effects of LANSEGEY ANDRIS PERERA DHARMAGUNEWARDANE, deceased.

Civil Procedure—Testamentary action—Judicial settlement—Administration of estates of persons dying previous to the Code—Civil Procedure Code, Chapter LV. *sections* 725, 726.

The provisions of Chapter LV. of the Civil Procedure Code relative to the judicial settlement of an executor or administrator's account do not apply to the estates of persons who died previous to the Code coming into operation.

Semble, per WITHERS, J., that under the Code one of several joint administrators, who is also one of the next of kin of the deceased, may petition for the judicial settlement of accounts by the other administrators as well as himself, but where the joint administrators have filed their final accounts, one of them cannot compel them to exhibit their accounts over again, without disclosing material *prima facie* probative of errors in those accounts.

The facts previous to the order appealed from sufficiently appear in the judgment of WITHERS, J.

The three administrators in this matter were (1) Siman Perera Dharmagunawardane, (2) Don John Goonewardane, and (3) Don Carolis. The administrators having filed their final accounts, and certain proceedings had in reference thereto, Siman Perera Dharmagunawardane (one of the administrators) applied for an order for the judicial settlement of the administrators' accounts. The "application", which named him as applicant and the administrators including himself as respondents, stated that the applicant was son of the deceased and was entitled to one-third share of the estate, that the respondents, the administrators, had disagreed and were acting one against the other, and that there was in the hands of Don John Goonewardane, the first respondent to the application, a sum of Rs. 1,877·09, which he had to account for. The applicant prayed that in terms of section 725 of the Code the court should compel a judicial settlement of the administrators' accounts. An order *nisi* having been made on this application, Don John Goonewardane, the first respondent, in shewing cause took exception to the procedure. But the court made an order requiring the administrators to file accounts and attend a judicial settlement thereof on a day named.

Don John Goonewardane, the first respondent to the application, appealed.

Dornhorst (*Sampayo* with him) for the appellant. It is submitted that letters of administration having been granted under the old procedure no proceedings could be taken under the Code, and that therefore the

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order directing the appellant to have his accounts judicially settled under Chapter LV. of the Code was wrong. It has been already decided (*D. C. Trincomalee* 184, 9 S. C. C. 179) that proceedings under Chapter XXXVIII. of the Code do not apply to persons who have died before the Code came into operation. Chapter LV., it is submitted, is auxiliary to Chapter XXXVIII., and consequently no proceedings could be taken under it. [He also cited *D. C. Colombo No.* 63, 1 C. L. R. 99.]

Sir Samuel Grenier, A.-G. (*Wendt* with him) for the appellant. Chapter LV. of the Code has merely altered the procedure for settling an executor's account, and has not introduced any new liability on an executor's part. It cannot be said that the immunity from a judicial settlement was a "right" saved by section 2 of the Code. The Trincomalee case cited only ruled that the substantial rights involved in the grant of letters of administration must, in the case of persons dying before the Code, be governed by the old law; but the same principle does not apply to a matter of mere procedure like the present.

Dornhorst, in reply.

Cur. adv. vult.

On October 13, 1892, the following judgments were delivered :—

WITHERS, J.—On June 30, 1890, letters of administration were granted to three persons jointly to administer the estate of one Lansegey Andris Perera Dharmagunewardene, Muhadiram, who appears to have died in Colombo, but when I have failed to discover, though it must have been before the Code came into operation. A son and two daughters were the sole next of kin of the intestate. The son and the husbands of the two daughters are the joint administrators. Pursuantly to a conditional order for the issue of letters, those three persons, on June 4, 1890, executed a bond with the conditions of rendering into Court a complete inventory of the estate and a true account of their administration. The times fixed in the bond and in the final order for a grant of letters for rendering inventory and final account were July 4 and August 4, 1890, respectively.

It is almost needless to say that all three administrators violated the engagements in their joint oath of administration and bond and failed to render their accounts within the time prescribed, which was certainly a narrow one. On December 11, 1890, all three were "noticed for default" in filing their accounts. On September 24, 1891, two of them, the appellant and one of the respondents herein, filed their final accounts. On October 29, 1891, the third administrator, the other respondent herein, filed his final account, and on this day the three administrators, who had evidently fallen out, were required to examine each other's accounts and accept or contest each other's accounts, as the case might be.

On November 16, 1891, one of the respondents herein lodged some objections to the accounts of the other two. Thereupon the secretary of the district court was directed to enquire into these objections and to examine the several accounts. He reported his inability to comply with these directions for want of dates in the accounts and vouchers in support of payments, and he further required an explanation of the nature of the objections lodged by the administrator above-mentioned. This was on December 21, 1891, on which day the district judge ordered one of the respondents herein to bring into court without delay a sum of Rs. 1,877·09 (a requirement which had been moved for on behalf of one of the other joint administrators) on the curious ground that, as this administrator's account as compared with the accounts of his joint administrators shewed that he had that amount in hand, he had no right to detain it. That order was appealed against, and naturally discharged by this court.* Then, after a skirmish about a sum of Rs. 150, the applicant herein applied, on July 23, 1892, for a citation in terms of clause 726 of the Civil Procedure Code on the two other administrators and respondents herein and himself as administrator, to show cause why all three administrators should not be compelled to have their accounts judicially settled. The joint administrators appeared to the citation, and after hearing argument the court ordered all three to account at the cost of the respondents herein. From this order the appeal with which we are concerned was taken. It was contended for the appellant that the principle of the decision of this Court in 9 S. C. C. 179, applied by the Chief Justice to the case reported in 1 C. L. R. 99, governs this case, and I think that it is a right contention, for Chapter LV. of the Code is ancillary to Chapter XXXVIII., which was held in the former case not to be retrospective as regards the estates of persons dying intestate before the Code came into operation.

Under the old practice there was no right to compel a judicial settlement of an administrator's account. In the ordinary course of testamentary proceedings if a question arose of a character unfit to be settled therein, the interested party was referred to his remedy by administration or other appropriate suit where the court could deal with and decide the question involved. The *motif* for this application for a judicial settlement is on the face of it the apparent balance in hand

* Reported *ante*, p. 9.

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of one of the respondents of the sum of Rs. 1,189 odd, which the applicant wants to reach and for which he may have a just claim for all that I know, and this under the old practice was a question which could not have been settled in the matter of these testamentary proceedings but would have required a separate suit or action.

It was further contended that the proceedings under sections 725 and 726 of the Code were irregular. The application should have been by petition, and should have been entitled as of the action in which the joint grant of administration issued. This was not quite strictly observed, for the application is not a petition and is not entitled as of the action as numbered on the court files, but this defect of form is not sufficient to imperil the application, and we cannot forget that the applicant is not only one of the next of kin but a joint administrator. The Code does not provide for the petition from joint administrators for the judicial settlement of accounts by the other administrators, but on principle I do not see why a person in the position of the applicant should not present a petition for that purpose, as he is interested in the estate and has asked that the order for a judicial settlement do pass against himself as well as his joint administrators. This Chapter has been taken from the New York Code, but the forms of oath and bond required in the old practice of our courts have been substantially re-introduced into the Code (see Schedule II. forms 88 and 90, pages 541, 542 of the Civil Procedure Code) while the bond in the New York Code is at large, conditioned for the due administration of the estate and effects of the decedent. An administrator does not bind himself there, as here, to render a final account by a given date. He can, after a certain time had elapsed from the date of his letters, ask that his accounts be judicially settled. Now the three administrators in this matter have filed their final accounts as they engaged themselves to do by oath and bond, though not within the time prescribed by their oath and bond. In these circumstances, can a joint administrator compel the other administrators to exhibit their accounts over again without disclosing material *prima facie* probative of errors in those accounts? A judicial settlement under the New York Code presupposes either the non-existence of any account or the existence of an interim account which an administrator is at liberty for his own protection to file in certain circumstances preparatory to an account to be judicially settled thereafter. I confess this question embarrasses me, but I am disposed to answer in the negative. However, I would set the order aside on the ground previously indicated, that the applicant is not entitled to the remedy sought for, which applies only to cases in which estates of persons dying after the Code came into operation are being administered.

Burnside, C. J.—I have nothing to add to the opinion of my brother Withers. I adhere to my previous ruling, that the provisions of the Code are not retrospective as regards the rights of persons in respect of estates of persons who died before the Code came into force, and this is sufficient to support the appeal.

I agree that the order appealed against must be discharged with costs.

Set aside.

———:o:———

Present :—Lawrie, J.

(October 6 and 13, 1892.)

D. C. Trincomalee, (Criminal) No. 2,353. } Queen v. Krisnen.

Criminal Procedure—Probation of First Offenders Ordinance, 1891—*Offence punishable with not more than three years' imprisonment—Voluntarily causing grievous hurt—Power of court to release on probation—Ceylon Penal Code, section* 316—*Criminal Procedure Code, Schedule* II.—*Ordinance No.* 6 *of* 1891, *section* 1.

The Ordinance No 6 of 1891, which empowers a court to release on probation of good conduct a person convicted of an offence, is expressly applicable only to offences "punishable with not more than three years' imprisonment".

Held, that the words "punishable with not more than three years' imprisonment" mean "punishable before any court", and not merely "punishable by the court before which the conviction was obtained".

Revision.

The defendant was indicted under section 316 of the Ceylon Penal Code for voluntarily causing grievous hurt. At the trial the defendant pleaded guilty, and the district judge proceeded to deal with him under Ordinance No. 6 of 1891, section 1, and ordered him to be released on his entering into a recognizance with sureties to appear and receive judgment within two years when called upon and in the meantime to keep the peace and be of good behaviour. The district judge held that the words "punishable with not more than three years' imprisonment before any court" in section 1 of Ordinance No. 6 of 1891 applied to the court trying the offence, and not the maximum punishment prescribed by Ordinance No. 3 of 1883, Schedule II.

The record having been sent for upon the motion of counsel for the Crown,

Cooke, C. C., moved that the Supreme Court do

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revise the order of the district court contending that the offence of which the defendant had pleaded guilty was "punishable" with seven years' imprisonment and the Ordinance No. 6 of 1891 was therefore inapplicable.

Wendt, for the defendant, *contra*.

Cur. adv. vult.

On October 13, 1892, the following judgment was delivered :—

LAWRIE, J.—The Ordinance No. 6 of 1891, section 1, enacts that in any case in which a person is convicted of any offence punishable with not more than three years' imprisonment before any court, and no previous conviction is proved against him, the court may release upon probation of good conduct instead of sentencing to imprisonment.

Muruken Krisnen was committed for trial before the district court of Trincomalee, and he pleaded guilty to an indictment charging him, under section 316 of the Penal Code, with having voluntarily caused grievous heart. Before sentence was passed, witnesses as to the accused's character were examined and the learned district judge holding that this was a case which might be dealt with under the Ordinance No. 6 of 1891, released the accused on his entering into a recognizance of Rs. 400 and two sureties of Rs. 200 each for two years, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. On the motion of the Attorney-General the proceedings were brought before me in review. I am unable to give to the Ordinance the construction put on it by the learned district judge.

I hold that indulgence is extended only to comparatively lenient offences which are not punishable in any court with more than three years' rigorous imprisonment. Those who are guilty of offences of a graver kind for which the Code provides a higher maximum punishment than three years do not benefit under the Ordinance No. 6 of 1891.

I must set aside the order and remit the case to the district judge to sentence according to law.

Set aside.

———: o :———

Present :—LAWRIE and WITHERS, JJ.

(*September* 16 *and* 20, 1892.)

D. C. Mannar, No. 8,231. } DOMINGU v. SANDARASEKERE.

Civil Procedure—Decree for possession of property—Resistance to execution—Resistance by person other than judgment debtor—Petition of complaint, requisites of—Investigation of claim—Civil Procedure Code, sections 325, 326, 327.

A petition, presented under section 325 of the Civil Procedure Code, complaining of resistance to a proprietory decree, although it is required by section 327 to be registered and numbered as a plaint in an action, need not contain all the requisites of a plaint, such as disclosing a cause of action against the respondent. No formal pleadings need be filed, but the court should, upon the petition being presented, proceed to investigate the respondent's claim as if an action had been instituted against him by the decree-holder.

Petition under section 325 of the Civil Procedure Code, complaining of resistance to the execution of a proprietary decree.

In August, 1889, the Right Reverend Theophilus Melizan and another instituted action No. 8,061 in the district court of Mannar against one Santiago Mottam Savery Pariyari and five others praying for a declaration that they were entitled to the church called Koottattu Mathavin Covil, and that the defendants be restrained from interfering with the management of the said church. The district judge gave the plaintiffs judgment, and the defendants appealed. The Supreme Court, in April, 1890, set aside the judgment and dismissed the action with costs. The defendants, in March, 1892, obtained from the district court an order directing them to be put in possession of the church. The execution of this decree was resisted by one Father Sandarasekera, who claimed to be in possession of the property and in charge of the church at the request of the congregation and not under the plaintiffs in the action. The third and fourth defendants thereupon presented a petition, under section 325 of the Civil Procedure Code, complaining of the resistance, alleging that Father Sandarasekere was in possession as the agent and subordinate of the plaintiffs, and praying that he be dealt with under sections 325, 326, and 327 of the Code. After an interlocutory order made on this petition and inquiry held, the district judge found that the resistance was occasioned by Father Sandarasekere, a person other than the judgment debtors, claiming in good faith to be in possession of the property on account of persons other than the judgment debtors, and directed the petition to be numbered and registered as a plaint in an action between defendants, the decree holders, as plaintiffs, and the claimant, Father Sandarasekere, as defendant. The court also fixed fourteen days' time within which to receive pleadings from either side. Father Sandarasekere filed an "answer", among other things taking exception to the petition as disclosing no right to relief.

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The district judge, on the day fixed for trial, held that the petition was defective and disclosed no right in the petitioners as against the claimant, and he dismissed the petition with costs.

The petitioners appealed.

Dornhorst (*Weinman* with him) for the appellants. It is submitted the district judge was wrong in requiring pleadings to be filed upon this inquiry exactly as if a regular action had been instituted. Section 327 merely directs that the *investigation* into the claim, which the court has already had sufficiently disclosed to it, should be in the same manner as if an action had been instituted, and with like powers to the court. The proceedings are merely incidental to the original action and to the execution of the decree therein, and the Code merely requires the petition of complaint to be numbered and registered as a plaint on grounds of convenience. Instead, therefore, of dismissing the petition, the district judge should have inquired into the claim of the respondent to retain possession against the decree-holder.

Wendt, for the respondent. The use in section 325 of the term "petition," in which "respondents" are named, with an interlocutory order under section 377 (*b*), indicates that the procedure is to be that laid down by Chapter XXIV and described as "Summary Procedure." In this procedure the party plaintiff must not only make averments entitling him to relief but he must support them with *prima facie* proof (section 376). The decree-holder complaining of resistance must contemplate the case provided for by section 327, viz., the court's finding that the party resisting claimed *bona fide* independently of the judgment-debtor, and he should therefore plead matters entitling him, even in such an event, to the relief he prays. If he fails to do so, he takes the risk of his pleading being held insufficient when his petition becomes an "action" under section 327 (see concluding words of section 328). The present petition merely prays that if the court should hold that the respondent's resistance was under the judgment-debtors, he should be punished for contempt of court, but omits to deal with the contingency provided for by section 327. Seeing this, the district judge, in holding the resistance to be *bona fide*, expressed his willingness to allow further pleadings on either side, but the appellants refused to avail themselves of this opportunity, and the court had no alternative, when objection was expressly taken by the respondent, (who was in no way bound by the original decree) but to dismiss the action.

Dornhorst, in reply. The onus lies on the claimant to shew a right to possession as against the decree-holder who is *prima facie* entitled by virtue of the decree. Even admitting the soundness of the respondent's contention, there was sufficient material before the court to enable it to frame an issue between the parties which it should have proceeded to do. [He referred to O'Kinealy on the Indian Civil Procedure Code, notes to section 331.]

Cur. adv, vult.

On September 20, 1892, the following judgments were delivered :—

WITHERS, J.—On March 15, 1892, the following order was made in the matter of an application by the successful defendants in district court case No. 8,061, of the Mannar court for the restoration to them of the fabric of a church by the plaintiffs in that action—"It is ordered that the plaintiffs and their workmen, labourers, servants and agents and each and every one of them be removed from and the defendants be replaced in possession of the Roman Catholic Church called Koottattu Mathavin Covil &c."

On the 18th of that month, according to his return, the officer entrusted with the mandate to execute that order was prevented by a certain person called the Revd. Father Sandarasekere from putting the applicants into possession of that church. The next day, it would seem, a petition was presented to the court complaining of the resistance made to the execution of the mandate by the officer entrusted with it, and it was eventually found by the court on enquiry that the resistance complained of was occasioned by a person on account of some one other than the plaintiffs in No. 8,061; for the first minute on the first page of a record devoted to this particular matter is to the effect that the petition by the mandate holders is registered and numbered as an action between the petitioners as plaintiffs and the third respondent, i. e., the said Revd. Father Sundarasekere, as defendant, agreeably to the provisions of section 327 of the Civil Procedure Code. On the same day as this minute was made, parties were informed by the court that pleadings would be received within fourteen days, and the next day petitioners' counsel actually applied to the court for a notice on the third respondent to file his answer before the expiration of that time, and it was allowed. On April 27, an "answer" was filed by the Revd. Father Sandarasekere taking exception on legal grounds to the petition as if it was a bad plaint. These exceptions were discussed, and after hearing argument, the learned district judge dismissed the petition, or, as he styles it "action", with costs, on the ground that as the petition was to be registered and numbered as a plaint it was a plaint,

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but that as it, in short, disclosed no cause of action, it was a bad plaint and must be rejected accordingly.

All this is strangely misconceived. So far from anything being said in section 327 about the necessity of formal pleadings consequent upon complaint made of resistance to the execution of a proprietary decree, the court is required at once to investigate the claim just as if an action had been instituted by the decree-holder against the claimant. The claimant, being treated as a respondent to a petition, on which an interlocutory order has been made in accordance with alternative (*b*) section 377, should be required to appear on a certain day to show cause why the mandate should not be enforced. On that day he opens his case, states his objections, and supports them by affidavit. In the end, the court either stays execution of the proprietary order or directs its enforcement. Again, so far from the petition disclosing no ground for relief, it disclosed the only ground for relief under this chapter of the Code, viz., a resistance to the officer charged with the execution of the writ. The order must be set aside and the case remitted for enquiry into the respondent's claim. He must pay appeal costs.

Lawrie, J.—I agree that the district court having found that the resistance or obstruction was made, that it was occasioned by a person other than the judgment-debtor, that that person claimed in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court did right to number and register the petition of complaint as a plaint between the decree-holders as plaintiffs and the claimant as defendant, and that it was therefore bound to investigate the claim.

It would be premature to form an opinion on whom the burden of proof now lies, and I have not had the advantage of hearing argument from counsel on that point. If the petitioners are to be treated in the same manner as if they were the plaintiffs in an action for the property, they must accept the burden of proving their own title.

Set aside.

———:o:———

Present:—Lawrie and Withers, JJ.

(*September* 30, *and October* 11, 1892.)

D. C. Badulla, No. 370. } Nachchiappa Chetty v. Muttoo Kankani.

Civil Procedure—Decree nisi*—Decree absolute for default—Appeal—Civil Procedure Code, sections* 86, 87.

No appeal lies from a decree *nisi* for default of appearing or answering, nor from any order making such decree absolute on the ground either of defendant's failure to appear to shew cause against it or of his not shewing sufficient cause. If such decree be made absolute on the former ground, the defendant may within a reasonable time move the court to set it aside on proof that he was prevented from appearing to the decree *nisi* by reason of accident or misfortune, or by not having received due information of the proceedings, and upon refusal of his application may appeal. But if the defendant appear in due time and shew cause against the decree *nisi* and the same be made absolute, the defendant has no further remedy by appeal or otherwise.

The plaintiff sued by way of regular procedure on a promissory note and obtained a decree *nisi* for default of appearance of the defendant on the day fixed in the summons for appearance and answer. The defendant, on the returnable day of the decree *nisi*, moved that it be discharged on the ground that he had not been served with the summons, and evidence was led by both parties touching the service of summons. The district judge, after hearing the evidence, held that the summons had been duly served on the defendant and that there was no excuse for his non-appearance in due time, and accordingly made the decree absolute.

The defendant appealed.

Wendt, for the appellant.

VanLangenberg, for the plaitniff.

Cur. adv. vult.

On October 11, 1892, the following judgments were delivered :—

Withers, J.—Section 87 of the Code takes away the right of appeal against a decree *nisi* for default. Section 86 gives a remedy, in case the decree has been improperly obtained, by shewing cause against it in the court below on the motion to make it absolute; but if it is made absolute there is no appeal against the decree absolute (section 87).

Nor can any appeal against the order making it absolute lie, except it be obtained for default, when the defendant may review it before the court below on the ground that he had no information of the proceedings or was prevented by reason of accident &c. from appearing &c.

It thus appears that the only appeal against an order making a decree absolute must be on the ground that the defendant had no information of the proceedings or was prevented by accident &c. from appearing. If a defendant appear and contest a decree *nisi* and it is made absolute, no appeal lies against the order making it absolute. The learned judge's attention is invited to the printed form of decree *nisi* adopted in his court with the absurd and erroneous

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heading under the royal arms—"DISMISSING the ACTION in default of appearance of defendant."

Judgment affirmed with costs.

LAWRIE, J., concurred.

Affirmed.

———:o:———

Present:—WITHERS, J.

(*October* 20 *and* 27, 1892.)

C. R. Kandy, No. 1668. } CARPEN v. NALLAN.

Practice—Decree for immediate payment of claim—Subsequent application for payment by instalments—Civil Procedure Code, section 194.

Where a decree has been once entered for the payment of a sum of money, it is not competent for the court to vary the decree by subsequent order allowing the amount of the decree to be paid by instalments.

The two defendants were sued on a promissory note for Rs. 40, payable in three instalments, with a provision that in default of payment of any of the instalments the whole debt should become recoverable. All three instalments were overdue and unpaid. On August 1, 1892, the day fixed for appearance and answer, the second defendant appeared and admitted the debt, the first defendant being in default and a decree was entered in plaintiff's favour for Rs. 58·50 debt and Rs. 13·25 costs. The subsequent proceedings in the action are sufficiently set out in the judgment.

The plaintiff appealed against an order confirming two *ex parte* orders made on the application of the respective defendants and directing the fiscal to levy the amount of the decree by monthly instalments of Rs. 2·50 out of the salary of each defendant.

Wendt, for the appellant. The court could not alter the absolute decree once passed, and make the judgment amount payable by instalments. Section 194 of the Code contemplates an order made at the time of recording judgment. LAWRIE, J. so ruled in *C. R. Colombo* 3,282 (S. C. Civ. Min. September 16, 1892.) Further, this was not a case in which the court would make such an order. The obligation on which the action was brought having been itself payable in instalments, and defendants having made default in paying them, they were not entitled to a further indulgence of the same kind. *Ragho Govind Paranjpe* v. *Dipchand*, I. L. R. 4 Bom. 96.

Cur. adv. vult.

On October 27, 1892, the following judgment was delivered :—

WITHERS, J.—On August 1, 1892, it was ordered and decreed by the commissioner that the defendants do pay to the plaintiff Rs. 58·50, with further interest on Rs. 40 at 37½ cents per Rs. 10 per month from July 12, 1892, with costs of this action (Rs. 13·25). On August 17, it would appear that on the *ex parte* application of the first defendant, the fiscal, who had charge of the writ under this decree, was directed to levy this sum in monthly instalments of Rs. 2·50 from first defendant's salary. And on a similar application of second defendant on August 19, similar directions were given to the fiscal to levy similar instalments out of second defendant's salary. These two orders after hearing the parties to the action, were confirmed by an order of August 30. It is from this confirming order that the execution-creditor appeals.

Such an order cannot stand. Final decree having once passed for the full amount could not be afterwards varied. Where a judge thinks that payment by instalments is the proper order to make in the circumstances, such an order should be embodied in the decree.

The other point urged by Mr. Wendt need not be discussed now. On account of its importance, I hope it will be raised on the first opportunity that presents itself.

Set aside.

———:o:———

Present:—WITHERS, J.

(*October* 20 *and* 27, 1892.)

P. C. Gampola, No. 12,946. } PIETERSZ v. WIGGIN.

Criminal law—Misconduct in a "public place" while intoxicated—Police station—Place to which public have access—Ceylon Penal Code, sections 343, 488.

A police station is not a "public place" within the meaning of section 488 of the Ceylon Penal Code.

The defendant was charged under section 488 of the Ceylon Penal Code with having, while in a state of intoxication, appeared in a public place, to wit, the Gampola police station, and there conducted himself in such a manner as to cause annoyance to the complainant (an inspector of police), a police sergeant, and the members of the Gampola police force. The police magistrate convicted the defendant, holding that the police station was a public place within the meaning of the section.

The defendant appealed.

Wendt, for the appellant.

Cur. adv. vult.

On October 27, 1892, the following judgment was delivered :—

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Withers, J.—I cannot agree with the law laid down by the police magistrate, that the inside of a police station is a public place within the meaning of those words in section 488 of the Penal Code. I should have thought a police station was essentially a private place, and none the less so because members of the public can enter it for a limited purpose. It might as well be argued that the office of the head of a public department was a public place.

In my opinion a public place in the said section is a place to which and from which the public have ingress and egress and regress as of right and without reference to any particular purpose, as a public thoroughfare, square, &c.

The conviction must be set aside and the defendant acquitted and discharged.

Set aside.

———: o:———

Present :—Burnside, C. J., Lawrie and Withers, JJ. (*October* 7 *and* 11, 1892.)

D. C. Kalutara, No. 36,247. } Wijesekara v. Jayasuria.

Civil Procedure—Dormant judgment—Revival—Judgment entered before the Code came into operaton—Prescription—Ordinance No. 22 *of* 1871, *section* 5—*Civil Procedure Code, sections* 2, 837, 347.

Judgments passed before the Civil Procedure Code came into operation are not governed, on the question of limitation, by section 337 of the Code, but by the previously existing law

This was an application by way of summary procedure by the plaintiff for execution of the decree entered in the case. The judgment was obtained in January, 1882, and some recoveries were made in September, 1883. In June 1892, the plaintiff made the present application, which was discussed *inter partes* on August 29. The defendant objected to the allowance of the application as the writ had been wholly satisfied, but the district judge refused to go into that question, holding that, as the judgment was ten years old, he was precluded under section 337 of the Code from entertaining the application. The plaintiff appealed.

Wendt, for the appellant. It is submitted that section 337 of the Code is here inapplicable. This was a judgment which had been obtained before the Code came into operation, and plaintiff's right to execute it and defendant's liability to satisfy it were a "right" and a "liability" conserved by section 2 of the Code and therefore unaffected by the repealing clause of the Code. Even supposing the Code be held to apply to such cases, the judgment was not barred, as ten years had not elapsed since the levy in September, 1883.

The defendant did not appear upon the appeal.

Cvr. adv. vult.

On October 11, 1892, the following judgments were delivered :—

Burnside, C. J.—The decree in this case had been obtained before the passing of the Code, and more than ten years had elapsed, when the present motion was made under the provisions of the Code to execute the decree. The decree itself had not been prescribed under the Ordinance No. 22 of 1871, section 5, because intermediate steps had from time to time been taken to keep it alive; but the district judge held that the decree itself being more than ten years old, section 837, of the Code prevented any order being made to execute it, and he disallowed the motion and the plaintiff has appealed.

I do not think that section 387, on the question of prescription, was intended to apply to decrees which had been obtained before the passing of the Code, and to which a particular law of prescription was applicable. I think as a matter of procedure, the clause governs and must be held to apply to every thing done under the section, *i. e.*, where there has been an application to execute the decree. This would be governed, no doubt, by the prescription and other provisions of the section, but with regard to decrees obtained before the Code they must still be governed by the provisions of section 5 of the Ordinance No. 22 of 1871, which, although repealed, still applies to rights, obligations or liabilities acquired under it which have been specially conserved.

We must set aside the judge's order and send the case back in order that the learned district judge may deal with the other question raised and which he abstained from deciding, because he considered that the point which he decided defeated the whole motion.

The appellant will have his costs of appeal.

Lawrie, J.—The repeal of section 5 of Ordinance No. 22 of 1871 on August 1, 1890, did not affect the presumption that all judgments, which at that date were more than ten years old, were satisfied.

But on August 1, 1890, the judgment in this case was only eight years old and it was not yet of an age to be deemed to be satisfied. When the judgment subsequently attained the age of ten years it did not then fall under the presumption, because the section creating the presumption was by that time repealed

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and, though rights, privileges, obligations, or liabilities accrued and incurred on August 1, 1890, were unaffected by the repeal, the presumption of satisfaction was not extended to judgments which had been pronounced within ten years of that date.

The defendant in this case cannot claim any benefit from section 5 of the Ordinance No 22 of 1871. It seems to me that the procedure should be governed by section 347 and not by section 337 of the Code. The restrictions on the re-issue of execution contained in section 337 apply only to cases where an application to execute a decree has been made under Chapter XXII and has been granted. The section directs the courts how to deal with *subsequent* applications. This is the first application which has been made under Chapter XXII, and so the rules regarding subsequent applications do not apply.

The district judge is untrammelled by presumptions of satisfaction or by restriction as to re-issue. He is free to decide whether the judgment is satisfied (as the defendant says it is) or whether there be a balance still due, and, if so, what that balance is.

I agree that the order must be set aside with costs.

WITHERS, J.—This was not an application under section 337 of the Civil Procedure Code as the learned judge seems to have treated it, for that section applies to cases where application to execute a decree for the payment of money has been *made* under Chapter XXII of the Code and granted. Now, no such application had been made and granted in this action under this chapter. The petition was to revive a stale judgment for the purposes of execution, and I know of no provisions in the Code for reviving stale judgments. An order abating dormant proceedings can be set aside.

The judgment sought to be revived was long anterior to the time when the Civil Procedure Code came into operation, and the procedure adopted was the old one in a new guise.

Had this been an application under section 337 of the Code, I do not think the judge would have been precluded from entertaining it by the provisions of that section. The right (on good cause shown) of prosecuting a judgment pronounced before the Code came into operation within the time limited by the repealed section 5 of Ordinance No 22 of 1871 is a right, I take it, especially conserved by section 2 of the Civil Procedure Code.

The order appealed from must be set aside and the case sent back for the learned judge to hear and determine the application on its merits. The appellant will have his costs.

Set aside.

Present:—WITHERS, J.

(*October 27 and November* 4, 1892.)

P. C. Matara, No. 16,869. } SNOWDON v. RODRIGO.

Nuisance—Barking of dogs—Ordinance No. 15 *of* 1862, *section* 1, *subsection* 4—*Interpertation.*

Ordinance No. 15 of 1862 section 1 enacts (subsection 4) "whosoever shall keep in or upon any house, "building, or land occupied by him, any cattle, goat, "swine, or other animal, so as to be a nuisance to or "injurious to the health of any person, shall be liable "to a fine."

Held, that the generic term "other animal" includes a dog, and that permanent interference with comfort, such as occasioned by dogs which being tied and kept in a neighbour's compound bark with little or no intermission during the night, is a nuisance within the purview of the Ordinance and punishable as such.

The defendant was charged with keeping on land occupied by him dogs so as to be a nuisance to the complainant, thereby committing an offence punishable under section 1 of Ordinance No. 15 of 1862. The police magistrate found the defendant guilty of the nuisance complained of, and sentenced him to pay a fine of Rs. 1. The defendant appealed.

Dornhorst, for the appellant.

Cur. adv. vult.

On November 4, 1892, the following judgment was delivered :—

WITHERS, J.—I think the conviction is right and should be affirmed.

Upon a charge of keeping on land occupied by him dogs so as to be a nuisance to the complainant the accused has been convicted of an offence under subsection 4 of section 1 of the Ordinance No. 15 of 1862 and sentenced to pay a fine of Rs. 1.

In brief, the evidence discloses that for more than a year past the repose of the complainant has been disturbed by the continuous barking and howling during the night of three dogs which the accused kept tied in his compound, and one or two recent instances are given. The complainant deposes that there have been few nights on which his repose has not been disturbed and his comfort seriously interfered with for want of sleep. It was contended for the appellant that a dog is not an animal *ejusdem generis* with cattle, goat, sheep, or swine in the subsection of the Ordinance referred to. The old and fast rule that a general word following specific words must be construed as of *ejusdem generis* with these words has been considerably modified by modern decisions according to which words in a statute must be

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construed in their ordinary sense and effect given to them within the purview of the statute.

If a dog is kept on premises so as to be a nuisance to any person within the sense of the word nuisance as used by the statute I take it that it is covered by the generic term "other animal". Now, the word "nuisance" in the expression "in such a state as to be a nuisance to or injurious to the health of any person" has been interpreted in the case reported in 52 L. J. M. C. 38, as the *Bishop of Auckland Sanitary Authority* vs. *The Bishop of Auckland Iron and Steel Company*, to mean something which interferes with comfort and not the same as nuisance injurious to health.

Permanent interference with comfort such as the complainant has deposed to in this case is distinctly a nuisance, and if occasioned by dogs tied in his neighbour's compound and which being kept there bark with little or no intermission during the night is, I take it, a nuisance within the purview of the Ordinance under which the accused has been convicted.

Affirmed.

———:o:———

Present:—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(*October* 4 *and* 18, 1892.)

D. C. Kandy, No. 5,368 } THE COMMISSIONERS OF THE LOAN BOARD v. RATWATTE.

Ejectment—Sale of rents issues and profits—Right to possession—Assessment for rates—Failure to pay taxes—Legality of warrant of distress—Ordinance No. 6 *of* 1873—*Ordinance No.* 18 *of* 1884—*Ordinance No.* 7 *of* 1887, *sections* 127, 133, 139, 151, 159.

For default of payment of certain municipal taxes and rates two warrants were issued for their recovery under the provisions of the Municipal Councils Ordinance, 1887, on January 29, 1890, returnable on March 15; two others on May 20, returnable on July 10; and two others on July 23, returnable on September 15. Under these warrants the plaintiffs' house in respect of which the taxes and rates were due was seized on July 9, and on September 1 the "rents issues and profits" of the house for a period of four years were sold and purchased by the defendant, who entered into possession of the house.

In an action of ejectment against the defendant—

Held, by BURNSIDE, C. J., and WITHERS, J. (*dissentiente* LAWRIE, J.) that the sale was invalid, the warrant having expired on their returnable dates, and it being essential to a valid sale that both the seizure and the sale should take place before such returnable dates; and further that a sale of the rents issues and profits of land conferred on the purchaser no right to possession as against the owner or any person holding under him, but merely the right to recover any rent accruing from a tenant or occupier, or the value of any profits derived from the land.

Per LAWRIE, J.—The warrant did not expire on their returnable dates, the authority of the officer entrusted with them not being limited by those dates. He was simply required to certify on those dates what he had done by virtue of the warrants. The sale of the rents issues and profits conveyed to the defendant the right to demand these from the owner or his tenant in possession, and the defendant having got into peaceful possession ought not to be ejected until the owners tendered or secured to him a fair rent for the four years.

Ejectment.

The plaint averred that one William Goonetilleke, the original owner of the house, had mortgaged it to the plaintiffs in 1886, and that in execution of a decree passed upon the mortgage the plaintiffs had themselves purchased the house in December, 1889. The plaint further averred that the defendant had been since September 1, 1890, in the unlawful possession of the house. The defendant answered admitting plaintiffs' title to the house, but averred in his answer that the land had been taxed under the Municipal Councils Ordinance, 1887, and rated under the Kandy Waterworks Ordinance, 1884, whereby the plaintiffs had become liable to the Municipal Council of Kandy in certain sums on account of taxes and water-rate, that they had failed to pay the said sums, that in pursuance of a warrant of distress issued in conformity with the ordinance the rents and profits of the house and the right to hold and possess the same for a period of four years had been sold and purchased by the defendant on September 1, 1890, and that under that purchase the defendant was entitled to the possession of the land and buildings. The plaintiffs replied, denying defendant's averments as to the sale for default of paying taxes and contesting the Council's right to sell. At the trial the district judge held that the sale by the Municipal Council was good and that the purchase of the rents and profits of the land by the defendant entitled him to the possession of it, and dismissed plaintiffs' action with costs. The facts proved relative to the sale of the rents issues and profits are sufficiently disclosed in the judgments in appeal.

The plaintiffs appealed.

Wendt (*de Saram* with him) for the appellants, contended that the seizure and sale on September 1 were invalid, the warrants under which they were made having previously expired. Even if there existed a legal authority for a sale, the sale of the "rents issues and profits" of the house gave the purchaser no right to possession as against the owners, but only a right to take such rents issues and profits as might from time to time accrue. [He referred to Ordinance No. 6 of 1873, Ordinance No. 7 of 1887, sections 133, 151, and Form F., *D. C. Kandy* No. 97, 544, 8 S. C. C. 63.]

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Dornhorst, for the defendant, contended that the returnable date of a warrant was not the date on which it expired, but merely a direction to the officer entrusted with it, requiring him to inform the authority issuing it of what he had done in pursuance of it. The rents, issues, and profits were clearly saleable before the land itself, under the Ordinance No. 6 of 1873, the provisions of which were by section 151 of the Municipal Councils Ordinance made applicable. The effect of such a sale was to create a lease for the term by operation of law, and to give the purchaser the right to possession even as against the owner. [He referred to Ordinance No. 7 of 1887, sections 127, 139. 159.]

Wendt, in reply.

[Other points were argued by counsel, but as the decision did not turn upon them they are not reported.]

Cur. adv. vult.

WITHERS, J.—Had the defendant contented himself with justifying his occupation of the premises sought to be recovered herein under the certificate of sale of the chairman of the Municipal Council of Kandy, that judicial sale would not have been impeached unless the plaintiffs had in their replication alleged and proved facts showing that the directions of the Municipal Councils Ordinance or any by-law thereunder had not been in substance and effect complied with, and the only question in issue would have been whether the sale of the rents and profits of the premises for a term of four years passed to him, as the purchaser, the right to occupy the house as he is admittedly doing. But the defendant did not confine himself to this simple defence. He expressly averred that the premises were taxed under the Municipal Councils Ordinance of 1887 and the Kandy Waterworks Ordinance of 1884, that the plaintiff Board had become liable to the Municipal Council of Kandy on account of taxes and water-rate in the sum of Rs. 20.25 inclusive of costs, and that thereafter, in pursuance of a warrant of distress issued in conformity with the said Ordinance of 1887, the rents and profits of the premises in question were sold on September 1, 1890, when the defendant became the purchaser, &c. These averments were expressly denied by the plaintiff Board in their replication, and it became incumbent on the defendant to prove them quite independently of the presumption, which, in the absence of these averments, would have attached to the certificate of the said sale. I will say no more of the evidence in support of the first averment than that I am doubtful if it is sufficient, but as to the averment that the rents and profits were sold in pursuance of a warrant of distress conformably to the Municipal Councils Ordinance, the defendant has to my mind quite failed to prove it. On the contrary his evidence discloses just such substantial defects as section 159 of the Municipal Councils Ordinance was not intended to save, namely, a sale of the premises, either under warrants which could not operate by reason that the time named in them for execution had expired or under warrants without any seizure thereunder preceding the sale.

As to the issue taken on the allegations in paragraph 4 of the answer, I entertain no doubt whatever that the sale of the rents and profits of the premises conferred no right on the purchaser to enter and occupy the house during his term of four years.

Rents and profits (*i. e.*, in the nature of rent) are what is payable in money or kind or services certain, either as compensation for the occupation of lands or tenements or in recognition of fealty or tenure to the owner of the land or tenement. They issue out of the land or tenement and are not the land and tenement itself or any part of it.

The right purchased by the defendant in this case was a right to demand, take, and recover the rents and profits of the house from any one competent and compellbale to pay or render them, but not a right to the use and occupation of the house itself.

The "right to hold and possess" the land and building which is introduced into the certificate is a gloss of the chairman, unwarranted by law and quite ineffectual for any purpose whatever.

The plaintiff Board must have judgment for the recovery of the premises and there must be an enquiry into damages.

Set aside the decree and order accordingly.

LAWRIE, J.—The Commissioners of the Loan Board purchased a house in Kandy at a fiscal's sale on December 21, 1889, and obtained a transfer on February 29, 1890. The house was unoccupied, the taxes were in arrear. The commissioners did not enter into possession, nor did they pay the taxes for the ensuing quarters and warrant of distress issued on January 29, 1890, for the taxes due for the last quarter of 1889. These warrants contained a direction to the officer to certify on or before March 15 what he had done by virtue of the warrant. So far as appears the officer took no steps on these. Again, two warrants of distress were issued on May 20, 1890, to enforce payment of the taxes due for the first quarter of 1890. These contained a direction to certify what had been done on or before July 10. On July 9 the officer seized the house in question. On July 23 two warrants were issued for the recovery of the taxes due for the second quarter of

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1890. The officer was directed to send in his certificate on or before September 15. On August 19 the secretary of the Municipal Council gave public notice, published in the *Ceylon Independent* of August 21, that the house in question would be sold on September 1. During these months the commissioners of the Loan Board took no steps, they did not attend to any notice, they did not pay the taxes which amounted to the small sum of Rs. 20.25. On September 1, 1890, pursuant to notice, the sale took place, and Ratwatte Basnaike Nilame became the purchaser of the rents and profits of the house for four years. He obtained from the chairman of the Kandy Municipal Council a certificate of sale on November 25, 1890. The house was then unoccupied and in bad repair. The purchaser entered into possession without objection or let or hindrance from the commissioners. The commissioners awoke to a sense of their responsibility regarding the house, and in January, 1892, they instituted this action against Ratwatte for ejectment and for damages.

In my opinion the warrants of distress did not expire on the day on which the officer was required to certify what he had done. They seem to me to be continuous warrants, which remain alive until they are executed. I do not say that they would not at length become stale from efflux of time, but I find nothing in them which limits the power of the officer to execute them before the date when he is required to report. It was the duty of the officer to certify from time to time what he had done, and the proper certificate due on March 15 was that the commissioners of the Loan Board had not paid and that the house had not yet been seized. The proper certificate due on July 10 was that the house had been seized on July 9, and the proper certificate due on September 15 was that the house had been sold on September 1.

I am of opinion that the sale on September 1 was regular and valid under the warrants of distress issued in May under which the house had been seized in July and under the warrants issued in July which were in full force at the date of the sale.

I am further of opinion that the sale of the rents and profits conveyed to the purchaser the right to demand these from the owner or his tenant in possession and that the purchaser having got into peaceful possession ought not to be ejected until the owner tenders to him a sum equivalent to the value of the rents or profits or contracts with him to pay regularly a fair rent during the four years. I regret that I am unable to agree with the rest of the Court.

I venture to think that this litigation is discreditable to the Loan Board.

I would affirm the judgment of the district judge.

Burnside, C. J.—This case was exceedingly well argued before us by Mr. Wendt for the appellant and Mr. Dornhorst for the respondent, and if I do not express an opinion on all the material questions submitted for our consideration it is because I can give my judgment irrespective of those to which I do not refer. I gather the facts from the proceedings before us. The action is by the Commissioners of the Loan Board against Ratwatte, described as Basnaike Nilame. They pray ejectment, alleging that the defendant is in the unlawful possession of the plaintiffs' land and buildings described in the plaint and for costs and damages. The defendant admits the plaintiffs' title as owners of the land, but denies that he has been in the unlawful possession, alleging that the land and buildings were taxed under the Municipal Councils Ordinance, 1887, which tax the plaintiffs failed to pay and that in pursuance of a warrant of distress issued in conformity with the said Ordinance for the sum of Rs. 20·25 inclusive of costs the rents and profits derivable from the land and buildings and the right to hold and possess the same for a term of four years was sold on September 1, 1890, when the defendant became the purchaser of the said possessory right and interest, as shewn by the certificate filed with the answer, and by such purchase the defendant became entitled to hold and possess the lands and buildings for a term of four years. The plaintiff replied taking issue on all these allegations. Such is a short statement of the pleadings, sufficient however to show the real and important issues between the parties, upon which the district judge has given judgment for defendant. The plaintiff has appealed. The learned district judge has gone very fully into many of the points which were raised on the part of the plaintiffs on the facts developed in the case. It is not necessary, as I have already said, to follow the district judge through them all. There are two most material points going to the rights of the parties, which I shall dispose of, viz., first, was the sale on September 1 under the warrant from the chairman of the Municipal Council, sufficient to vest the property in the defendant? And secondly, what was the nature and extent of the property so sold, and in what relation did the purchaser, the defendant, stand, and what rights were thereby created with regard to the owner? As a general proposition it is safe to say

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that a certificate of sale in the form contained in schedule F would be *prima facie* evidence that everything had been legally done which should have been done leading up to such certificate for the purpose of vesting the property embraced by it in the purchaser. *Omnia presumuntur rite esse acta*, and the person challenging the certificate would have the burthen of establishing the contrary. In this case the defendant has produced with and pleaded as part of his answer a certificate which upon the face of it recites that the sale of the property took place under "a warrant of distress issued in comformity with the Ordinance", and, apart from the distinct traverses of the plaintiffs at the close of the plaintiffs' case, the defendant could have relied on his certificate as sufficient to show good title for the rents and profits of the land without going into the details how that certificate had beed obtained. But the express traverses put him to the direct proof of his allegations to support his title, and he proceeded to open up his title and lay bare the proceedings under which it was obtained, thereby calling on us to decide on the plaintiffs' objection to them as to any defects which were disclosed and how far they affected the certificate itself. The officer of the Municipalty who carried out the seizure and sale was called as a witness by the defendant, and this is the material part of his evidence: "I received a warrent to distrain on that house for the fourth quarter "1889 and first and second of 1890. [Original of K1 "to K6 shewn him.] Those are the warrants, I "seized the house on July 9, 1890." Now, the documents K1 to K6 are the warrants under which the officer says he seized the house, and I necessarily turn to those warrants, and this is what I find. Two of them are dated January 29, 1890, returnable on March 15, 1890. It is needless to say that on July 9, 1890, when the alleged seizure was made, they had expired and were valueless for every purpose. The Ordinance requires that these warrants should be returned on a particular day, and I need not repeat the well-known doctrine that a warrant must be executed before it is returnable. The next two, one for water rate Rs. 3·30, and the other for assessment tax Rs. 2·25, bear date on May 20, and are returnable on July 10, 1890. Now, these warrants justified the seizure of the premises on July 9, and, had a sale taken place under them, they would have justified it, and any mere informality in such seizure and sale would have been protected by section 159, but in truth the seizure had become ineffectual because no sale had followed it and the warrant had expired and had ceased to be in force. Then, the next two warrants are dated July 23, and were returnable on September 15, and no seizure took place under them. Whatever seizure had been made had been previous to their being issued and before the rate and tax were due, and therefore those warrants were no authority for the sale of the house until it had been seized. The defendant has therefore himself negatived the presumption on which he may have relied, and has given direct evidence of such defects as go to the very existence of his certificate of sale. These defects are not cured by section 150 of the Ordinance. That section applies only and in so many words to "mistakes" in "the name of a person" liable to pay a rate or tax, or in "the description of property", or in the "amount of assessment", or in "the mode of seizure or sale". There was no mistake in the "mode" of seizure. There was no seizure at all. And even with regard to these mistakes, it is required that the directions of the Ordinance be in substance and effect complied with. Mark that it is not substance *or* effect, but substance *and* effect. The defendant has therefore failed to show any authority for the sale of plaintiffs' property. Notwithstanding, however, our ruling on that point, which goes to the entire defence, as the district judge has expressed a very strong opinion in his judgment that the sale of the rents and profits of immoveable property under the Ordinance entitles the purchaser to the possession of the property itself for the period sold, I think it right to say that I cannot agree with the district judge. I hold that the sale of rents and profits of immoveable property gives to the purchaser no right of occupation or possession of the property to the exclusion or eviction of the owner, but only the right to receive and recover at law, from whomsoever may be liable, any rent which may be accruing from a tenant or occupier of the property, or the value of any profits which may come into the possession of any one or to which he would otherwise be entitled. If there be no rent accruing, the purchase does not authorize the purchaser to let the premises so as to get rent. If there are no profits, the purchase does not authorize him to enter and create profits. This construction is supported by the form of certificate of sale provided by the Ordinance, which requires that the property sold shall be described, and the vesting words of the certificate extend only to the "property above described". In this case the form of the certificate of sale to the defendant has been materially and unjustifiably altered, for, while the property sold has been rightly described as "the rents and profits derivable from the premises" and vested in the defendant, a further clause has been added, not to be found in the form provided by the Ordinance, vesting the possession of "the premises" as well in the defendant. There is no authority in the Ordinance for this.

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The judgment of the district judge must therefore be set aside and judgment entered for the plaintiffs as prayed for in the first and second paragraphs of the plaintiffs' prayer, and the case go back for enquiry as to the damages under the third prayer, and judgment be entered for the plaintiffs for the amount so found to be due with costs in both courts.

Set aside.

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Present:—BURNSIDE, C. J.

(*October* 13 *and* 18, 1892.)

D. C. Kurunegala, Criminal No. 2,450. } THE QUEEN v. HERAT.

Criminal Procedure—Appeal by Attorney-General—Petition, how lodged—Forwarding by post—Practice.

The petition of appeal of the Attorney-General in a criminal case must be lodged in court by the Attorney-General or by some person authorised by him, and the requirements of the Criminal Procedure Code are not satisfied by the transmission of the petition by post.

The Attorney-General appealed against the acquittal of the defendants, and his petition of appeal was forwarded to the district court by post addressed to the district judge. The district judge accepted the petition and forwarded the case to the Supreme Court.

Templer, C.C., for the Crown.

Dornhorst, for the defendant, took the preliminary objection that the petition of appeal was irregularly admitted.

Cur. adv. vult.

On October 18, 1892, the following judgment was delivered:—

BURNSIDE, C. J.—Two questions of some importance arise here. First, in what relation does the Attorney-General stand with regard to criminal prosecutions? There is but one answer. All criminal prosecutions are at the instance of the Sovereign, although her royal name or title may not appear on the record, and the Attorney-General represents the Sovereign in her executive capacity in all Her Majesty's courts. His commission confers that authority on him. It does not require the authority of the Governor and Legislative Council to empower the Queen to create the office of Attorney-General and invest him with the executive functions which by right and law are inherent in the Crown and which by her commission she may delegate to her Attorney-General. The second question is, can the Attorney-General file a petition of appeal by merely forwarding it by post to the judge of the court? The Solicitor-General says that such has always been the custom and practice. I think it was a most convenient practice, and no reason has been urged for challenging it by the court itself. As it has been challenged, I must say that it does not satisfy the strict requirements of the Code, which require that the petition should be lodged in court by the person appealing. There should therefore be, in cases where the Attorney-General appeals, the manual act of lodging the appeal in the court by the Attorney-General or by some one whom he may authorise to act for him.

As the petition of appeal was not thus lodged it must be rejected.

Appeal rejected.

———:o:———

Present:—BURNSIDE, C. J., and LAWRIE, J.

(*September* 13 *and October* 11, 1892.)

D. C. Colombo, No. 98,202. } JAIN CARIM v. RAHIM DHOLL.

Prescription—Adverse position, requisites of—Acknowledgment of title—Ordinance No. 8 *of* 1834, *section* 2—*Ordinance No.* 22 *of* 1871, *section* 3—*Burden of proof—Evidence.*

Observations by the Supreme Court on the requisites of adverse possession necessary under the Ordinances for acquiring title to land by prescription.

The plaintiff claimed title to a certain land by purchase from one Hassim Jaldeen who derived title from one Cuppe Tamby, and sued the defendants in ejectment alleging that they had taken forcible possession of a house standing on the land. The defendants pleaded that Cuppe Tamby had verbally gifted the house in question to one Sailo Umma, the mother of the second defendant, and they claimed title by prescription. On the evidence the district judge gave judgment for the plaintiff, and the defendants appealed.

Dornhorst, for the appellants.

Wendt, for the plaintiff.

Cur. adv. vult.

On October 11, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—In my opinion the district judge has misapprehended the law. The learned district judge has found that the "possession" of defendants' mother was one by sufferance, the right and title to the house remaining in Cuppe Tamby, and therefore he holds that such possession could

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not be considered as giving her a right adverse to and independent of the owner so as to obtain title by prescription. With due respect to the learned district judge I must differ from him. The learned district judge has perhaps gone wrong by endeavouring to follow the English law of adverse possession, one of the least settled heads of English law as it existed previous to the passing of the Prescription Act 3 and 4 Will iv. c. 27, and overlooked the fact that what is "adverse possession" has received an express definition in the Ordinance of prescription itself, a definition which has found place throughout all our ordinances—the Ordinance No. 3 of 1822, Ordinance No. 8 of 1834, and the present Ordinance No. 22 of 1871. This is the definition—"a possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred." I have in vain endeavoured to discover the origin of these words, whether they have been taken from any English statute, or are due to the wit of the colonial draftsman; but, however that may be, this court has already decided, overruling a previous decision to the contrary, that the words contain a definition of the words previously made use of, viz., possession by "adverse title". The judges in the case overruled regarded them as being introduced only by way of illustration and explanation and as containing only certain examples of the kind of possession intended by an "adverse possession". This interpretation, says the judgment from which I am quoting, appears to do violence to the words "that is to say", by which the definition is introduced, which do not mean the same as the words "as for instance", or "by way of example". And we can see no reason or necessity for understanding them in any but their literal sense or connecting the equivalent and co-extensive propositions. See *C. R. Batticaloa* 9.653, Vand. 44. This is a binding decision, and I moreover agree with it. Such being the effect of the words of our Ordinance, the material question to be determined is whether there has been a *de facto* possession upon which the claim of prescription is based. The district judge has distinctly found that the defendant's mother "was in possession", but as that possession had been obtained by leave and retained without disturbance by the tacit acquiescence of the owner, he holds that prescription could not run with it. I desire to point out that such possession, if not accompanied by payment of rent or performance of service or some act from which an acknowledgment of title in another may be inferred, and if it so continues for the prescriptive period, gives a good title by prescription, and a mere verbal acknowledgment is not sufficient to arrest it. It must be a substantial act of acknowledgment to prevent the entire possession from being adverse as defined by our Ordinance. In the present case, the evidence leads to no other conclusion than that the defendant's mother entered into possession of the tenement out of the charity of the owner her brother, that she possessed it by residing in it with her family alone without interruption or disturbance from him for long over the prescriptive period, perhaps out of his sheer benevolence, which he might have terminated at his pleasure, and during that period she never paid rent, nor performed service to him, nor did she do any act by which his ownership was acknowledged. I take it as beyond doubt that she acquired prescriptive title as against him and those claiming under him. Mere occupation such as that of an agent or servant or guest of another would not in my opinion amount to possession under the Ordinance, but on this point, I take it, the evidence is clear that hers was not a mere occupation such as I have referred to, and that she lived in the house as the head of her family exercising independently acts of ownership by repairing the house at her own expense. She was married in it, was divorced in it, and still remained in it, and she received into the house inmates at her discretion, and it is beyond doubt that her seperate possession was regularly recognised by Cuppe Tamby the owner as well as by the plaintiff's vendor, who says: "I never gave plaintiff possession of the house where Saibo Umma lived." But there can be no doubt on this point, for the pleadings treat the property in dispute, although part of the same curtilage with others, as an independent tenement in the sole possession of the defendants, of which the plaintiffs in their libel pray to be restored to possession. The judgment should be reversed and judgment entered for defendants with cost.

LAWRIE, J.—I agree. Although our Ordinances regulating prescription have not expressly so declared, I take it that the undisturbed and uninterrupted possession with entitles the possessor to a decree in his favor must be a possession *ut dominus*.

The possession of a usufructuary mortgagee, of a tenant, of a planter, of an agent, of a trustee, of an incumbent of a temple or the holder of an office, of a person standing in *loco parentis* to the owner, and in some cases even the possession of near relatives, have been held not to entitle the possessor to a decree as against the original owner, although in these cases the possession was unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an "acknowledgment of a right existing in another

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"person would fairly and naturally be inferred."

When, however, the bare fact of possession unaccompanied as aforesaid is proved, the party claiming adversely to the possessor must allege and prove that the possession was not *ut dominus*. If he succeeds in proving that the possession began otherwise than *ut dominus*, then the burden of proof is shifted, and to use the words of Rough, Chief Justice, which have often been quoted with approval in this court, "it "being shewn that the possession commenced by "virtue of some other title, such as tenant or planter, "the possessor is to be presumed to have continued "to hold on the same terms until he distinctly "proves that his title has changed".

In the case before us it is proved that Cuppe Tamby became owner of the premises by deed dated 18th December, 1888, that some time between 1855 and 1865 (I do not think that the proof fixes the date more precisely) Saibo Umma, a sister of Cuppe Tamby, began to possess a part of the premises and that she continued to possess the part now in question until her death in 1885, and that her daughter, the second defendant, is now in possession. In the answer the defendants allege that Saibo Umma's title to possession was a verbal gift by the owner Cuppe Tamby. That allegation is not traversed in a replication, nor was issue taken on this at the trial. No evidence was adduced of this verbal gift, either because the defendants assumed that it was admitted because not denied, or because they had no proof to offer.

The learned district judge says on this point: "There is not evidence in support of the defendants' al-"legation that the house in question was verbally gifted "to Saibo Umma". The learned district judge so expresses himself that it is plain that he did not believe that there was a verbal gift. He holds it proved that Cuppe Tamby "by way of charity" allowed Saibo Umma to "occupy the house which at that time was "not a separate or distinct house but formed part of "the premises occupied by Cuppe Tamby and his "wife", and the district judge adds: "it was a mere license to occupy."

I have read the proof with some care, and I confess that if there be evidence of this act of charity or of this license to occupy, it has escaped my notice and I find no proof of these statements. The entry of Saibo Umma into possession was about 30 years ago, and none of the witnesses profess to remember the fact, nor can any tell what Cuppe Tamby and Saibo Umma then did or said.

The learned district judge uses the word "occupy" instead of the word "possess", but I take it that he uses "occupy" as meaning "possess personally". He speaks of Cuppe Tamby and his wife occupying the premises.

If I am right in holding that Saibo Umma's possession must be presumed to have been *ut domina*, unless the contrary be shown, and if it be the case that the contrary has not been shown, then she acquired by possession a prescriptive right, for there is evidence that she possessed for more than ten years without interruption and without payment of rent, &c.

If it be the fact that when she began to possess she lived in a room not separted or distinct from but a part of the premises occupied by her brother Cuppe Tamby, it is clear from the proof that at some remote time this mode of possession changed and that her room or rooms were separated from the rest of the house in which Cuppe Tamby and his family lived. When this separation took place her possession must have become markedly *ut domina*.

Further, if I take the facts of the charitable act and of the license to occupy as proved, I arrive at a different result to that which the learned district judge reaches. If Cuppe Tamby was charitable enough to permit his sister to possess, if he was good enough to give a license to occupy, the charity and the license when followed by possession must be presumed to be a permission to possess *ut domina*, not in any other capacity. It is true that Cuppe Tamby could have recalled the license within ten years, but if he allowed (and I think it is proved he did allow) Saibo Umma to possess *ut domina* for ten years she acquired a right against him.

The plaintiff has not proved by production of the decree or by other sufficient evidence that he obtained judgment against Saibo Umma or that by that or by any act of her own she acknowledged his right.

I agree with the Chief Justice that the judgment under review must be set aside and the action dismissed with costs.

Reversed.

———:o:———

Present:—Burnside, C. J.

(*October* 13 *and* 21, 1892.)

C. R. Batticaloa, No. 977. } Velaither v. Nallatamby.

Cause of action—Money paid—Implied promise—Sale of paddy field by Government—Payment of grain tax by mortgagee—Liability of owner.

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The owner of a paddy field gifted it in 1885 to defendant subject to an already existing mortgage. The field having been seized and sold by Government for the grain tax due for the year 1887, the plaintiff, an assignee of a decree obtained upon the mortgage, paid to Government the amount for which the land was sold and had the sale cancelled, and brought the present action to recover the amount from defendant.

Held, that the circumstances disclosed a good cause of action, as the law implied a promise on defendant's part to reimburse plaintiff the amount of the tax.

One Kumaravaloe, being the owner of a certain field, gifted it in July, 1885, to the defendant, subject to a mortgage created by him in favour of one Karthigasoe. Subsequently Karthigasoe sued upon his mortgage and obtained judgment for a certain amount and a mortgagee's decree, which he thereafter assigned to plaintiff. In 1889 the Government seized and sold the land to a third party for default of payment of the grain tax due in respect of the field for 1887. Thereupon the plaintiff paid to Government the amount for which the land was sold and had the sale cancelled, and now brought the present action to recover from defendant the amount so paid.

The defendant among other things pleaded as a matter of law that the plaint disclosed no cause of action on the ground that the payment was voluntarily made by plaintiff and raised no promise in law on defendant's part to reimburse plaintiff.

The commissioner upheld the defendant's contention and dismissed the action, and plaintiff appealed.

Wendt, for the appellant, contended that the circumstances proved raised an implied promise on defendant's part to repay the amount paid by plaintiff. The plaintiff's security would have been wiped out by the sale, which would have passed the land free from encumbrance, and he was therefore entitled to make the payment and recover it from the owner, to whom the land was now restored. *C. R. Batticaloa* No. 129 (1 C. L. R. 73), cited below, was in point. [He also referred to *Exall* v. *Partridge*, 8 T. R. 308; and *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38.]

Sampayo, for the defendant, argued that the sale of the land had realized sufficient to wipe out the debt for taxes due by the owner, and that therefore there was not at the date of the payment by plaintiff any existing debt due by the defendant such as would entitle plaintiff to recover from the defendant the amount paid. Further, the law would imply a promise only if the plaintiff had been compelled to pay as a matter of legal obligation. Here the payment was made voluntarily. Besides, the plaintiff is an assignee of the mortgage decree, and this distinguishes the present case from those cited.

Cur. adv. vult.

On October 21, 1892, the following judgment was delivered:—

BURNSIDE, C. J.—The cause of action alleged in the plaint in this case is that the plaintiff is the holder of a mortgage over certain land of which the defendant is the owner, and that the plaintiff obtained a mortgage decree declaring the land bound and executable for the debt, that the defendant, as owner of the land, was legally bound to pay the commutation tax due on the land and which accrued subsequent to the mortgage, but failed to pay it. The Government seized the land and sold it, but, as the plaintiff came forward and paid the tax, the Government cancelled the sale and the defendant was released from the liability to pay the tax, and the plaintiff claims the sum so paid, as "money paid" by the plaintiff for the defendant at his request on the promise implied by law, where one person is compelled to pay money which another person is legally compellable to pay, that the latter will repay it.

To this plaint the defendant answered on legal grounds, that the plaint discloses no cause of action in that the payment was made voluntarily and under the circumstances raises no promise on the part of the defendant to repay the plaintiff. The learned commissioner disposed of this legal point in these words: "As the plaint discloses no cause of action I dismiss plaintiff's action with costs," and the plaintiff appeals. I wish I could deal thus summarily with this most important question of law. I have no doubt I should have derived valuable assistance in disposing of it if the learned commissioner had favoured the court of appeal with the reasons by which he was enabled to dismiss the plaintiff's claim in the emphatic terms of his judgment, but without that assistance I must approach the consideration of the law on the subject with some diffidence in view of the decided opinion of the learned commissioner. Had the plaintiff been the mortgagee and the defendant the mortgagor, I think I might have ventured on good authority to differ at once with the learned commissioner and hold that the law did imply a promise from the mortgagor to repay money which subsequent to the mortgage the mortgagee had been compelled to pay and which the mortgagor was compellable to pay. The case of *The Orchis*, 59 L. J. P. & M. 31 (for the reference to which I am indebted to my brother Withers) is an authority directly in point. The plaintiff in that case was mortgagee of a ship of which the defendants were owners. Subsequent to the mortgage the captain of the ship incurred liability in respect of the ship and binding on the defendants. The ship was arrested for this debt and in order to obtain her release and

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get possession of the ship the plaintiff came forward and paid the debt and then brought an action against the defendants to recover the amount, and Butt, J., in the court below held, the court of appeal affirming, that the action well lay. Butt, J., said: they (the plaintiffs) paid the money "without any express "authority from the defendants and they base their "claim to reimbursement upon a promise which the "law implies, and implies under the circumstances, "by the defendants to pay them, they being compell-"ed to pay a sum to pay which the defendants were "legally compellable." This authority is direct and settles the question as between mortgagor and mortgagee, but I have been a little embarrassed by the particular circumstances of this case. The plaintiff is not the actual mortgagee but an assignee of the mortgagee, and the defendant is not the mortgagor but the owner claiming title from the mortgagor, and the question which suggested itself to me was, whether the implied promise grew out of the contractual relations previously existing between parties by which the one may have agreed to guarantee and indemnify or contribute to the other, or simply from the relations in which the parties might find themselves with respect to particular property, one party being compelled to pay money in respect of it which the other was primarily compellable to pay. I have satisfied myself on the point by reference to all the authorities—particularly those like that of the owner of a coach distrained on for rent due by the coachmaker on whose premises it was standing, and who paid the rent to obtain the possession of the coach—and I have arrived at the conclusion that the promise which the law implies is independent entirely of any express contract of the parties by way of guarantee, indemnity, contribution, or otherwise Lindley, L. J. in *Edmunds* vs. *Wallingford*, 54 L. J. Q. B. 305, says: "The right to indemnity or contribution in these "cases exists although there may be no agreement "to indemnify or contribute, and although there "may be in that sense no privity between the plaintiff and defendant;" and Lord Esher in the case of *The Orchis* said: "The case is therefore brought "within the common law rule laid down in *Ed-"munds* v. *Wallingford*, that if by reason of the de-"fault of one person the property of another be-"comes subject to detention by law, and the person "whose property is so detained pays the debt, the "law implies a promise from the one whose debt is "paid to repay it to the person who has paid it." It may be here urged that the plaintiff was not the owner of the property: neither was the plaintiff in the case of the "Orchis," but as against the defendants in that case he was entitled to the possession of the property; and so in this case the plaintiff had the right to the possession of the mortgaged property as against the defendant, which gave him the right to pay to secure that possession.

The commissioner says that the case decided by Mr. Justice Clarence, reported in 1 C. L. R. p. 73, is not parallel, but again he gives no reason for the dictum, and but for it I should have said it is exactly in point.

The plaintiff will have judgment with costs on the legal issue, and the case be sent back in order that the issues of fact may be disposed of.

Set aside.

———:o:———

Present:—BURNSIDE, C. J. and WITHERS, J.

(*August* 23 *and* 26, 1892.)

D. C. Badulla, No. 899. { PALANIANDY v. RANGASAMY. F. C. FISHER, Fiscal of the Province of Uva, appellant.

Practice—Process—Returnable day—Time within which process should be returned—Fiscal, liability of.

The fiscal entrusted with the service of a process has the whole of the returnable day to make return to the process and is not in default until the expiration of that day.

In this case original summons was issued to the fiscal for service, returnable on July, 1892. On that day, at the time the court began its sitting and the case was called, the fiscal had not yet made his return to the summons. The district judge thereupon directed a summons to be issued to the fiscal to appear on a certain day and "to shew cause why he should not be fined for failing to return the process on the returnable date." It appeared, however, that the fiscal's return to the summons reached the court later in the day, *i. e.*, about 12 noon or 12-30 p. m. of the returnable day.

The fiscal appeared to the summons issued against him and shewed cause, but the district judge held the fiscal to be guilty of contempt of court, being of opinion that it was the duty of the fiscal to make his return to a process at least before the usual hour for the sitting of the court, and he accordingly imposed a fine of Rs. 5 on the fiscal.

The fiscal appealed.

Wendt, for the appellant.

Cur. adv. vult.

On August 26, 1892, the following judgment was delivered:—

BURNSIDE, C. J.—The fiscal had all the last day of the returnable time to make return to the process, and he was not in default until the expiration of that

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day. This is a sufficient ground to set aside these proceedings, without reference to their irregularity and want of conformity to the provisions of the Code.

The order fining the fiscal and all proceedings leading to it are set aside.

WITHERS, J., concurred.

Set aside.

———: o :———

Present:—LAWRIE and WITHERS, JJ.

(*November* 8 *and* 22, 1892.)

D. C. Colombo, No. C 2,328. } HENDERSON v. DANIEL.

Civil Procedure—Appeal—Deposit of costs of serving notice of appeal—Limit of time for making such deposit—Civil Procedure Code, section 756.

The deposit of a sum of money, under section 756 of the Civil Procedure Code, to cover the expenses of serving notice of the appeal on the respondent, must be made within 20 days and, in the case of a court or requests, within 14 days from the date of the decree of order appealed against, and such deposit is a condition precedent to the right of prosecuting an appeal.

In this case judgment was pronounced against the plaintiff on July 6, 1892, and the plaintiff appealed from the judgment, the petition of appeal being filed on July 19, 1892. On July 21 the plaintiff obtained a notice on defendant to shew cause why a certain sum of money should not be accepted as security for costs of appeal. On returnable day of the notice, *i.e.*, July 29, the security tendered was accepted and the security bond was perfected on the same day. But it was not until August 3, 1892, that the costs of serving notice of appeal was deposited. The appeal, however, was duly forwarded to the Supreme Court.

Morgan, for the appellant.

J. Grenier, for the respondent, took the preliminary objection that the appeal was irregularly before the court, inasmuch as the costs of serving notice of appeal was not deposited within 20 days of the judgment appealed against.

Cur. adv. vult.

On November 22, 1892, the following judgments were delivered :—

LAWRIE, J.—The 756th section of the Procedure Code provides that every appellant within 14 or 20 days from the date of the judgment appealed against shall deposit a sufficient sum of money to cover the expenses of serving notice of the appeal on the respondent and shall furnish to the court a copy of the petition of appeal which with the notice of the appeal shall immediately after the expiry of the 20 days (if security has been found and accepted) be issued by the court to the fiscal for service on the respondent or on his proctor.

If the appellant has not within the time specified —14 or 20 days—deposited a sufficient sum, &c., the Ordinance enacts that the petition of appeal shall be held to have abated. The objection to the appeal on the failure of the appellant to deposit within the 20 days must be sustained, and the appeal is rejected.

WITHERS, J.—I agree. The deposit of a sum of money to cover the expenses of serving notice of the appeal on the respondent must be made within 20 days from the date when the decree or order appealed against in a district court was pronounced and is a condition precedent to the right of prosecuting an appeal.

That requirement being unfulfilled, the petition of appeal "shall be held to be abated".

Appeal rejected.

———: o :———

Present :—BURNSIDE, C. J., and LAWRIE, J.

(*July* 1 *and* 12, 1892.)

D. C. Tangalle, No. 80. } SILVA v. DISSANAYAKE.

Husband and wife—Separate estate—Mortgage of separate property by wife—Written consent of husband—Validity of bond—Matrimonial Rights Ordinance, 1876, *section* 9.

A mortgage created by a woman, married after the proclamation of the Ordinance No. 15 of 1876, over immoveable property belonging to her separate estate, amounts to an act "disposing of and dealing with" such property within the meaning of section 9 of the Ordinance, and requires the written consent of her husband for its validity.

When such consent has not been given, the creditor cannot even recover the debt due on the bond, inasmuch as the general personal incapacity of a married woman to bind herself by contract renders the instrument inoperative even as a simple money bond.

The first defendant was husband of one Ceciliana Manikhamy, to whom he was married in September, 1881, and the second and third defendants were their children. Ceciliana Manikhamy in June, 1890, executed a bond in favour of plaintiff, by which she bound herself in the sum of Rs. 522·50 and as security therefor mortgaged certain lands belonging to her as her separate estate. Ceciliana Manikhamy having died intestate, the plaintiff brought the present action against the defendants upon the bond. The defendants, among other things, took exception to the action on the ground that the bond was invalid,

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inasmuch as Ceciliana Manikhamy was a married woman at the date of the bond and had not obtained her husband the first defendant's consent in writing for the execution of the bond.

The district judge dismissed the plaintiff's action, and the plaintiff appealed.

Dornhorst for the appellant.

Wendt for the defendants.

Cur. adv. vult.

On July 12, 1892, the following judgments were delivered :—

Burnside, C. J.—The judgment of the district judge is clearly right. The woman had no right to deal with her sole property otherwise than with the written consent of her husband, and she had no right to enter into an engagement whereby she incurred personal liability on a bond.

Lawrie, J.—Dona Ceciliana Manikhamy, a Sinhalese woman, resident in the district of Tangalla, and subject to the law in force in the maritime provinces of Ceylon, was owner of several lands. In 1881 she was married to a low-country Sinhalese, also subject to the same law. In 1890 she executed a bond in favor of the plaintiff, in which she acknowledged to have borrowed and received from him Rs. 522·50 and she as security for repayment mortgaged certain lands belonging to her. She died in the same year 1890. The creditor instituted this action against her surviving husband and her children praying for judgment on the bond.

By the law of the maritime provinces prior to the passing of the Ordinance No. 15 of 1876 a married woman had no power to enter into any description of contract on her own account during the coverture. That disability still exists except in so far as it has been removed by the Ordinance No. 15 of 1876. A married woman now as before the passing of Ordinance cannot bind herself by executing a money bond.

If she has immoveable property, the Ordinance declares that shall belong to her for her separate estate, and she "shall...... . have as full power of disposing "of and dealing with any such property by any "lawful act *inter vivos* with the written consent of "her husband but not otherwise.........as if she were "unmarried."

The learned district judge has held, and I agree with him, that the execution of the mortgage by this married woman was an act "disposing of and dealing with" her immoveable property, and that as she did not obtain written consent of her husband the mortgage is not binding on her heirs or executors.

So that, whether the bond be looked on as a simple money bond or as a mortgage, the plaintiff creditor is not entitled to recover.

Affirmed.

———:o:———

Present:—Burnside, C. J.

(*November* 16 *and* 18, 1892.)

D. C. Galle No. 55,354. } Ismail Lebbe v. Mohamado Casim.

D. C. Colombo, No. C 1,251. } Jackson v. The Colombo Commercial Co.

Civil procedure—Appeal to Privy Council—Application for Certificate—Security for costs of hearing in review—When and how given—Civil Procedure Code, section 783.

The nature, amount, and sufficiency of the security for costs to be given by an appellant, upon his application for a certificate under section 781 of the Civil Procedure Code preparatory to appeal to the Privy Council, must be determined by the Supreme Court upon the appellant's petition after due notice to the respondent, and the mere deposit of a sum of money with the Registrar by way of such security is insufficient, unless it be received with the consent of the respondent.

Applications for certificates under section 781 of the Civil Procedure Code, preparatory to appeal to the Privy Council.

In the Galle case, the Supreme Court on August 16, 1892, affirmed the judgment of the district court dismissing plaintiffs' action, and plaintiffs within two months from that date filed a petition praying for a certificate under section 781, and also deposited with the Registrar a sum of Rs. 200 by way of security for the costs of the hearing in review. Plaintiffs afterwards served notice on the respondent of such deposit, but there was no petition or determination by the Court thereon, as required by section 783.

In the Colombo case (the Tea-Roller Patent case) a sum of Rs. 250 had within the two months been deposited with the Registrar by the appellants and received with the consent of the respondent as security for costs of the review hearing.

Dornhorst, for the appellants in the Galle case.

Browne (*Dornhorst* and *Loos* with him) for the appellants in the Colombo case.

Wendt, for the respondent in each case, took the preliminary objection that the applications could not be entertained, the security required by section 780 not having been determined by the court and perfect-

ed within the two months in the manner prescribed by section 783.

Browne, and *Dornhorst*, were heard *contra*.

Cur. adv. vult.

On November 18, 1892, the judgment of the court was delivered by

BURNSIDE, C. J.—In both these cases applications were made to bring a judgment in review, in order to an appeal to the Privy Council, under section 780 of the Civil Procedure Code.

Mr. Wendt took a preliminary objection that the security which was required by section 780 for the payment of the costs of hearing in review, and, under section 783, of the hearing before the Privy Council, had not been given. The 783rd section of the Code provides that the nature, amount, and sufficiency of the security to be given by the appellant under section 780, as well as that to be given under section 783, "for the prosecution of the appeal and for the payment of all such costs as may be awarded by Her Majesty in Council to the party respondent", shall be determined by the Supreme Court upon the motion of the appellant made by petition, of which notice shall be duly served on the respondent.

I confess, on first reading these two sections together, the inclination of my opinion was that the giving security for the costs of the hearing in review and of the costs of the hearing in the Privy Council were to be by simultaneous process determined by the Supreme Court on petition under section 783 when the desire to appeal was asserted under section 780 and within two mouths of the judgment sought to be reviewed, as required by that section. However, my attention was called to that part of section 783 which requires that the security for the costs of hearing in the Privy Council shall be given within three months from the date of judgment in review, and consequently it is clear that the proceeding to give security for the hearing in review and for the hearing before the Privy Council depended on the dates of the judgment below and of the judgment in review; but the nature, amount, and sufficiency of the security to be given in both cases shall be determined by the Supreme Court upon motion on petition with notice as provided by section 783. Applying this law, then, to the motions now before us, it must preclude the plaintiff from his motion, because he has simply paid into court a sum of money without petition to the Supreme Court or notice to the other side as to the nature, amount, or sufficiency thereof. His petition for hearing in review must therefore be dismissed with costs.

Then with regard to the other case (the Tea-Roller case) the defendants, the proposed appellants, had with the consent of the other side, but without any intervention of the court, also made a deposit in court of the costs of hearing in review. Mr. Wendt properly admitted that, the plaintiff having consented to this, the defect of securing the authority of the court had been avoided, or at least the plaintiff was not in a position to take the objection. Therefore the defendants' motion was in order, and must be heard.

The costs of this preliminary objection will depend on the order ultimately made.

———:o:———

Present :—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(*November* 22 *and* 29, 1892.)

D. C. Kandy, No. 5,619. } LOKUHAMY v. SIRIMALA.

Civil Procedure—Replication, necessity for—Pleading—Settlement of issues—Civil Procedure Code, sections 79, 813.

Under the Civil Procedure Code there is no necessity for a replication to any new matter in the answer, but such new matter will be taken as denied, or if the plaintiff desires to question its sufficiency as an answer to the declaration he may at the trial have an issue settled by the court on the point.

Ejectment.

The plaintiff claimed title to a certain land by right of purchase upon a certain deed. The defendant in his answer "denied the validity" of the deed under which plaintiff claimed, and he also among other things pleaded that he was in possession of the land under a license granted to him by Government to asweddumize the land. The plaintiff did not file any replication.

At the trial the plaintiff did not adduce any evidence to prove the execution of the deed pleaded by him, and the defendant objected to its reception in evidence. The license pleaded in the answer was tendered in evidence by the defendant and was objected to by the plaintiff. As regards the admissibility of the latter document, it was contended for the defendant that there being no replication the document required no proof, and must be taken to have been admitted; but for the plaintiff it was argued that no replication was necessary and that defendant must prove all the material allegations in his answer. The learned district judge upheld the plaintiff's contention, but on the whole case he held against the plaintiff and dismissed the action.

The plaintiff appealed.

J. Grenier, for the appellant.

Wendt, for the defendant.

Cur. adv. vult.

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On November 29, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—The learned district judge has gone wrong on the point of law that the deed in question had been denied by the defendant. The deed was not denied by the defendant so as to put the plaintiff to the proof of it. The defendant simply denied its validity, setting forth nothing as constituting it invalid, and, if this denial raised any issue at all, the burthen of it, whatever it may be, was on the defendant. In this view my inclination was to send the case back in order that the judgment of the district judge might turn on whatever value the deed might posses; but when I come to examine the deed itself carefully, it seems to me that it cannot possibly help the case for the plaintiff. She pleaded the original deed as conveying to her title to the land, giving certain abuttals which she says are from memory. The defendant has specially denied that it did, and the production of the deed would certainly entitle the defendant to the judgment of the court on that issue. On the issue, therefore, that plaintiff derived no title by deed from Dingiria she must have been defeated. Then, assuming that the plaintiff had properly pleaded a prescriptive title, has the evidence come up to the requirements of section 3 of the Ordinance? I think not. The occupation by Kankani, her agent, was at most of an exceedingly interrupted character, and it is by no means clear that even that possession had existed for ten years before he died. The judgment must be affirmed.

The learned district judge has expressed a desire for some direct and binding ruling on the effect of section 79 of the Code, where no replication has been filed. As the point has arisen in the case, I think we may decide it authoritatively, and for myself I adhere to my ruling in *Weerawago* v. *Bank of Madras*, 2 C. L. R. 11, that where there is new matter pleaded in the answer by way of defence, and there is no replication, every material allegation shall be deemed to have been denied, and the burthen of proof of such new matter shall lie on the party asserting it. This practice will secure a joinder of issue at least in every issue tendered in answer by way of defence, and, besides, will secure uniformity of practice and procedure in district courts and courts of requests (section 813 of the Code).

LAWRIE, J.—I agree.

WITHERS, J.—I agree in affirming the judgment of the court below.

As to the important point of practice raised by the learned judge, I think it well that it should be once and for all authoritatively settled, in view particularly of the conflict of opinion of members of this Court on the question of the necessity of a replication to new matter pleaded by way of defence. Nor is it too late in the day to alter a practice under the new Code, which to my knowledge has in the district court of Colombo been recently shaped on dicta of former members of this Court. For my part, I confess that it always seemed to me that the dicta as to the requirements of a replication to new matter pleaded by way of defence rendered nugatory the provisions of section 79 of the Civil Procedure Code, which to my mind aimed in this respect at the simplification of pleadings so as to avoid delay as well as expense to suitors. Mark the imperative nature of the language of that section, which says that no pleading after answer (not being a claim in reconvention) shall be filed except by order of court on special motion after due notice to the other side, and no such order shall be made (except as aforesaid) unless the court is satisfied on such motion that the real issues between the parties cannot be conveniently raised without such further pleading. Remembering that one of the ordinary offices of a replication is either to demur to or traverse new matter pleaded by way of avoidance, if this is insisted on as a matter of course in every case where new matter is so pleaded, section 79 of the Civil Procedure Code is virtually blotted out of the statute. I think it was the intention of this section that new matter pleaded by way of avoidance in an answer should be taken as denied (unless of course admitted by a plaintiff) in the way more particularly provided for in the chapter relating to courts of requests, and that in consequence there is no necessity for a replication to an ordinary answer containing a plea in bar by way of confession and avoidance.

It will be undoubtedly open to plaintiff, if so advised, to press the court on the day fixed for trial to settle as one of the issues in the case that of a matter of law on the point whether the new matter pleaded by way of avoidance is, if true, an answer to the declaration or no. Cases are quite conceivable where a replication would be properly applied for and allowed, as, for instance, where a plaintiff while confessing the new matter pleaded in bar is able himself to plead new matter going to avoid the effect of what is pleaded in the answer, or, in other words, a replication by way of confession and avoidance on his part. But how rarely does occasion for this further pleading arise, when the material facts are well pleaded in the first instance by plaintiff and defendant? I am decidedly for ruling that a replication is not necessary in our courts to an answer which in

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common parlance would only require to be traversed or demurred to, if not admitted outright.

Affirmed.

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Present:—BURNSIDE, C. J.

(*November* 17 *and* 22, 1892.)

M. C. Colombo, No. 5,104. } AKBAR v. SLEMA LEBBE.

Criminal Law—Encroachment on street—Continuing offence—Institution of plaint—Limitation—Ordinance No. 7 *of* 1887, *sections* 175, 283.

The offence, created by section 175 of the Municipal Councils Ordinance, 1887, of erecting an obstruction or encroachment on a street, is a continuing offence so long as the encroachment is maintained, and a prosecution is not barred by section 283 if not instituted within three months from the date when the encroachment was first made.

On September 2, 1892, defendant was charged with having erected in August, 1890, an enclosure or obstruction in Third Cross Street, Pettah, and having thereby encroached on the street, and with having continued up to the date of the filing of the plaint to maintain the said encroachment, in breach of section 175 of the Municipal Councils Ordinance, No. 7 of 1887. It was contended on behalf of the defendant that the complaint not having been presented within three months from the date of the first erection of the obstruction, the prosecution was barred by section 283 of that Ordinance. The municipal magistrate upheld the objection and acquitted the defendant.

The Attorney-General appealed.

Wendt, for the appellant, contended that the offence charged was essentially a continuing offence, the gist of it being that the highway was obstructed, and so long as the obstruction was maintained the statutory bar did not attach. The terms of section 283 were noticeable: they did not declare that no prosecution could be instituted or maintained after the three months, but that no person should be liable to fine or penalty under that Ordinance. He might possibly be punished under section 289 of the Penal Code, for breach of the statutory provision of section 175.

Dornhorst, for defendant, relied on the language of section 175 ("whoever builds any wall or erects or sets up any fence, rail, post, or other obstruction or encroachment") as evidencing an intention to make penal the first act of encroachment. It would be manifestly unfair that a person who had, perhaps unwittingly, built an expensive house that encroached slightly on the street, and had been undisturbed for a long period, should be summarily prosecuted under section 175. Where that had happened, the Municipal Council should properly proceed by a civil action. As to section 283, it was the Municipal Councils Ordinance that created the offence, and if a person was not punishable under it he was not punishable at all.

Wendt, in reply.

Cur. adv. vult.

On November 22, 1892, the following judgment was delivered :—

BURNSIDE, C. J.—The judgment of the municipal magistrate in this case must be set aside, and the case sent back for adjudication on the merits.

The offence charged is a continuing offence, and the period, within which the complaint must be made, did not commence the day on which the erection was completed. See *The Metropolitan Board of Works* vs. *Ahthony & Co.*, 54 L. J. M. C. N.S. 89, which is directly in point.

Set aside.

———: o :———

Present:—BURNSIDE, C. J., and LAWRIE, J.

(*November* 18 *and* 25, 1892.)

D. C. Colombo, No. C 1,251. } JACKSON v. THE COLOMBO COMMERCIAL CO.

Civil Procedure—Appeal to Privy Council—Final or definitive judgment—Amount involved—Civil right—Decree for damages not yet assessed—Ordinance No. 1 *of* 1889, *section* 42—*Civil Procedure Code, sections* 780, 781—*Inventions Ordinance No.* 6 *of* 1859, *section* 34.

By section 52 of the Charter of Justice, 1833, re-enacted in section 42 of the Courts Ordinance, 1889, an appeal to Her Majesty in Her Privy Council is given in any civil suit against any final judgment, decree, or sentence of the Supreme Court, or against any rule or order having the effect of a final or definitive sentence, subject to the following rules: *first*, that such judgment, decree, sentence, rule, or order shall first be brought by way of review before the Supreme Court collectively; *secondly*, that any such judgment, decree, sentence, or order in review shall be given or pronounced for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000, or shall involve directly or indirectly the title to property or to some civil right exceeding that value; and *thirdly*, that the person aggrieved by such judgment, decree, order, or sentence in review shall within 14 days apply to the Supreme Court by petition for leave to appeal.

Chapter lxiii., section 779, of the Civil Procedure Code enacts that, subject to the provisions of the Courts Ordinance, 1889, a party may appeal against any final judgment, decree, or sentence of the Supreme Court, or against any rule or order having the effect of a final or definitive judgment, decree, or sentence; and (section

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780) that whoever desires to appeal under this Chapter must apply within two calendar months by petition to the Supreme Court to have the judgment, decree, sentence, rule, or order against which he is desirous so to appeal brought before the Supreme Court collectively by way of review, such petition (section 781) stating the grounds of appeal and praying for a certificate either that, as regards amount, or value, and nature, the case fulfils the requirements of section 42 of the Courts Ordinance 1889, or that it is otherwise a fit one for appeal to Her Majesty in Council. The person aggrieved by the judgment, decree, order, or sentence in review shall (section 783), if she desires to appeal, apply by petition within fourteen days for leave to appeal.

Held, by BURNSIDE, C. J., and LAWRIE, J. (*dubitante* LAWRIE, J.), that the limitations as to finality and value imposed by the above provisions applied as well to the original judgment of the Supreme Court as to that pronounced in review.

In an action for the infringement of a patent, a judgment of the Supreme Court, holding that plaintiff's patent had been infringed and granting an injunction, but directing an enquiry as to damages, which had not yet been assessed—

Held, not to satisfy the requirements of the above enactments either as to finality or value, and to be therefore not appealable.

Per BURNSIDE, C. J.—The words in section 781, "or that it is otherwise a fit one for appeal to Her Majesty", have probably crept into the Code through inadvertency, and not through any deliberate intention to confer on the Supreme Court an unlimited discretion to allow such appeals.

Application for a certificate under section 781 of the Civil Procedure Code, preparatory to appeal to the Privy Council.

This was an action for infringement of a patent relating to tea-rolling machinery, the plaintiff claiming an injunction, and an inquiry as to damages, which were not laid in the plaint at any specific sum. The district court, on May 2, 1892, dismissed the action, holding that there had been no infringement. The Supreme Court in appeal, on September 13, 1892, reversed the district court decree, and directed the issue of an injunction, and an inquiry as to damages, decreeing the defendants to pay the costs of appeal.

A preliminary objection to the present application having been overruled (reported *ante*, p. 124) it now came on for hearing.

Browne (*Dornhorst* and *Loos* with him), for the appellants. The defendants are entitled to a certificate under section 781. The decree of this court is both final in its nature and also involves a greater value than Rs. 5,000. First, as to finality: Section 42 of the Courts Ordinance, 1889, requires that there shall be a final judgment, decree, or sentence, or a rule or order having the effect of a final or definitive sentence. It is submitted that here the decree appealed against is conclusive and definitive of the rights of the parties in relation to the patent which is the sole subject of suit. No subsequent proceedings in the action can possibly alter or affect those rights as so settled. Assistance may be derived from the English decisions on the words "final judgment" in the Bankruptcy Act, 1883 (46 and 47 Vic. c. 52, s. 4). In *Ex parte Moore* (L. R. 14 Q. B. D. 627) it was held that a decree for an injunction restraining a solicitor from practising and directing an inquiry as to damages, with costs which had been taxed and partly paid, was a "final judgment" (see Lord Selborne's definition). And the *ratio decidendi* on this point was explained and approved (although on another ground the judgment was held not to be "final") in *Ex parte Strathmore* (L. R. 20 Q. B. D. 818). In a local case, *Carfrae* v. *Delmege* (8 S. C. C. 170), where a partnership was declared dissolved and an account ordered to be taken, leave to appeal to the Privy Council was given against the substantive part of the decree, although the order for an account was held not appealable. Next, as to the value involved: Section 42 (2) requires that the decree shall be given or pronounced for or in respect of a sum or matter at issue above Rs. 5,000 in value, or shall involve directly or indirectly the title to property or some civil right exceeding that value. Now, though the proceedings have not ascertained the money value of the interests here involved, it is submitted there clearly is a "civil right" involved (that is, the plaintiff's patent right) worth more than Rs. 5,000. It may even be that, by reason of the action having been promptly brought upon the first suspicion of infringement the damages actually sustained may be assessed at a smaller sum, but it is submitted the whole question of plaintiff's right is "directly or indirectly" involved, and that makes the matter appealable. But even taking the actual money value to be the criterion, a much larger sum is here involved and will be assessed as damages. If the value of the civil right involved be regarded as still unascertained, it is open for this court to direct an inquiry on that point, as has previously been done: *D. C. Kandy* No. 646, Morg. Dig. 57. It ought to be noticed that the Stamp Ordinance, 1890, requires patent actions to be stamped as of the value of Rs. 5,000, apparently fixing that value so as to allow of an appeal to the Privy Council. Where the value of the rights involved is incapable of ascertainment in money, as in matrimonial actions, an appeal has been held to lie: *D. C. Colombo* No. 11,016, Morg. Dig. 77. [He also referred to the *St. Coombs case*, 1 S. C. R. 1.]

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Wendt, for the respondent. It is submitted that there is here no "final judgment" in the sense which entitles a party to appeal to the Privy Council. The practice of the Judicial Committee has been to discourage intermediate appeals, and to require parties to wait until a definitive decree, capable of final execution, has been entered up. Upon appeal against such a decree, the Court will review all previous orders and judgments affecting the rights of parties. This was laid down in *Cameron* v. *Fraser* (4 Moo. P. C. 1) where an order was made referring it to the accountant of the Court to adjust a balance and report to the Court, and it was held that the appellant was entitled to wait until the report had been made and a decree passed thereon, and then appeal against the decree. So that, in an action like the present, the appealable decree is the final adjustment of the rights of parties, which only leaves execution to be carried out. If the present appeal were permitted and dismissed by the Privy Council, there would be nothing to prevent a second appeal after assessment of the damages, if they should happen to exceed Rs. 5,000. The question of a "final judgment" under the Bankruptcy Act is not the same in principle as the present question. In *Ex parte Moore*, the order for costs was held "final" in the sense that it ascertained a sum of money to be due by the defendant, which he could be called upon by a judgment-debtor summons to pay or be regarded as having committed an act of bankruptcy. The order for costs, when liquidated by taxation, has accordingly been held "final" in many cases where there was no final or definitive judgment on the rights of the parties involved in the suit. The decree now under consideration has doubtless settled the question of infringement finally so far as this Court is concerned, but this Court has accompanied that finding with a direction that the relative money claims of the parties on that footing be ascertained with a view to the pronouncement of a final decree, and until that has been done no appeal can be taken. In *Corbet* v. *The Ceylon Company* this Court on April 5, 1887, refused leave to the defendants to appeal. There the mortgagor-plaintiff had obtained leave to surcharge and falsify the defendants' accounts rendered and this Court (preparatory to referring the accounts to an accountant) held the defendants not entitled to charge several classes of items. Each of these classes involved over Rs. 5,000, and were finally disallowed, yet it was held that untill the accountant had reformed the account and a definitive decree had been passed thereon the defendants were not entitled to go to the Privy Council. In *Carfrae* v. *Delmege* the action was for a rescission of a partnership agreement on the ground of misrepresentation, and this Court affirmed the total dismissal of the action on the grounds on which it was brought, but (the partnership having been dissolved, pending the action, by the death of one partner) ordered the usual account to be taken: and the plaintiff was properly permitted to appeal against the dismissal of his action. Then as to the amount involved: *non constat* that when the inquiry is concluded the damages will be found to exceed Rs. 5,000. If the district court had found for the plaintiff originally, and had assessed the damages at less than Rs. 5,000, it is perfectly clear no appeal could have been preferred. The sole test of the right of a defendant to appeal to an action like the present in which damages have been decreed is the amount awarded as damages; *Allan* v. *Pratt* (57 L. J. P. C. 104). This Court cannot entertain the consideration of plaintiff's and defendants' patent rights being worth vastly more than the sum of money representing the particular injury done to those rights, which was the subject of this action. To admit such a principle would be to open a door to appeals in almost every case. The words "civil right", it is submitted, were intended to cover, not rights like those dealt with in the present action, which are readily assessable in money, but such as involve questions of status or office; for instance, the right to practise as a barrister, which has formed the subject of appeal; or matrimonial suits mentioned on the other side. The process of holding a supplementary inquiry, in order to ascertain the value involved—adopted in 1835 in the old case cited—has never been adopted in practice. That was an action for land, the value of which would not ordinarily be inquired into in the action, while here the injury done will in due course be ascertained in the assessment of damages. The provisions of the Stamp Ordinance are immaterial to the present question. Actions relative to patents being nearly always actions for unliquidated damages, the Ordinance has fixed their value at an arbitrary sum in order to obviate the inconvenience of an inquiry in each instance.

Browne, in reply.

Cur. adv. vult.

On November 25, 1892, the judgment of the Court was delivered by

Burnside, C. J.—This was an application by the defendants praying for a certificate under section 781 of the Civil Procedure Code for hearing in review previous to appeal to Her Majesty in Council. The plaintiff shewed cause against the granting of the certificate. The action is in the district court of Colombo by the plaintiff against the defendants,

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alleging an infringement of a patent, and the prayer was for (1) an injunction to restrain the infringement; (2) for an account of all gains and profits derived by defendants from importing, use, and sale of infringements of plaintiff's patent, and a decree for the amount of such gains and profits accruing from such infringement; (3) for costs; (4) for further relief. The defendants traversed the infringement, and at the trial on the merits in the court below the learned district judge dismissed the plaintiff's action with costs on his finding of fact that the defendants had not infringed the plaintiff's patent, and the plaintiff appealed to this Court. On the appeal the district judge's finding of fact was reversed and the judgment of the court below was set aside, this Court holding on the facts that there had been an infringement by defendants of the plaintiff's patent. The following is the decretal order which the defendants desire to appeal from:—"It is ordered and decreed "that the decree made in this action by the district "court of Colombo and dated the 2nd day of May, 1892, "be, and the same is hereby, set aside, and in lieu "thereof it is decreed and declared that the plaintiff "is entitled to, and it is accordingly ordered that the "district court do issue, an injunction restraining the "first defendant and the second defendant company, "and their servants, agents, andw orkmen severally, "from importing into, using, selling, or procuring to "be imported, used, or sold in Ceylon any tea-leaf "rolling machine possessing the arrangement of transmitting motion to the top rolling surface through the "case or jacket surrounding it as described in the "plaint and in the specification therein mentioned, and "claimed by the plaintiff as novel and original, and "further from infringing the plaintiff's grant of exclusive privilege and invention in manner aforesaid; "and it is further ordered and decreed that the case "be, and the same is, hereby remitted to the said "district court in order that the district judge may "deal with the plaintiff's prayer for an account of all "gains and profits derived by each of the defendants "from the importing into, use, and sale in Ceylon of "tea-leaf rolling machines infringing as aforesaid, imported into Ceylon, or used or sold here by the "defendants, or either of them, or by any person "or persons by the order or for the use of the "defendants or either of them, and that thereafter "the defendants be severally ordered to pay to the "plaintiff the amount of the gains or profits so derived "by them, and it is also further ordered and decreed "that the defendants do pay the plaintiff the costs of "this appeal." By the Courts Ordinance and by the provisions of the Civil Procedure Code, Chapter LXIII., the power of this Court to grant leave to appeal to the Privy Council is restricted to cases in which an appea is sought by a party or parties to a civil action (1) against any final judgment, decree, or sentence, or (2) against any rule or order made in any such civil suit or action having the effect of a final or definitive judgment, decree, or sentence; and by section 42, sub-section 2, of the Courts Ordinance every such judgment, decree, sentence, or order (1) shall be given or pronounced for or in respect of a sum or matter at issue above the amount or value of Rs. 5 000, or (2) shall involve directly or indirectly the title to property or to some civil right exceeding the value of Rs. 5,000.

It is not possible to read the Courts Ordinance and the Civil Code on this subject together without, I admit, encountering some, if not considerable, confusion; but I think it is clear that both provisions contemplated that the judgment to be appealed against must satisfy the material requirements which I have just quoted. But whether it is the judgment in review which is the matter of appeal or the judgment reviewed, is certainly not clear, and both Ordinances leave it quite open that it may be both judgments.

Section 42 of the Courts Ordinance refers to the desire, in the first place, to appeal against the judgment at first pronounced, and the first proviso declares that before any "such appeal" shall be "so brought" such judgment shall, &c. The plain meaning of this is that, whatever occurs subsequently, that is the judgment to be appealed against. Then the second proviso refers to "such judgment, &c., in review", clearly referring to the judgment in review which, under the latter part of the previous proviso, the court had had authority to pronounce, and it is to this judgment in review only that the provision as to value, finality, &c., attaches, and it is the third proviso which gives direct authority to appeal against such judgment. But when we come to the Code, we find that, precisely as in the Courts Ordinance, it refers to the right to appeal to Her Majesty against any final judgment, decree, &c., and the desire to appeal against such judgment, &c. It is therefore the original judgment against which the desire must exist to appeal, and it is this judgment, by section 780, that he must apply by petition to have brought in review and against which he must state his grounds of appeal, and he must pray for a certificate that as regards amount, or value, and nature, the case fulfils the requirements of section 42 which I have just quoted, or that it is otherwise a fit one for appeal to Her Majesty in Council. I will dispose of this latter exception directly.

Here then, by the Code, with regard to the original judgment, as by the Courts Ordinance with regard to the judgment in review, finality and value are essen-

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tial ingredients; and that this was distinctly contemplated is made clear by the subsequent section 782, which declares that the judgment, decree, order, or sentence, of the Supreme Court after such hearing in review shall be pronounced in accordance with the rules hereinbefore prescribed for the judgment and decree in appeal; and then comes section 783, which says:—"The person feeling aggrieved by such judgment in review shall, if he desires to appeal therefrom, apply", &c. I do not, therefore, think, it possible to successfully contend that no conditions attach to the judgment at first pronounced, and that any such judgment must be heard in review if a desire to appeal is asserted.

The question, therefore, for us to decide is, does this judgment or decree in question come within the category of those above enumerated, and against which only we are empowered to grant a certificate that it may be heard in review previous to an appeal to Her Majesty in Council? I have most carefully considered it without any reference to my own feelings or inclinations, except so far as they would naturally lead me to grant leave, if I thought we had the power to do so, and I can arrive at no other conclusion than that we have no power to grant the certificate asked for. In disposing of the question, it is proper to deal with the provisions of the Code as to the value of the judgment. Till that point is settled, it is immaterial whether the judgment, decree, or order be final or not, and this brings us to decide at once whether the judgment is given or pronounced for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000. For myself, I have no hesitation in saying it is not. It is on the contrary as yet, and so far, only a judgment given and pronounced upon the bare question of fact of infringement or no infringement, and involves no definite sum or matter at issue of any definite value, save and except the costs of appeal.

Then, does it involve directly or indirectly the title to property or to a civil right exceeding the value of Rs. 5,000? It was not denied at the hearing that upon the face of the proceedings it was not easy to gather what was the value of the property, the right to which was affected by the judgment; but it was suggested that this Court might order information to be obtained by enquiry, in accordance with some dictum, based on circumstances only, which is to be found in the older authorities of this Court, in which it was assumed that a money value could be attached to a decree for a divorce upon a fiction as to the value of every marriage. It is scarcely necessary to say that these *dicta* are of little or no value in the light of decided authorities by which we must be governed. Lord Selborne laid down the rule in *Allan v. Pratt* 57 L. J. P. C. 104 that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself of it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it, and, looking at this case upon that principle, I cannot see how it can be that the value of any right or property affected by it exceeds Rs. 5,000. Coming to the question as to the finality of the judgment, I am also of opinion that the partial decision of the action by our decree is not final, so as to bring it within the category of judgments or orders upon which we are permitted to allow an appeal. There can be but one final decree in an action, and this is certainly not the final decree. No final decree can be made till the district court has adjudicated on the matter remitted to it, and which involves the decision of the general question of costs. As the decree in respect of which the certificate is required now stands, it is final on a question of fact, but not final regarding the object of the suit, viz., damages for the infringement of the plaintiff's patent.

I am now brought to the words to which I have promised to refer, and which find place in the Code with respect to the original judgment, but are not to be found in the Court Ordinance, or in the Code in relation to the judgment in review; "or that it is otherwise a fit one for appeal to Her Majesty in Council". Beyond the fact that these words have been taken from the Indian Code, I cannot find any authority as to their intent and meaning. I am disposed to think that they have found their way into our law rather through inadvertency than from any deliberate intention to confer on a single judge of this Court an unlimited discretion to grant a certificate in any case which one judge of this Court may consider a fit one for appeal. Looking at the source from which the words come, I think they must be construed to refer to those cases peculiar to India in which the particular laws and customs and social life of the people often call on the local courts of law to decide large questions involving, not merely rights of property, but of personal status and of caste, affecting as well Imperial interests and rule as the interpretation of many systems of law. I have carefully examined the reports of all the cases dealt with by the Privy Council for the last 30 or 40 years, and I can find none in which an appeal has been taken by leave of the local court on principles analogous to this case. The defendants have the right to go to the Privy Council for special leave to appeal, and, looking to the practice of the Council not to grant special leave in those cases in which the court below has improperly granted leave which has been set aside, I feel it the safer course, and more in the interests of the

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defendants, to refuse a certificate, and so leave them free to go to the Privy Council for special leave, which will certainly be granted if we are wrong, without the prejudice against granting special leave, if without authority we grant leave improperly. I would add that my brother LAWRIE, whilst concurring in this judgment, has had some difficulty in arriving at the conclusion that it is requisite that the judgment sought to be appealed from should, in the first instance, and before the certificate is granted, disclose the money value referred to in the Ordinance. His opinion was that it was only the judgment in review to which the value qualification applied, and in agreeing with this judgment he has done so more in deference to the strong opinion which, as head of the Court, I have expressed; and I may say here with regard to the Inventions Ordinance, which contains a clause giving a right of appeal to the Privy Council, that that clause requires that the appeal should be governed by the same rules as those laid down in the Charter. The Charter has since been repealed and the terms of it re-enacted in section 42 of the Courts Ordinance, so that our judgment applies as well to the right of appeal as given by the Inventions Ordinance.

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Present:—BURNSIDE, C. J., and WITHERS, J.

(*August* 23 *and* 26, 1892.)

D. C. Jaffna, No. 22,887. } KATHARUVALOE v. MENATCHIPILLE.

Husband and wife—Thesawalame—Debt incurred by husband during marriage—Divorce a mensa et thoro*—Liability of acquired property to satisfy such debt—Claim in execution—Rights of wife.*

The property acquired during marriage by a husband and wife, who are governed by the Thesawalame, remains liable for debts incurred by the husband during marriage, notwithstanding a subsequent decree of divorce *a mensa et thoro* between the husband and wife.

Action under section 247 of the Civil Procedure Code by an execution creditor against a claimant.

The defendant and one Kathargamasagara Mudaliyar, who were Jaffna Tamils and were governed by the Thesawalame, were married to each other in 1871. Kathargamasagara Mudaliyar in 1886 granted a promissory note to the plaintiff for a certain sum of money. In May, 1890, the defendant obtained a decree of divorce *a mensa et thoro* from her husband. In a previous action the plaintiff in August, 1890, sued Kathargamasagara Mudaliyar on the promissory note and in October, 1890, obtained judgment and by virtue of the writ issued thereunder seized several parcels of land, which constituted "acquired property" of Kathargamasagara Mudaliyar and the defendant. Thereupon the defendant claimed a half share in all the lands seized and after enquiry the district court allowed the claim. The plaintiff accordingly brought the present action under section 247 of the Civil Procedure Code to have it declared that the whole of the said lands were liable to be sold in execution in satisfaction of the judgment obtained by plaintiff against Kathargamasagara Mudaliyar.

The defendant in her answer, among other things, denied that there was any consideration for the promissory note, and alleged that it was granted by her husband and judgment was obtained thereon by plaintiff fraudulently and collusively with intent to injure and defraud the defendant. The defendant further pleaded that at the institution of the action on the promissory note and at the date of the decree therein the defendant and Kathargamasagara Mudaliyar had been judicially separated and that they then and still possessed separately the property which had belonged to their joint estate.

The district judge dismissed the plaintiff's action, and plaintiff appealed.

Dornhorst for the appellant.

Wendt for the defendant.

Cur. adv. vult.

On August 26, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—This judgment is wrong, as far as I am able to decide by the aid of the authoritieies which I have consulted. I do not find that the Thesawalame deals directly with the principle of the case. The principle that man and wife are to be regarded as separate individuals with regard to property does not extend to acquired property during the existence of the marriage, with which the husband may deal and which he may dispose of at will, and which is liable for the payment of debts during the marriage. It is no test of the liability of the property that the wife could not be sued for the debt jointly with her husband. Applying that principle to this case, the plaintiff had a clear right to seize this land in satisfaction of his judgment, and the decree of divorce could not affect his rights. It was competent to the court, in the divorce proceedings, to have compelled the husband to make any settlement on the wife which did not affect the rights of third parties, and

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the statement in the answer, that, on the separation, each of the parties was entitled to their separate estates according to law, cannot be regarded as a conclusion of law and, in any event, can only apply to their separate estates. This land was not held in separate estate. The case must go back in order that the issue of fraud may be disposed of. So far as I see, I do not understand why the defendant is in this suit sued alone, unless the decree of the divorce court placed her in the position of a *feme sole*, of which there has been no proof. Her husband ought to have joined her in the claim and been joined in this action, and that in itself would indicate that she had no *locus standi* in respect of a separate share in the land.

I do not think we should deal with the question of costs in the present phase of the case, but simply set aside the decree, and send back the case. All costs reserved.

WITHERS, J.—I have no doubt that the acquired property is liable for the debts incurred by the husband during coverture, and this liability could not be affected by a simple sentence of divorce. The case must go back for the other issues to be determined.

Set aside.

———:o:———

Present:—WITHERS, J.

(*September* 15 *and* 16, 1892.)

P. C. Mannar, No. 327. } CASIM v. KALIVA.

Criminal law—Criminal intimidation—Injury—Threat of procuring imprisonment—Ceylon Penal Code, sections 43, 483, 486—*Charge—Criminal procedure.*

Section 483 of the Ceylon Penal Code enacts:—"Whoever threatens another with any injury to his person, reputation or property............with intent to cause that person............to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

Section 43 defines "injury" as "any harm whatever illegally caused to any person, in body, mind, reputation or property."

Held, that a threat of procuring by means of a false case a person's imprisonment if he should make a certain complaint was not a threat of an injury contemplated by the Penal Code, inasmuch as imprisonment by a competent court of justice is not harm illegally caused to the person undergoing it.

The complainant was a party in a civil suit in the district court of Mannar, in which a notice was issued to the fiscal to be served on another of the parties. The notice having been served by the process server, the complainant came up to the court with a petition to complain that the notice had been served not on the proper party but on a third person who falsely personated him and who was wrongfully pointed out as the party to whom the notice was intended. The complainant alleged that then the accused interfered and told him not to make the complaint and threatened that if he did so, he, the accused, would see him sent to jail for at least two months. The complainant then instituted this prosecution, and stated in his evidence that he was afraid that the accused would falsely charge him with some offence.

The police magistrate, after hearing the evidence for the prosecution, called upon the accused for his statement and the evidence for the defence and then framed a charge under section 486 of the Penal Code. The accused was found guilty of the charge framed and was sentenced to imprisonment.

The accused appealed.

Wendt, for the appellant.

Cur. adv. vult.

On September, 16, 1892, the following judgment was delivered:—

WITHERS, J.—This conviction cannot stand for more than one reason.

In the first place, the accused was charged and convicted *uno flatu* after evidence had been heard on both sides. The charge should have been at the close of the prosecution, but instead of that, when the prosecution was closed, the accused was called on for a statement and for any evidence in his defence. At that time he did not know what he was charged with. The language of criminal intimidation cannot be too precisely charged as well as the intent with which such language is used, so that the accused may if possible be able to contradict or explain the one or the other.

Now on the part of the prosecution there was very conflicting evidence as to the nature of the so-called intimidation, the matter to which it referred, and the intent with which it was addressed, and it therefore was incumbent on the learned magistrate then and there to specify the nature of the threat and of the intent in a charge before he called upon the accused for his defence. This conflict of testimony was, indeed, another reason, why the accused should have had the benefit of the doubt and been acquitted.

Lastly, the threat of procuring the complainant's imprisonment is not a threat with an injury such as is contemplated by the Penal Code. Injury under the Code denotes any harm whatever illegally caused to any person in body, mind, reputation or property etc. Imprisonment by a competent court of justice is not harm illegally caused to the person undergoing it.

The conviction must be set aside.

Reversed.

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Present :—WITHERS, J.

(*December* 8 *and* 15, 1892.)

C. R. Kalutara, No. 840. } FONSEKA v. JAYAWICKRAMA.

Landlord and tenant—Notice to quit—Monthly tenancy—Requisite length of such notice—Double rent.

To terminate a monthly tenancy there must be a complete calendar month's notice: that is to say, the notice must be given before the commencement of the month at the expiracy of which the tenancy is to determine.

Accordingly, in the case of a monthly tenancy commencing from the first day of the month, a notice to quit given on the first day of a month requiring the tenant to quit the premises at the end of that month,

Held, to be a bad notice.

The plaintiff, who was owner of a certain house which he had let to defendant on amonthly tenancy commencing from the first day of the month at a rental of Rs. 20 per month wrote to the defendant on July 29, 1892, a letter which, stating that he required the house for the accommodation of some visitors at the end of August, ran as follows: "will you kindly make other arrangements to allow us the use of the said premises from the 1st September next. A reply per bearer please". Receiving no reply to this letter, the plaintiff again wrote on the August 1, 1892, as follows: "I have to give you notice to quit the said premises on the 31st instant, and to inform you that in failure of your doing so, I shall hold you liable to pay me Rs. 40 per mensem as rent from 1st September next."

The defendant not having quitted the house in compliance with the above notices, the plaintiff on October, 4, 1892, brought the present action against the defendant for the recovery of Rs. 40 as rent for the month of September 1892. The defendant pleaded as a matter of law that the notices were insufficient and bad, and admitting his liability to pay Rs. 20 for the month of September, being the rent originally agreed upon, brought this sum into court and prayed for dismissal of plaintiff's claim in excess of that sum.

The commissioner upheld the defendant's plea and gave him judgment with costs, and the plaintiff appealed.

Ramanathan (*Browne* and *Wendt* with him) for the appellant. The letter of July 29 concludes by saying "will you make arrangements to quit the house," which is only a polite way of requiring defendant to do so, and it therefore contains a sufficient notice to quit. But even if otherwise, the second letter of August 1 is undoubtedly a good notice, and it is submitted that it was not given too late, as the commissioner has held. All that a tenant requires is a reasonable notice, the principle being that he must have such notice as would enable him to secure another house within the time. Here it is submitted the notice given was ample for that purpose. Further, this case comes within the decision in *C. R. Colombo*, 87,694, 2 Grenier (1873) 23, where Creasy C. J. held that the notice must be one "expiring at the expiration of a *current* month after the date of the notice." The use of the word *current* shews that the date of the notice may be in the expiring month of the tenancy determined by the notice. Besides, "month" in this connection must be taken to mean a lunar and not a calendar month. *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J. Ch. 165. So the notice in this case must be held to be good. In any event the order for costs is wrong.

Sampayo, for the defendant. The action is not one in ejectment but one for double rent, to which it has not been argued that the defendant had assented, so that plaintiff's action must fail apart from the question of notice. It is submitted further that the first letter contains no notice to quit at all. A notice should be imperative and distinct, but the letter in this instance amounts to a mere inquiry and at most gives an option to defendant. As to the second letter it is submitted that the commissioner was right in holding that it was given a day too late. This court has recognised the principle, and the very case cited on the other side from Grenier lays down, that "the notice must be one commensurate with the term for which the letting was, that is, a month for a month." Now, it is alleged in the plaint itself that the monthly tenancy in this instance was one commencing from the first day of the month, and therefore a full month's notice is required in order to determine it. But a notice given on the first day of the month to expire on the last day is not a clear month's notice; nor does the argument from convenience urged on the other side hold good, because a tenant cannot reasonably be expected to secure another house within a month. This court has always been very strict in the construction of notices to quit. See, for instance, *C. R. Colombo No.* 36,729 1 S. C. R. 61. The meaning put upon the expression "*current* month" in the judgment of Creasy C. J., is untenable, because "a current month after the date of the notice," can only mean "a month running after the date of the notice," and as so construed the decision is against the position of the appellant rather than in his favour. Nor does the word "month" in this connection or in the language of our law generally mean a lunar month. Such a meaning is opposed to the sense in which the word is employed in a long series of local decisions on questions of

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tenancy. Besides, if as conceded, the notice must be commensurate with the tenancy, the notice in this case must be for a calendar month, because it will not be contended that the tenancy was for other than a calendar month. As to costs, it is submitted that the order is right. The defendant brought into court the sum legally due from him, and the plaintiff having got judgment for nothing more was rightly condemned in costs.

Cur. adv. vult.

On December 15, 1892, the following judgment was delivered :—

Withers, J.—I think the judgment is right and should be affirmed. As the learned commissioner says, the first letter was in good time but was a bad notice, while the second letter was a good notice but given too late. A notice to quit cannot be too clear and distinct in its terms, but the first letter was ambiguous and optional. The law laid down by the late Sir Edward Creasy in the case cited to me (2 Grenier (1873) 23) I understand to be as follows and as so understood I adopt it. In the case of monthly tenancies either party must have a complete calendar month to find a new house or engage a new tenant. To ensure this a notice to quit must be given before the commencement of the month at the expiry of which the tenancy is to determine, so that the party noticed shall have from midnight of the last day of the month immediately preceding the month at the end of which the tenancy is determined by the notice to midnight of the last day of the expiring month of the tenancy as thus determined for the purpose of making fresh arrangements. If I am not mistaken, this law expresses the prevailing custom of the country.

Affirmed.

———:o:———

Present :—Withers, J.

December (8 *and* 13, 1892.)

P. C. Colombo, No. 22,645. } Buchanan v. Conrad.

Criminal law—Breach of trust—Clerk or Servant—General deficiency in accounts—Charge—Ceylon Penal Code, sections 388, 391—*Evidence.*

Mere failure to pay over sums received by a clerk or servant for the employer does not in itself constitute the offence of criminal breach of trust under the Ceylon Penal Code ; and in a charge of breach of trust against a clerk or servant, it is not sufficient to prove a general deficiency in accounts, but there must be evidence of some specific sum having been misappropriated or converted to the defendant's use.

The facts of the case fully appear in the judgment of the Supreme Court.

The defendant was charged under section 391 of the Ceylon Penal Code with breach of trust in respect of a sum of Rs. 180·30 and was summarily tried and convicted, the police magistrate having overruled an objection to his jurisdiction. The defendant appealed.

Dornhorst, for the appellant.

Cur. adv. vult.

On December 13, 1892, the following judgment was delivered :—

Withers, J.—On the point of jurisdiction the magistrate is right. I think, however, that it would be discreet in a magistrate, where the value of property in cases of criminal breach of trust exceeds Rs. 50 or at the most Rs. 100, to refer for instructions to the Attorney-General's department before committing for trial or undertaking a trial. The offence is a particularly serious one, while the class of case often presents features of great difficulty which require the most careful management, whether regard be had to the protection of the innocent or the interest of the public in having the guilty exposed and punished. The charge against the accused is, in brief, that in his capacity of clerk to the firm of Buchanan Frazer and Co. he was entrusted with that firm's petty cash and on or about November 1, 1892, at Colombo, committed criminal breach of trust in respect of a sum of the petty cash so entrusted to him amounting to Rs. 180·30.

This is not a simple case of a particular sum of money being entrusted to a clerk, which he dishonestly converts to his own use or dishonestly uses for some other purpose than that for which he received it and for which he was in duty bound to apply it. This is a case in which a clerk on the last day of his term of employment, when called upon to give up his books, render his accounts, and pay over any money in his hands, fails to account to his employers for a sum of money which his own books shew to be standing to his debit.

Mr. Buchanan and his head clerk differ as to the time at which the accused was employed as the firm's petty cash keeper. The latter says that accused's duties as petty cash keeper commenced on July 2, 1892, while Mr. Buchanan says that he was petty cash keeper from September 23, succeeding his head clerk—first witness—in that capacity, and this of course must be taken to be the true state of the case. The two books of accounts kept by the accused from that date were one styled a "Petty Cash Book," and the other a "Cash Account D. R. B. and G. F."

This particular "Petty Cash Book" was opened on April 9, 1892, with credit and debit balances carried forward in pencil of Rs. 335·25 credit, Rs. 695·93

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debit, and it contains entries, on one side of a page, of cheques of varying amounts—the debit side, and on the other, payments to various people and or a great variety of accounts—the credit side. The entries all through the book are in ink. The credit sides are totalled during each month at infrequent intervals except in the last month, October, where, with few exceptions, the items on the credit side are totalled daily, and from October 20, the petty cash book shews the initials of Mr. Buchanan put there day by day. The former book again is balanced in pencil except the final monthly totals which are written in ink. The monthly credit balances are carried forward in pencil and on the 1st October this petty cash book shews a debit balance carried forward of Rs. 101·25.

The "Cash Account D. R. B. and G. F." book contains entries of payments to Mr. Buchanan and Mr. Frazer, each of which entries is initialed by those gentlemen respectively. This book was opened as regards Mr. Buchanan in July 1891, and as regards Mr. Frazer in August, 1891, but the entries in it in accused's handwriting are from 23rd September last.

The prosecution led evidence of the accused's capacity as a clerk in the aforementioned firm, produced these two books, proved the entries in them to be in accused's handwriting from the 23rd September last, and proved that on the 1st November the head clerk was ordered to take over accused's books and balance. The books were handed over by the accused to the head clerk with a balance of Rs. 160·25. This cash was counted over in accused's presence; on the same day Mr. Buchanan had both the accused and his chief clerk before him and asked them both if "the cash was all right" and both replied in the affirmative and the accused went away. On the following day, the 2nd of November, the chief clerk says that he made the discovery of an incorrect computation on the last page of the book, Rs. 2,071·25 having been brought forward instead of the correct amount Rs. 2,251·31 on the debit side, so that a further sum of Rs. 180 odd had to be accounted for. Mr. Buchanan then balanced the October account himself and verified the incorrectness. Mr. Buchanan says he thereupon wrote to the accused informing him that his balance was wrong and asking for an explanation but the accused did not come. How the letter was sent or whether it reached the accused does not appear.

After the case was instituted the accused went to Mr. Buchanan who asked him to explain the deficiency but he offered no explanation: his answer was that he had taken no money—a statement he repeated when Mr. Buchanan observed to him that he had handed the chief clerk Rs. 160·30 instead of Rs. 340 which his book showed to be due, this sum of Rs. 340 being the difference of the October debit sums as entered in the petty cash book and the entries of that month on the disbursements side and of payments to Messrs. Buchanan and Frazer in the other book.

The statement of the accused is as follows:—"The "additions in both books are not in my handwriting "and when I left the firm I handed over every thing "correctly. Mr. Buchanan asked the head clerk if "everything was correct and he said 'yes' and I left." Cross-examined.—"The head clerk told me there were 340 odd rupees." Unfortunately, the question in cross-examination to which this answer is given was not recorded as it should have been, and without it the answer has no significance. It might have thrown light on what is a significant statement of the accused who says "when I left the firm I handed over everything correctly" but I cannot charge myself as jury that that, as it stands, is equivalent to saying "I admit I had 340 rupees in hand of my employers' money on the 21st of October but I delivered the full sum to the head clerk." Had he said so in so many words and had I disbelieved his statement, I should have had no hesitation in convicting him.

There is no evidence as to whose handwriting the balances totalled from time to time in pencil are. The head clerk, however, swears that the total, *i. e.* final total on page 50, of Rs. 1370. 15 (credits) in ink (apparently over pencil) is in accused's handwriting, and the final total Rs. 2271.31 in ink (also apparently over pencil) is in his handwriting also. If the pencilled balance on page 49 on the credit side of Rs. 2051·31 is in accused's handwriting, it is so placed over the receipt of 200 Rupees cheque entered just underneath it—thus $\frac{2051\cdot31}{200}$—that, though carelessly, it might naturally be carried forward 2071 instead of 2251, but again there is a pencilled balance carried forward on page 50 of the correct amount 2251 which stands just over the incorrect balance and remains untouched—thus $\frac{2251}{2071\cdot31}$ —but there stands the erroneous computation. It is to be noted that the receipts are all duly entered: it is only the calculation that is wrong. A child could add up the receipts and expose the error.

As to the evidence of the books against the accused, I think the pencilled balance in his handwriting on the 1st October of a debit of Rs. 101·25, in view of entries on that very day on the credit side nearly

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exhausting it, is proof that he had that sum in his hand that day as clerk, and as to the debit entries they are evidence that he received the cheques—all receipts were by cheque—but no more.

It is upon this evidence that the accused has been convicted of dishonestly converting to his own use petty cash to the amount of Rs. 180·30, the deficiency that is shewn by his books. I think the evidence is insufficient to bring the charge home to him.

To begin with, there is no evidence what the duties of the petty cash keeper in general were, and of this accused as petty cash keeper in particular.

There is nothing to show when the firm's petty cash keeper or the accused had to settle accounts and pay up balances in hand. To judge from the petty cash book itself, it would appear indeed that for the first time on 1st November, 1892, the petty cash keeper had been required to account to his employer in the strict sense of the term for his receipts.

It is not proved that the cheques admittedly received by the accused were cashed and the proceeds received by him, and at least as regards the last cheque entered by him on the debit side of his account evidence on this point was of consequence.

I do not see how the Code as to criminal breach of trust varies from the law as to embezzlement in England in certain of its aspects. It may be said, I think, here as there, that the mere failure to pay over sums admittedly received by a servant from his master or a clerk from his employer is not in itself embezzlement or breach of trust: that alone argues no more than a civil liability (see *R. v. Hodgson*, 3 C. & P. 422), and that it is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, as in *R. v. Lloyd*, 8 C. & P. 288, or dishonestly converted to the clerk's use.

Further, the fact—if it be one—that the wrong computation was designedly entered to cover a deficit for which the accused could not account, does not carry the case further as a dishonest conversion of the deficiency. It may be or not a criminal offence in itself, but it is not this offence and not necessarily proof of it. If done, it was a very stupid, a very wrong, and perhaps even a criminal—though I do not impute the latter—attempt to conceal a deficiency for which the accused could not account. He simply says: I did not take the money. He may not have entered certain payments—there is slight evidence in his October account of his having omitted to put any sum opposite a credit item—but, to return to what I observed at first, there is no proof that he received the money which he is convicted of having converted to his own use dishonestly.

Conviction set aside and the accused acquitted and discharged.

Reversed.

———:o:———

Present :—Withers, J.

(*October* 20 *and* 27, 1892.)

C. R. Galle, No. 1, 183. } Don Louis v. Bastian.

Civil Procedure—Death of sole plaintiff—Substitution of minor heirs—Application for appointment of next friend, requisites of—Irregularity.

In the case of the death of a plaintiff in an action, the application for the substitution of the next of kin as plaintiffs in the room of the deceased plaintiff and for the appointment of a next friend of the next of kin, being minors, may properly be made in one petition.

The plaintiff in this action having died during its pendency, the heirs of the deceased plaintiff made an application by petition to be substituted as plaintiffs on the record and to have a next friend appointed over two of the heirs who were minors. The defendants who were made respondents to the application took exception to the procedure. The commissioner, however, allowed the application, and the defendants appealed.

Sampayo, for the appellants, cited *D. C. Galle No.* 49,861, 2 C. L. R. 76.

Morgan, for the applicants.

Cur. adv. vult.

On October, 27, 1892, the following judgment was delivered :—

Withers, J.—This order must be set aside, not so much on account of irregularity of procedure as for want of sufficient material to justify the order.

I see no objection to the petition embracing the two objects of being substituted as plaintiffs and being represented by a next friend. A minor can only make an application of this kind by a next friend, and when the object is to have a next friend for the purpose of instituting or continuing an action, I see no reason why leave to the minor to take action and to be represented for that purpose by a competent friend should not be given on one application. Rather, it seems to me a proper thing to apply for the leave and the appointment of a next friend in one petition.

The case, cited in argument, of *Abayawardene* vs. *Marikar*, 2 C. L. R. 76, is not in point. There the steps of coming in as executor and applying for execution of a stale judgment were distinct in kind and one had necessarily to precede the other. The ob-

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jects of the present application are on the other hand difficult to dissociate. The application for the appointment of next friend must be by petition by way of summary procedure. See section 481 of the Civil Procedure Code. The defendants to the action are the proper respondents. But the two points in which the material is defective are the advantage to the minors to carry on this action and the fact of their being the legal representatives of the deceased sole plaintiff.

The legal representative in section 395 of the Civil Precedure Code is the administrator of one dying intestate, and before the court could give a minor leave to institute an action or continue one, it must be satisfied that it is to the minor's interest he should embark on the proposed litigation, that he is the next of kin of the deceased, that the estate of the deceased is below the value of Rs. 1,000, and that as next of kin he has adiated the inheritance. Nor is it at once apparent how a minor can adiate an inheritance except by a testamentary guardian or a curator appointed by the court, but this is a point which the commissioner will have to decide should the question ever come before him. The commissioner's attention is invited to the decision of the Chief Justice reported 2 C. L. R. 82. A petition by way of summary procedure which may be made orally in the court of requests must contain full particulars. See the earlier sections of Chapter XXIV.

The date of the death of the sole plaintiff and the ages of the children should be more clearly proved than they are here, and there is nothing to show that the proposed next friend is a proper and competent (competent as to his means) person as well as a disinterested one. It is safe to require his express consent in writing. See section 19 of the Civil Procedure Code.

Order set aside. No costs can be decreed.

Set aside.

———:o:———

Present:—LAWRIE and WITHERS, JJ.

(December 9 and 15, 1892.)

D. C. Kegalla, No. 108. } RANMENIKA v. VANDERPUT.

Civil Procedure—Co-creditors—Bond in favor of several persons—Action by one to recover his share of the debt—Plaint—Civil Procedure Code, section 17.

It is open to one of several joint mortgagees to sue on the bond for his share of the amount due, by making his co-mortgagees defendants to the action, if they refuse to join him as plaintiffs.

D. C. Galle No. 253, 1 C. L. R. 85, followed.

This was an action by one Ranmenika suing as administratrix of the estate of her husband Arachchilage Appuhami for the recovery of Rs. 325, being her husband's share of the amount due on a mortgage bond executed by one Loku Banda in favour of her husband and one M. A. Appuhami, the fourth defendant in this case. The right of the plaintiff to sue for only a part of the debt was contested. The district judge gave judgment for the plaintiff, and the defendants appealed.

Browne for the first defendant.

Dornhorst for the second and third defendants.

Wendt for the fourth defendant.

Grenier (*de Saram* with him) for the respondent.

Cur. adv. vult.

On December 15, 1892, the following judgments were delivered:—

WITHERS, J.—This is an action to recover a sum of money by the sale of fourteen lands specially hypothecated by one Loku Banda to the fourth defendant and one Appuhamy to secure the repayment of a principal sum of Rs. 650 under a mortgage bond bearing date January 9, 1878. The co-mortgagees by the bond were to hold the fourteen lands in lieu of interest and accordingly they took possession of the fourteen lands as usufructuary mortgagees. The plaintiff is the widow and administratrix of the co-mortgagee Appuhami who died in July, 1880. The first defendant is sued as the adminitrator of the estate of the mortgagor Loku Banda who died in April, 1892. The second and third defendants are sued because they have been in exclusive possession of three of these mortgaged lands since January, 1888, under pretence of title, but whether they are joined because they are in legal or illegal possession is not easy to determine as their acts are described as wrongful and damages are asked against them, and in consequence I must take it that they are sued as trespassers. The fourth defendant is sued on the ground that he has refused his consent to join the plaintiff in this action though as a co-obligee he should have joined in the action, and this course is permitted by section 17 of the Civil Procedure Code.

The plaint is curiously defective because it is nowhere alleged therein that at the date of this action any sum was due to the plaintiff or the co-obligee under the bond, but no point of law was taken by any of the defendants that the plaint was a vicious one on this ground. On the contrary, the second, third, and fourth defendants pleaded payment of the money due under the bond and allowed the issue raised by the plea to be settled as one proper to be tried.

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As to the fourth defendant, his case may be disposed of at once. He has attempted to excuse his obligation to join the plaintiff in this action under a plea of payment, which if true will excuse him and throw the costs of his defence on the plaintiff. As to the third and fourth defendants, it is not asked that they shall be required personally to pay the damages alleged to have been caused to the plaintiff by the unlawful occupation of the premises charged to them. Nor can the mortgaged lands alleged to be unlawfully occupied by them be judicially sold in satisfaction of those damages.

A point was taken that in any event a co-mortgagee cannot sue for his share only of the principal and interest due under a bond made to two or more persons jointly, and in support of this contention was cited to us the case reported in 1 C. L. R. 85. That case, however, is precisely similar to this, and according to that a plaintiff in similar circumstances was entitled to sue for a share of a joint debt. The Supreme Court of Indiana, according to a valuable American text book, *Bliss on Code Pleadings*, has held in regard to a rule of law in that state similar to ours that one may sue for and recover his share of a sum of money due to him and another jointly by making his co-obligee defendant if he refuses to unite as plaintiff. I venture to consider such a ruling right in principal. It was, however, urged that to authorise one of two or more joint promisees to bring an action against the will of the others would change rights on the one side and obligations on the other; would convert, in other words, a joint into a several right whenever those who possess it disagree as to its enforcement. I do not think so. A debt must be paid by the debtor. A co-obligee has a right to an aliquot part of that debt. If he sues for that aliquot part, it is no plea in bar that the other co-obligees are not joined. His right to claim that aliquot part could at common law be resisted by such a plea for the reason that to suffer one out of several joint creditors to bring an action would subject the defendant to more than one action and hence all were required to join. It was to obviate the injustice of this requirement in cases like this that courts of equity demanded that all who were united in interest should be made defendants if they refused to join as plaintiffs. Once before the court, any binding decree could be rendered in reference to all the parties which was warranted by the facts. I have taken much of my language from the text book referred to because it is clear and I adopt the reasoning. Our Code rule expresses the well known rule of equity, and is exactly applicable to this case.

I am entirely at one with the learned judge on the facts. I hold with him that payment has not been proved as alleged nor could more than the payment of Rs. 500 have been admitted in proof because the agreement as set out by the fourth defendant relating to the balance limiting the right of the co-obligees to hold the three lands named in paragraph 6 of the plaint as usufructuary mortgagees for six more years in full satisfaction of the debt was a new agreement releasing the hypothec of the remaining lands and substituting a new mortgage over the remaining three for the balance and in the absence of a notarial writing this agreement was of no binding force.

But for the admission in the answer of the third and fourth defendants that they are in possession of the three lands named in paragraph 6 of the plaint as purchasers from the heirs of the deceased mortgagor, I should have felt some difficulty in declaring that these lands were liable to be judicially sold in satisfaction of the debt due to the plaintiff, but their answer has removed that difficulty. As for the first defendant's plea of *plene administravit*, he has wholly failed to maintain that plea. As this, however, is a suit against him as administrator he can only be adjudged to pay the debt due under his intestate's mortgage bond out of assets presently in his hands, if any.

The cloud in the shape of an alleged sale to a son of the late co-mortgagee by a son of the deceased mortgagor of his one-fourth share of the three lands in possession of the second and third defendants is also removed by the second and third defendants who in their answer state that the vendor to the late co-mortgagee's son was a minor when he sold his interest in the lands, and that when he came of age he repudiated that disposition and joined with his co-heirs in the sale of their common interest therein to themselves (second and third defendants). In fact the plaintiff was in continuous possession of the three lands now possessed by the second and third defendants till the end of 1887; of that there can be no doubt. In law she was in possession as administratrix of the deceased co-mortgagee during that time, for the new agreement pleaded by fourth defendant and taken up by the second and third was, even if true, not binding upon her.

I would vary the learned district judge's judgment as follows:—Declare that the plaintiff as administratrix of the late Appuhamy is entitled to recover from the first defendant as administrator of the estate of the late Loku Banda the sum of Rs. 325 with legal interest thereon from date of action till date of payment. Declare that all the lands in schedule A are specially bound and executable under the mortgage bond declared on by plaintiff for the payment of the said principal sum and interest, and all the said lands except 1, 2, and 3 in the said schedule execut-

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able for plaintiff's costs of this action as well. Direct the first defendant as administrator as aforesaid to pay the said principal sum of Rs. 325 and interest and plaintiff's taxed costs as aforesaid on March 1, 1893.

In default, sell all the said scheduled lands in payment of the said principal sum, interest, and costs, save and except as regards costs, the said 1, 2, and 3 lands in the said schedule.

Order the first defendant as administrator as aforesaid to pay any balance unsatisfied by said sale.

The defendants will severally bear their own costs.

LAWRIE, J., concurred.

Varied.

———:o:———

Present:—LAWRIE and WITHERS, JJ.

(*December* 20 *and* 22, 1892.)

D. C. Kalutara, No. 514. } SILVA v. GOONEWARDANE.

Will—Proof of execution—Probate—Practice.

The question whether a will which has never been admitted to probate can be proved incidentally in an action in support of title to property discussed.

Ejectment.

The plaintiffs as lessees of a certain land sued the defendants in ejectment. They pleaded title in their lessors as devisees under the joint will and testament of one Hendrick Silva and his wife, and they also averred prescriptive possession on the part of the lessors. The defendants denied the title of the plaintiff's lessors to the whole land and pleaded that Hendrick Silva and his wife died intestate, leaving certain children as their heirs, and that the defendants were married in community of property to two of the daughters of Hendrick Silva and his wife and were entitled to and lawfully in possession of certain shares in the land.

It appeared that the alleged will of Hendrick Silva and his wife, which was dated September 8, 1855, was not proved in any testamentary proceedings or probate thereof taken, but the plaintiffs at the trial of this action called the attesting notary and witnesses to prove its execution. The document, however, when tendered in evidence, was objected to by defendants on the ground that a will could not be proved incidentally in an action or otherwise than in the testamentary side of the court. The district judge overruled this obejction and upheld the will and the plaintiff's lessors' title thereunder, and on the evidence as to prescriptive possession he held also in plaintiffs' favour and gave them judgment.

The defendants appealed.

Layard, A. G. (*Dornhorst* and *de Saram* with him) for the appellants, contended that the will could not be received in evidence unless it had been admitted to probate, and cited *Stone* v. *Forsyth*, 2 Doug. 707.

Ramanathan, S. G. (*Wendt* with him) *contra*, cited *D. C. Badulla, No.* 20,703.*

Dornhorst, in reply.

Cur. adv. vult.

On December 22, 1892, the following judgments were delivered:—

LAWRIE, J.—On the production of a will and on proof of its execution, or even without proof if it be thirty years old, the fact of execution may be held to be established, *valeat quantum.* But that fact is not conclusive in favor of any one who founds on the will as affecting a valid bequest or devise in his

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* *Present:*—PHEAR, C. J., CLARENCE and DIAS, JJ.

(*March* 5, 1878.)

D. C. Badulla, No. 20,703. } PUNCHI MENIKA v. UKKU MENIKA.

The judgment of the Supreme Court was delivered by:—

PHEAR, C. J.—In this case the plaintiff claims the lands, which are the subject of suit, as devisee under her late husband's will, and the question has arisen at the trial in the district court whether she can be allowed to prove the will, as evidence of her title in this suit, by any other means than by the production of probate.

In England the ecclesiastical courts formerly had, and the probate courts now have, exclusive jurisdiction to authenticate the authority of the executor to administer his testator's goods and chattels, and therefore whenever the executor's title is in question in any other court, it can only be established there by probate issued by the probate court, or by some other sufficient evidence of the will under which he claims his right having been authenticated by *that court*, so far at least as concerns the appointment of the executor. But the seal of the court impressed on the original will would be sufficent for this purpose, or even the Act Book containing an entry of a will having been proved and of probate having been granted to the executor therein named. (*Cox* v. *Allingham*, Jacob 514.) The procedure by which the act of authentication was arrived at is certainly unimportant to the court where the suit is being tried, which only needs to be certified of that authentication.

In the case before us, however, the district court is in the situation of the English court of probate itself, and not of the courts external thereto; it is itself the court which has authority to authenticate the will, and there is nothing to limit the exercise of that authority to a par-

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favour. As a will is revocable by the execution of a subsequent will, the mere proof that the testamentary document was executed by a deceased will not prove that it was his *last* will. The proper proof that a deed (the mere execution of which is admitted or proved) is the last will of a deceased is probate by a competent court, and I doubt whether any other evidence than probate is sufficient to establish that a testamentary writing is the last will. Here the fact that the deceased did execute this deed may be taken as proved. Without clear proof afforded by probate that this was his last will, that it was acted on by his widow and heirs, that each devisee enjoyed the estate devised to him or her—in the absence of such proof, and it is here absent, I regard this will as of no effect. I could deal with the plaintiff's case only on the evidence of prescriptive possession.

My brother Withers has analysed the proof. He finds, and I have confidence that he is right, that the plaintiffs have not proved a prescriptive title.

In dismissing the action I do not doubt that the plaintiffs' lessors (except perhaps the wife of the man in jail) had a right to the shares in the land which they leased to the plaintiffs. The action is dismissed, because the plaintiffs have not proved their cause of action against the defendants.

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ticular course of procedure, except that doubtless the district court cannot regularly by virtue of that authority direct the issue of probate otherwise than in the method of proceeding, if any, which is prescribed for that purpose by the Rules and Orders. There seems therefore to be no occasion arising out of analogy with the English practice and the rule of comity between English courts to prevent the district court in this case from allowing the plaintiff to prove the will in the usual way as a document of evidence in the present trial.

The Ordinance of Frauds and Perjuries, however, enacts (clause 8):—"Every will, testament, or codicil "executed in manner hereinbefore required shall be valid "without any other publication thereof, provided always "that every such will, testament, or codicil shall, after "the decease of the testator or testatrix, be duly proved "and recorded in the district court empowered by the "charter to grant probate or administration in such case "according to such general rules of practice as may now "or hereafter be made by the judges of the Supreme "Court."

And this proviso amounts to making it a condition precedent to the validity of a will that it should be proved and recorded in the district court according to the rule of practice made by the Supreme Court and applicable thereto.

The existing "Rules and Orders" made by the Supreme Court are unfortunately not very precise or very complete. Those strictly bearing upon this point seem to be the 1st and 2nd rules of section 4 of the Rules for regulating the proceedings of the district courts. They are as follows :—(1) "When any person shall die leaving "a will, the person in whose keeping or custody it shall "have been deposited, or who shall find such will after "the testator's death, shall produce the same to the court "of the district in which such testator shall have been "last domiciled for the space of one year or more, or to "the court of the district in which such testator shall "have died, if he be a stranger, or if his last place of "domicile be unknown, within fourteen days after such "decease, on pain of being prosecuted and punished for "the concealment thereof, besides being civilly liable for "any damages which shall have been occasioned by "the delay. And he shall also make oath, or produce "an affidavit (Form No. 1) verifying the time and place "of the death, and stating that, if such be the fact, the "testator has left property within the jurisdiction of "the Court."

(2) "The will so produced shall be proved by the wit"nesses thereto (if any) on oath (Form No. 2) in open "court, if they be at or near the place where the court is "holden, or by affidavit, sworn before a person duly "authorised to take the same, if at a distance. If there "be no witnesses to such will, then by the proof of the "handwriting of the testator, if written or signed by him"self, or if neither written nor signed by the testator, "then by the person who wrote it. Provided the law by "which such will must be governed will admit of such "proof."

The remaining rules of the section seem to apply to the issuing of probate and granting of letters of administration. And there appears to be no good reason why a will should not be proved and recorded under the practice laid down by (1) and (2) without the further steps being taken which are rendered by the following rules necessary for the purpose of proving probate.

It can hardly be the meaning of these rules that a will shall not be proved and recorded for the purpose even of the Ordinance of Frauds and Perjuries by any other proceeding than one in which probate is asked for and issued, because it has been judicially held by the Supreme Court that there is nothing in the law to compel administration to be taken out in the case of small estates where there is no will. (Lorenz 92.) And if there is no such legal obligation in cases where there is no will to which the Ordinance of Frauds and Perjuries does not apply, such obligation is expressly imposed by that Ordinance where there is a will, and no power seems to be given by it to the Supreme Court to create the obligation through the machinery of its Rules and Orders in cases where there is a will.

It seems on the whole, to be sufficient under the Rules and Orders to satisfy the provision of clause 8, Ordinance No 7 of 1840, if the will be admitted by the district court on reasonably sufficient proof and be filed of record. This can be done very much more satisfactorily on the footing of evidence taken in a trial between contending parties, such as the present trial is, than upon the ordinary affidavit of course. That it has not been done in the present instance within the time prescribed by the Rules and Orders for the purpose, may have the consequence, so far as regards the plaintiff, of her being liable to a criminal charge, but if so, the fact is not material to the question which is now before us for decision.

We are, therefore, of opinion, that if the will be proved by evidence and be duly recorded in the district court in the ordinary course, and as the result of this trial, it may rightly be considered and dealt with as part of the evidence in the suit between the parties.

The judgment of the district court is consequently affirmed.

CLARENCE, J.—I agree.

DIAS, J., agreed.

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WITHERS, J.—Notwithstanding the strong words of the learned judge's finding that the evidence of exclusive possession was overwhelmingly in plaintiffs' favour, it was warmly contended by appellants' counsel that there was not the slightest evidence of any probative force of such possession on the plaintiffs' side. I think that both the language of the judgment and of the argument against it may be characterized as somewhat exaggerated. The evidence is not limited to the usual statement, which only begs the question, of "I possessed the land". The plaintiff, for instance, in answer to a question in cross-examination, describes the mode of possession. Whenever the nuts were plucked, he says, his brother Sidoris took one-third of the produce, while the remainder was divided between himself and two other brothers. Again, Udaris says that, while her husband was in jail where he was sent seven years ago, a third of the produce of this land was brought to her house for and on account of her husband's share. None of the plaintiffs' lessors, however, say when their exclusive possession commenced. The parents of plaintiffs' lessors no doubt died some years ago—according to the first defendant, eighteen years ago, but the plaintiffs' lessors do not say that their exclusive possession commenced from the death of the parent who died last. Again, we know nothing of the ages of the children to help us in deciding whether the male children could commence to prescribe against their sisters immediately upon the death of their mother.

In my opinion the plaintiffs do not establish any prescriptive title in their lessors to the land in dispute. When the defendants laid claim to two-sevenths of the land in virtue of their wive's shares as next of kin to the parents of plaintiffs' lessors, they are met by an amendment to the libel setting out a will of which it is alleged that it purports to contain a special devise of this land to three of the children named in the will. It is very significant that this will was never pleaded, as it should have been, in the first instance, if the plaintiffs were going to rely upon it as a source of title in their lessors, and why it was not pleaded in the first instance is not explained.

The proof in support of this will was admitted and accepted as good and sufficient by the learned judge.

I presume the paper sworn to and admitted in evidence is the original joint will of the parents of the plaintiffs' lessors, though nothing is said about the custody it comes from.

Again, if a will can be admitted in evidence without probate on the testamentary side of the court, especially in a case like this when so many years have elapsed since the death of those who made it. it should be proved in the strictest manner possible.

The evidence here falls far short of being strict. The deaths of the attesting witnesses are not duly verified. Indeed, the due execution of the will has not been proved by the witnesses who spoke to it. The one attesting witness who is called does not swear, for instance, that the parties making this will signed it in the presence of the attesting notary, himself, and the other witnesses present at the same time.

In view of this finding, it becomes unnecessary for us to discuss the case cited by plaintiffs' counsel to this court, which I confess surprises me and upsets the idea I had always entertained that, in pleading a will as a source of title to property a plaintiff seeks to recover, a plaintiff is bound not only to allege that the will relied on was duly executed, but was duly proved in the court competent to admit it to probate.

It was, of course, an error on the learned district judge's part to adjudge the plaintiffs' lessors as absolute owners of the land, for they are no parties to the suit. For the reasons I have given, I think he was also wrong in decreeing to the plaintiffs' possession of the entire land as lessees.

I would set aside the judgment and dismiss plaintiffs' action with costs.

Set aside.

———:o:———

Present:—BURNSIDE, C. J.

(November 17 and 29, 1892.)

P. C. Matara, No. 17,279. } DISSAN v. SUBEHAMY.

Criminal law—Mischief—Wrongful loss—Intent—Proof—Ceylon Penal Code, section 408.

In a prosecution for mischief it is not incumbent on the prosecutor to prove that the accused intended to cause or knew that he was likely to cause loss or damage to any known individual, provided the act complained of was a wilful act committed in respect of property of which there would naturally be some owner.

The defendant appealed from a conviction.

VanLangenberg for the appellant.

Cur. adv. vult.

On November 29, 1892, the following judgment was delivered:—

BURNSIDE, C. J.—The only point on this appeal which required consideration is this in a prosecution for mischief, is it incumbent on the prosecutor to show that the accused intended to cause or knew that he was likely to cause wrongful loss or damage to any particular known individual, or is it enough to show that wrongful loss or damage to some individual even unknown to him would in all probability result from his act? The point is not by any means

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one easily determined, but after much consideration. I have arrived at the conclusion that where the act complained of is a wilful and deliberate act committed in respect of property of which in all natural probability there would be some owner, it is sufficient to establish those facts to throw on an accused the burthen of rebutting the inference of the intent or knowledge which the law requires. In this view the conviction must be affirmed.

Affirmed.

———:o:———

Present:—BURNSIDE, C.J., LAWRIE and WITHERS, JJ.

(*November* 25 *and* 29, 1892.)

D. C. Galle, No. 1,172. } SILVA v. WIJESINHA.

Civil Procedure—Claim in execution—Order disallowing claim—Claimant not leading evidence—Action brought to set aside order on claim—Practice—Costs—Civil Procedure Code, section 247.

A claimant, although he has not appeared or led any evidence at the investigation in support of his claim, can, in the event of the claim being disallowed, bring an action under section 247 of the Code to established the right which he claims to the property. But in such a case the plaintiff, alth ugh successful, must pay the defendant's costs.

This was an action under section 247 of the Civil Procedure Code to set aside an order disallowing a claim. The claimants did not appear at the investigation into their claim or adduce any evidence in support thereof, but the district judge adjudicated upon and disallowed the claim. Subsequently they brought this action under section 247 of Code. The district court gave plaintiffs judgment with costs and the defendant appealed.

There was no appearance of counsel upon the appeal.

Cur. adv. vult.

On November 29, 1892, the following judgment was delivered :—

BURNSIDE, C. J.—A point of much importance arises out of these proceedings, and that is—can a claimant abandon his claim and leave the court without any evidence in support of it, and thereupon if the court proceeds to adjudicate against him, then may he bring an action under section 247 to set aside such order? This court has already held that the mere fact that a claimant abandons his claim does not prevent the court from dealing with it and making an order, but it seems to me that it is contrary to principle and is certainly most inconvenient and oppressive to permit the claimant after such an order against him to seek to set it aside by an action under section 247. Yet it does not seem that the Code has provided against it. In this case it appears that the plaintiffs as claimants offered no evidence on their claim, and an order having passed against them brought this action and have obtained judgment in their favour with costs. I think we should speak authoritatively on the point, and if necessary lay down a rule that in every like case the plaintiff should pay the defendant's costs. This judgment seems right on the merits and should be affirmed, but the plaintiffs should pay defendant's costs at least in the court below. Plaintiff will have costs of appeal. Defendant should not have appealed.

LAWRIE, J.—I concur.

WITHERS, J.—I agree.

Affirmed.

———:o:———

Present:—BURNSIDE, C. J., and WITHERS, J.

(*October* 25 *and November* 8, 1892.)

D. C. Colombo, No. C509. } ARUNASALEM CHETTY v. VEERAWAGO.

Promissory note—Granting of a note on account of a debt—Satisfaction—Extinguishment of debt—Remedy—Composition—Pleading.

The taking of a bill or note on account of a debt does not extinguish the liability for the debt but only suspends the remedy, which revives if the bill or note is dishonoured; but where the bill or note is taken expressly in satisfaction of the debt, the debt is extinguished and the only remedy thereafter is on the instrument.

The plaint alleged that the plaintiff sold to defendant certain goods and also paid to the chetty firm of R. M.M.S.T. at the defendant's request a certain sum of money, that in respect of the goods sold and money paid the defendant was on March 5, 1889, indebted to plaintiff in a certain amount, that subsequently "in part satisfaction of his said debt" the defendant paid certain sums of money and also endorsed and delivered to plaintiff certain promissory notes "and the plaintiff thereupon credited defendant in reduction of his debt with the amount of the said notes". The plaint then proceeded to allege dishonour of three of the said notes and the non-payment thereof by defendant though he had due notice of such dishonour, and it averred that thereupon the plaintiff debited the defendant's account with the amount of the said notes. So, deducting the sums of money paid and the amount of the promissory notes that had been duly paid from the defendant's whole indebtedness, the plaintiff claimed the balance sum due.

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The defendant admitted the purchase of the goods, but denied that plaintiff paid to the chetty firm of R. M. M. S. T. the sum alleged at defendant's request. As to the promissory notes, the defendant denied the notice of dishonour, or that "plaintiff was or is entitled to debit defendant's account with the amount thereof". The answer then averred an agreement for composition upon certain terms between defendant and his creditors, including plaintiff, and fulfilment of the terms of the composition.

The plaintiff in his replication admitted the agreement for composition, but denied its performance on defendant's part, and pleaded that in consequence of such failure the plaintiff was released from his obligation under the composition and was entitled to maintain the present action.

At the trial it appeared, as to the money alleged to have been paid to R. M. M. S. T., that this was the value of rice sold by plaintiff as agent of that chetty firm to defendant and subsequently paid by plaintiff to the firm, but no request on defendant's part was proved. The district judge also held on the evidence that the defendant did not perform the terms of the agreement for composition.

Judgment was given for plaintiff, and the defendant appealed.

Layard S.-G. (*Sir Samuel Grenier A.-G.* and *Sampayo* with him) for the appellant.

Dornhorst (*Wendt* with him) for the plaintiff.

Cur. adv. vult.

On November 8, 1892, the following judgment was delivered :—

Burnside, C. J.—I am afraid that in deciding this case, as we are bound to do, upon the pleadings, substantial justice will not be done between the plaintiff and defendant from the arguments addressed to us on this appeal. There were, as it seems, three legitimate questions which had to be determined between the plaintiff and defendant. The first was: could the plaintiff recover from the defendant the price of the rice which he had sold, as an agent for an undisclosed principal, to the defendant? The second was: did the plaintiff by taking certain bills from defendant for the price of goods then due to him from the defendant lose his right to sue for the price of the goods when the bills were subsequently dishonoured? The third was: did the agreement for composition release the defendant from all liability on the previous transactions, and leave the plaintiff to his remedy on the agreement?

Now, if we proceed to decide these questions upon the allegations of the pleadings, the plaintiff is out of court. The plaintiff by his plaint and particulars claims the value of the rice sold by him as agent of R. M. M. S. T. to the defendant, as money paid by him to defendant's use. It is perfectly clear that he cannot recover it in that form of action, as there was no authority either express or implied from the defendant to the plaintiff to pay the money, but there was nothing that we see to have prevented the plaintiff from recovering that money as the price of goods sold and delivered, if he had so claimed it. He has, however, not done so. His particulars limit the item to "money paid". Judgment must, therefore, pass for the defendant with regard to that item.

Then, on the second question, the law is clear that the mere taking of a bill or note on account of a debt does not extinguish the liability for the debt, but only suspends the remedy, which revives, if the notes are dishonoured, but there is nothing to prevent a creditor from taking a bill or note in satisfaction and discharge of the debt, in which case the debt is extinguished and the only remedy is on the bill or note. Now, it is most curious that in the plaint of the plaintiff it is alleged roundly that the plaintiff took the bills in "satisfaction" of his said debt and credited the defendant in "reduction of his debt" with the "amount of the said notes". Not content however with thus fixing the transaction on the notes as one in "satisfaction" of the debt, in his replication the plaintiff claims the amount of the notes "as money paid to the defendant's use". It is clear that if he took the notes in satisfaction of the debt, as he alleges, his remedy is on the notes only, and it is equally clear that he cannot, as indorsee of the dishonoured notes which he had negotiated and taken up, recover the amount as money paid. So that, with respect to these two questions, the plaintiff has put himself out of court by his pleadings.

In this view of the case we need not deal with the issue which the district judge has decided in plaintiff's favour. It may be useful to say that the plaintiff has admitted the effect of the agreement of composition as alleged by the defendant, and it is, to say the least, questionable whether it was of any importance whether the defendant performed it or not. The defendant's allegation on the pleadings was that the plaintiff had joined in an agreement of composition. The plaintiff admits this, and there seems to have been no issue to try, for the plaintiff nowhere traverses the effect of the agreement, as alleged by the defendant, to release the original debt. Neither as an issue of law nor of fact is this point raised.

The judgment must be reversed, and defendant must have judgment with costs.

Withers, J.—I agree. *Reversed.*

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Present :—LAWRIE and WITHERS, JJ.
(*December* 2 *and* 6, 1892.)

D. C. Kandy, No. 4,684. } MENIKA V. HAMY.

Civil Procedure—Resistance to execution of proprietary decree—Writ of possession—Party put in possession under writ subsequently dispossessed—Civil Procedure Code, sections 325 and 326—Jurisdiction.

Section 325 of the Civil Procedure Code enacts that if the officer charged with the execution of a writ for delivery of possession of property is resisted or obstructed by any person, "or if after the officer has delivered possession the judgment creditor is hindered by any person in taking complete and effectual possession", the judgment creditor may complain of such resistance or obstruction by petition, and section 326 and the following sections provide for dealing with the matter of such petition.

Where a judgment creditor, who had been duly put in possession of certain land under a proprietary decree on June 3, 1892, and had subsequently on September 21, 1892, been dispossessed again by the judgment debtor, complained to the court by petition—

Held, that the judgment creditor was not entitled to proceed under the above sections of the Code.

Per LAWRIE, J., on the ground that although in case of disturbance shortly after delivery of possession the court has the power to deal with a complaint under the above sections with the view of compelling complete and lasting obedience to its decree, yet where, as in the present case, the disturbance takes place several weeks after, the only remedy is by a new action.

Per WITHERS, J., on the ground that the hinderance in taking complete possession contemplated by section 325 is one occurring at the time of and not at any time after delivery of possession, and should at all events follow as instantly upon delivery of possession as the circumstances of the case will permit.

The plaintiffs were put in possession of certain land under a writ of possession issued on April 25, 1892, and return of the fiscal to the writ was to the effect that he had put the plaintiffs in possession of the land on June 3, 1892. On October 18, 1892, a petition was filed by the plaintiffs complaining that the defendant and others who were made respondents on the petition had turned them out again and retaken possession of the land on September 21, 1892, and praying that the respondents might be dealt with under sections 325 and 326 of the Civil Procedure Code. The district judge refused the application, holding that he had no power to grant the application. The petitioners appealed.

Dornhorst, for the appellants.

There was no appearance of the counsel for the respondents upon the appeal.

Cur. adv. vult.

On December 6, 1892, the following judgments were delivered :—

WITHERS, J.—I do not think sections 325 and 326 of the Civil Procedure Code apply to a case like the present, where some three months and three weeks after an execution creditor has had a decree for the possession of land duly executed by being put into possession of it under a writ in execution of the decree the judgment debtor and others at his instigation hinder the judgment creditor in the exercise of his rights over the land.

What is meant by "taking" possesion of a thing after it has been "delivered" to you is not quite apparent, but anyhow I think that the attempt to "take complete and effectual possession" of that which has been "but imperfectly" delivered to the execution-creditor (a state of things I repeat not very intelligible) should follow as instantly upon the so-called delivery as the circumstances of the case will permit and that the hinderance is contemplated as occurring at that time and not at any time after the delivery of possession. "Taking" cannot mean keeping possession. In this case I should say the execution creditor had had complete possession given to him, but he was interrupted in the exercise of his proprietary rights.

LAWRIE, J.—I agree. I understand from my brother WITHERS that he prefers to rest his judgment on the grounds given by him rather than on those which I give in deciding the case reported in 1 S. C. R. 257. For myself, I adhere to that decision, and in agreeing with my brother WITHERS in this case I do not find anything in his judgment which conflicts with my former one.

With regard to the refusal of the learned district judge to issue the writ of possession, I am not prepared to disturb his order. At the same time I feel that it is a question of some difficulty and importance whether a court is *functus officii* on receiving from a fiscal a return to a writ of possession that he has put in possession the party declared entitled to possess

My own inclination is to extend the power of our courts to enforce their decrees; and when the obedience shown to the order of a court is proved by the subsequent conduct of the party to have been a pretended and not a real obedience, I would reissue the writ—when, for instance, the man against whom a decree in ejectment was given and who makes no appearance on the day when the fiscal's officer goes to put the successful man in possession, afterwards resumes possession in defiance of the decree. I am much inclined to the opinion that a court ought to have power to compel complete and lasting obedience to its decree, and that on due proof of dispossession a fresh writ of possession ought to issue. I am aware that that is opposed to the practice in England, where it has been held in *Pate* v. *Roe*,

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1 Taunt. 55, that after possession is once given under a writ the plaintiff cannot sue out another writ of possession even though he be disturbed by the same defendant.

The only decision in our own Ceylon law reports which I have found is one of this Court delivered by CARR, C. J., on October 20, 1846,* where he said that the general practice in Colombo, when a party has once been put into quiet possession by the fiscal under a decree and a subsequent trespass occurs, is to seek redress by instituting a new action in which the plaintiff has only to plead his having been put into possession under the former decree and the defendant's subsequent disturbance and the defendant must join issue on these points and could not be allowed to enter into further proof of his claim set up in the former suit.

In cases where the decree holder is ejected very soon after the fiscal has put him in possession, he might, I think, complain without delay to the fiscal in order that his complaint might be reported to the court in the return; but when, as in the present case, the disturbance or ejectment complained of occurred several weeks after the plaintiff was put in possession, the only remedy may be the very insufficient one of a new action. I am inclined to treat with disfavour any rule of practice which assists parties to render judgments of courts ineffectual.

Affirmed.

———:o:———

Present:—WITHERS, J.

(*January* 19 *and* 26, 1893.)

C. R. Kandy, No. 1,834. } SAIBOO v. SIRIMALE.

Registration—Deed affecting land—Pleading—Practice—Ordinance No. 14 *of* 1861, *section* 17.

A party, who has not specially pleaded it, is not entitled to rely on the priority conferred by the Registration Ordinance on deeds affecting land.

The plaintiff, who held a mortgage of certain land from the first defendant with the right of possession in lieu of interest, sued the defendants for trespass, and the second defendant (wife of the first defendant) justified under a conveyance on sale from the first defendant. The mortgage to plaintiff was dated March 29, 1892, and registered on March 30, 1892. The conveyance to second defendant was dated August 29, 1887, and registered on March 31, 1892. The commissioner dismissed the action, holding that second defendant's title prevailed over plaintiff's mortgage. The plaintiff appealed.

Wendt, for the appellant. The commissioner's ruling as to the effect of registration was wrong. The competition is between the two deeds executed by the admitted owner of the land, that is, the mortgage to plaintiff and conveyance to second defendant, and as between these the prior registration of the mortgage renders the conveyance void as against it. (Ordinance No. 14 of 1891, section 17.)

Dornhorst, for the second defendant. The plaintiff is not entitled to rely on the priority conferred by registration, not having pleaded it. Even if otherwise, it is submitted that the prior registration does not avail plaintiff. At the date of the mortgage to plaintiff the first defendant had no interest whatever left in him, having previously conveyed all his interest to the second defendant. Plaintiff had therefore nothing to register.

Wendt, in reply.

Cur. adv. vult.

On January 26, 1892, the following judgment was delivered:—

WITHERS, J.—I think the judgment should be affirmed, though for other reasons than those given by the commissioner. I am of opinion that Mr. Dornhorst's contention is right, and that he who relies on the registration of his instrument to give support to his claim thereunder to an interest or charge on land should, in his plaint of convention or reconvention, allege the fact and date of registration. It gives a defendant the opportunity, not only of compelling proof of the registration, but to elicit evidence in cross-examination or produce positive evidence to satisfy the court that the priority in time of the registration relied on will not avail the party pleading it, because of the absence of valuable consideration for his instrument or the presence of vitiating circumstances or fraud. I therefore affirm the judgment, because plaintiff has not alleged and proved priority of registration so as to defeat defendant's earlier conveyance. Second defendant will have her costs in appeal.

Affirmed.

———:o:———

Present:—LAWRIE and WITHERS, JJ.

(*October* 14 *and November* 4, 1892.)

D. C. Colombo, No. 2,222. } DELMEGE v. FREUDENBERG.

Warranty—Sale of oil in pipes—Warranty as to pipes—Construction of contract—Action for breach of warranty as to pipes.

* *Queen* v. *Abraham*. D. C. Galle, No. 8,827, Ram. 1843-55, p. 79.

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A contract in writing for the sale of "100 tons good "merchantable coconut oil, in pipes, with small packag- "es to suit stowage. Delivery in November—Decem- "ber, 1890, at Rs. 330 per ton in good merchantable "condition f. o. b. Ship named by buyers."—

Held, to contain an express warranty that the pipes and packages as well as the oil were in good merchantable condition and fit for shipment at the time of delivery under the contract.

The plaint, after setting out that by an agreement in writing the defendants sold to plaintiffs 100 tons of coconut oil in pipes and packages to suit stowage, averred that by the said agreement the defendants warranted the same pipes and packages to be in good merchantable condition, that relying on the said warranty the plaintiffs purchased the said oil in the said pipes and packages, and that thereafter on the day of delivery of the said oil the plaintiffs relying on the said warranty shipped the said oil to New York in the said pipes and packages, destination of the said oil being well known to the defendants at the time of delivery. The plaint then proceeded to allege that the said pipes and packages were not in good merchantable condition, but on the contrary were made of green unseasoned timber, in consequence whereof there was a leakage of oil in the course of the voyage in excess of ordinary and natural causes, to the plaintiffs' damage of Rs. 30,23·62, which they accordingly claimed from defendants in this action.

The defendants admitted the agreement, but denied that thereby they warranted the pipes and packages to be in good merchantable condition, and that plaintiffs in purchasing and shipping the oil relied on any such warranty. They further denied that the pipes and packages were not in good merchantable condition or were made of green unseasoned timber, and that at the time of entering into the contract they were aware of the destination of the oil. They then in the sixth paragraph of their answer stated that in terms of the said agreement and of the usual custom of the oil trade defendants gave plaintiffs due notice that the oil was ready for inspection, that at such inspection the plaintiffs were at liberty to reject any portion of the oil or pipes and packages tendered, that plaintiffs inspected the oil and pipes and passed the same, which then were delivered to and accepted by plaintiffs, and that defendants' responsibility thereafter ceased.

The plaintiffs by their replication joined issue with the defendants on their statement of defence.

The contract of sale was effected through a firm of brokers, whose bought note was as follows:—

"We beg to advise sale this day on account of "Messrs. Freudenberg and Company to your good "selves of 100 tons good merchantable coconut oil, "in pipes, with small packages to suit stowage.

"Delivery in November—December, 1890, at "Rs. 330 per ton in good merchantable condi- "tion f. o. b. Ship named by buyers.

"Payment against mate's receipts, but in event "of shipment being in any way hindered by buyers "payment shall be made not later than three days "after notice has been given buyers that oil is ready "for shipment, due notice being given buyers when "it is ready for inspection.

"Sea risk from shore to ship is to be borne by "buyers."

The case having been fixed for trial, the plaintiffs moved for a commission to be issued to New York to examine certain winesses there and for postponement of the trial until return of the commission. Both parties then agreed that the court should first hear argument and decide the issue as to the warranty or no warranty and as to the effect of the defendants' plea of custom in the sixth paragraph of the answer. These points were accordingly argued before the district judge, who ultimately held that the agreement did contain a warranty of the pipes and packages as well as of the oil, and, as to the custom pleaded, he considered that evidence should first be heard before deciding on the point. He accordingly postponed the trial of the action and condemned the defendants in the costs of the argument before him.

The defendants appealed.

Sir Samuel Grenier, A.-G. (*Loos* with him), for the appellants. The action is clearly based on an express warranty alone, and such warranty if it exists must be gathered from the terms of the contract itself. It is submitted that the warranty in the contract is strictly limited to the oil, and does not extend to the packages containing it. The case of *Gower* v. *VonDedalzen* (3 Bing. N.C. 117) is exactly in point. That was a sale of a "cargo of good merchantable oil" then being the cargo of a certain vessel and consisting of so many casks; and it was held that there was no warrant that the casks were fit and proper for the purpose of containing good merchantable oil. If it be contended that a sale of "good merchantable coconut oil in pipes," &c., implied that the pipes should be of a particular quality, and they were not, then the action should have been as upon a failure to deliver "good merchantable oil in pipes," &c. The sale was of the oil, the price was the price per ton of oil, nothing whatever being charged for packages, and the accident of the oil being contained in certain packages did not make it any the less a sale of oil alone. Then as to the custom: the fact of the custom has not been traversed, and it affords a complete answer to the action.

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According to the facts pleaded in paragraph 6 of the answer the plaintiffs had the opportunity of rejecting these packages, but deliberately accepted them, after inspection, and it would be monstrous to allow them now to set up that they were insufficient.

Wendt (*Dornhorst* with him), for the plaintiffs. It is submitted that the warranty expressly relates to the packages as well as the oil. The contract describes the oil as good merchantable oil in pipes, and provides for delivery in good merchantable condition f. o. b., this description of the condition covering the whole subject of sale, both oil and packages. The case of *Gower* v. *VonDedalzen* is distinguishable, for there the sale was of oil already existing as a separate corpus and identified as such, and the contract was solely directed to the oil. But in the present case neither oil nor packages were in existence at the date of the contract so far as appears, and the parties distinctly contemplated that the packages should be fit for shipment. Even if there be no express warranty, there is an implied warranty of the fitness of the packages for shipment for which they were intended. As to the custom pleaded, the plaintiffs in replication have "taken and joined issue with the defendants on their statements of defence" (besides objecting that the plea in paragraph 6 discloses no defence), and this is sufficient according to the English rules to cast the burden of proof on defendant, while no replication at all would appear to be necessary under section 79 of our Code of Civil Procedure. The plea is bad because it does not show that the defendants' freedom from further responsibility after the acceptance of delivery arose under the alleged custom; and so far as the mere examination of the packages was concerned, the acceptance of them did not debar plaintiffs from suing for a breach of warranty upon defect subsequently developed.

Sir Samuel Grenier, in reply.

Cur. adv. vult.

On November 4, 1892, the following judgments were delivered :—

Lawrie, J.—I read the contract 10/243 as binding the vendors to deliver good merchantable oil in pipes and packages in good merchantable condition f. o. b. ship named by buyers.

Bad oil may be delivered and shipped in good casks and good oil in bad casks; but here the vendors expressly warranted that the oil should be good merchantable oil and that the casks should be in good merchantable condition fit for shipment. I do not read the contract as meaning that the pipes and packages were to be af any particular kind of material, nor that they were to be of intrinsic value or merchantable apart from the oil. From the nature of commodity, oil is not merchantable, nor can it be said to be in a condition fit for shipment, unless the casks or bottles in which it is held be sound and strong.

The decision in *Gower* vs. *VonDedalzen*, 8 Bing. N. C. 717, turned on ancient niceties of pleading. Tindal, C. J., intimated that the decision would have been the other way had the defendant pleaded that the oil was not in a merchantable state not because the oil was bad but because the casks were insufficient. In this case the parties are at issue whether the pipes and packages were delivered in good merchantable condition fit for shipment. That issue must be tried. The sixth paragraph of the answer raises other questions of fact which may form matter for other issues.

I would dismiss this appeal with costs and would remit the cause to the district court to be proceeded with according to law.

Withers, J.—Having been of counsel for the plaintiffs up to but not in the proceedings before the lower court, I was reluctant to take part in the hearing of this appeal, but being pressed to do so I could not very well decline jurisdiction. I shall say as little as possible. What came up for determination, as I understand the matter, was the learned judge's ruling on the two following issues. The first issue was whether the agreement for the breach of which the defendants are sued in this action contained an express warranty that the oil packages were equally with the oil itself in good merchantable condition at the time of delivery under the agreement. The learned district judge has found in plaintiffs' favor on that point. Different persons read language in such different senses that you can rarely predicate of the language of any given contract that it will be construed in exactly the same way by two persons.

In this case, had my learned brother found himself unable to read in this contract any warranty relating to the oil packages as well as the oil itself, I should have in deference to his expressson of his yielded my judgment to his. I will say no more than that I read this contract as he reads it. The case of *Gower* vs. *VonDedalzen* so earnestly pressed upon us by the learned Attorney-General appears to us not in point, for the simple reason that the contract there was not expressed in language identical with that before us.

As for the other issue of law assumed to arise out of the matter of defence pleaded in paragraph 6

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of the answer the learned judge has ruled as I understand him, that if that defence be a good one it raises a question of fact rather than of law, or, at all events, of mixed fact and law, and he expressed himself unable to determine the matter at that stage of the case.

In conclusion, I agree with my brother Lawrie that the case should be remitted to the lower court for trial in due course.

Affirmed.

———:o:———

Present :—Withers, J.

(*January* 18 *and* 26, 1893.)

P. C. Galle, No. 8,610. } Goonewardene v. Kader.

Criminal law—Using criminal force—Intent—Act done in defence of property—Public servant—Ceylon Penal Code, sections 88, 90, 92, 343.

The complainant, a fiscal's officer charged with the execution of a writ against a certain person, came to the defendant's house and was proceeding to seize certain moveable property as belonging to the execution debtor, when the defendant ran up and claiming the property as his own prevented seizure by pulling the complainant by the hand to the outer verandah.

Held, that the above facts did not disclose any intent on defendant's part to cause injury, fear, or annoyance to the complainant, and the defendant therefore did not commit the offence of using criminal force under section 343 of the Ceylon Penal Code.

The complainant charged the defendant with intentionally obstructing him as a public servant in the discharge of his public functions under section 183 of the Ceylon Penal Code. The police magistrate acquitted the defendant of this charge, but convicted him of using criminal force under section 343 of the Code.

The defendant appealed.

Sampayo for the appellant.

Cur. adv. vult.

On January 26, 1892, the following judgment was delivered :—

Withers, J.—It was urged by Mr. Sampayo that inasmuch as a fiscal's officer is not a public servant, his client's "technical assault" in defence of his property was justifiable. But section 92 of the Penal Code does not apply to public servants exclusively: it embraces the acts of others done by their direction. Again, a person has only a right to defend his property or that of another against certain offences or attempts to commit them—see section 90 of the same Code. It can hardly be said here that the prosecutor had ever attempted to commit an offence of the description therein mentioned. But did the defendant commit the offence of using criminal force to the complainant? Did he intentionally use force to him without his consent, intending illegally by the use of such force to cause injury, fear, or annoyance to that person? What does the complainant himself say? "I, the creditor, and debtor "went inside the house and made an inventory. "The accused ran up and told us not to make "an inventory and pulled me by the hand to the "outer verandah; that is all; we went away." The defendant, it must be remembered, claimed the house and moveables in it. His intent was to prevent the seizure of his property rather than to injure the complainant in any way. One must not forget section 88 of the Code, which enacts that nothing is an offence by reason of its causing harm so slight that no person of ordinary sense and temper would complain of such harm, and I think that defendant's conduct may be fairly said to be of that character. Even the magistrate describes it as a "technical assault" though he imposed a rather heavy fine of rupees five for a "technical assault". For the reasons above given I hold that the defendant was not guilty of an offence. The conviction is set aside and the accused acquitted.

Set aside.

———:o:———

Present :—Withers, J.

(*January* 26, *and February* 2, 1893.)

P. C. Pasyala, No. 12,242. } Lewis v. Senanayake.

Forest Ordinance—Removing timber without permit—Breach of rules under Ordinance—Rules published in Goverment Gazette—*Proof—Presumption in favor of Crown—Conviction, form of—Criminal Procedure Code, section* 372—*Ordinance No.* 10 *of* 1885, *Chapters* II. *and* III., *and sections* 41 *and* 46—*Ordinance No.* 1 *of* 1892, *section* 27.

The judgment of a police magistrate should specify the offence of which, and the section of the Penal Code or other law under which, the accused is convicted.

In a prosecution for breach of rules prescribed under section 41 of the Forest Ordinance, 1885, it must be shown that the land in question is not included in a reserved or village forest.

The defendants were charged in that (1) they did on or about June 14, 1892, at the Crown jungle called Vilekulekande fell and cut reserved trees, to wit, *hora* trees, without obtaining a permit from the Government Agent of the Proivnce and thereby commit a breach of rule 14 made under Chapter IV. of Ordinance No. 10 of 1885 and published in the *Government Gazette* of February 10, 1887, and (2)

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they did on the same day remove timber without a permit. In his judgment the magistrate said "I find the accused guilty on both counts", and sentenced them to pay certain fines. The defendants appealed.

Dornhorst, for the appellant.

Cur. adv. vult.

On February 2, 1893, the following judgment was delivered ;—

WITHERS, J.—The conviction on the second count for removing timber in breach of section 46 of No. 10 of 1885 must be quashed in view of the fact that that section has been expressly repealed by Ordinance No. 1 of 1892. (See section 27.)

The magistrate has not been careful to observe the requirement of section 372 of the Criminal Procedure Code, so obviously a proper requirement, of specifying in his judgment the offence and section of the law of which he has convicted and for which he has sentenced the accused.

Now the information charges the accused with the offence of breaking rules prescribed in the *Government Gazette* of June 15, 1888, under section 41 of Ordinance No. 10 of 1885. I can find no rules relating to the Western Province in the *Government Gazette* of that date. The magistrate has charged them with an offence in breach of rule 14 published in the *Government Gazette* of February 10, 1887. This, however, is doubtless a slip for Februray 11, 1887, in which rules affecting the Wertern Province and made under chapter IV of the Ordinance No. 10 of 1885 are published, and rule 14 therein is to the effect that "no person shall fell, cut, saw or convert any reserved tree or the timber of any such tree or any unreserved tree or timber of any unreserved tree without a permit from the Government Agent of the Province or the Assistant Government Agent of a district for his district, except as hereinbefore provided for in regard to clearing and burning of chenas and hereafter provided for in regard to timber required by inhabitants of and shareholders of fields in villages surrounded by jungle" for certain purposes.

The first general observation that may be made in regard to rules prescribed under section 41 of chapter IV of ordinance No. 10 of 1885 is that they can only apply, within the limits marked out in *a, b, c, d, e, f, g, h*, to forest land not included in a reserved or village forest, which latter two classes of forest are treated in their respective chapters II and III, save in particulars which do not bear on the present case, and it is incumbent on the prosecution to show that the particular forest land is not included in either class.

There was no attempt to do so in this case, and indeed the evidence of the fact that the land from which the trees are alleged to have been felled is land at the disposal of the Crown is meagre in the last degree. The place is generally referred to as "Crown forest," a mere assumption of the fact to be proved. In view of the presumptions in favour of the Crown there can be no difficulty in shewing that any particular land is at the Crown's disposal in the sense of the Ordinance, if it really be so. Again, I can find no evidence that the defendants felled *kora* or other trees in any forest, or, for the matter of that, removed any *kora* trees, to which kind of trees the magistrate's charge is restricted.

Lastly, I think the evidence for the prosecution too tainted with suspicion to make it safe to convict the accused of the offences with which they have been charged in the first count. Convictions on that count set aside and the accused severally acquitted.

Set aside.

———:o:———

Present :—BURNSIDE, C. J., LAWRIE, and WITHERS, JJ.*

(January 20, and February 14, 1893.)

D. C. Colombo, No. C 715. } PERERA v. SILVA.

Administration—Marriage in community—Administrator of deceased husband's estate—Powers over entire matrimonial estate—Widow-administratrix.

A widow who had taken out letters of administration to her deceased husband's estate—the marriage having been in the community of property—

Held, entitled in her capacity of administratrix to maintain an action in respect of the entirety of a leasehold interest which had belonged to the common estate, notwithstanding her own right to one-half of such interest as surviving spouse.

Per BURNSIDE, C. J.—Upon the death of one of the spouses the entire common estate vests, in the first instance, in the administrator of the deceased, for disposal among the persons legally entitled to individual shares of it.

Per LAWRIE, J.—An executor or administrator can administer and realise only such estate as the deceased had testing powers over. The administrator of a deceased spouse cannot, therefore, deal with the entire common estate, but only with the half to which the heirs or legatees of the deceased have right.

The plaintiff, as administratrix of her husband, to whom she had been married in community of property and who had died in December, 1884, sued the defendant for an account of a moiety of the plumbago dug and removed by defendant from certain land, averring that the deceased had been lessee of a moiety of the land under a lease dated march, 1882,

* WITHERS, J., took no part in the decision, having been of counsel for the plaintiff when at the bar.

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for a term of eight years commencing from January 17, 1885, and that the defendant, the owner of the other moiety, had since the commencement of the lease, with the permission of the plaintiff as such administratrix, retain the exclusive management and working of the plumbago pits on the land. The defendant, besides taking other defences, pleaded that one-half only of the lease-hold interest had vested in the plaintiff as administratrix of the lessee and that she could not therefore call upon the defendant to account for any more than one-fourth share of the profits; and at the trial, this point was argued as a preliminary question. The district judge upheld the plaintiff's right, and the defendant appealed.

Layard, A.-G. (*Wendt* with him) for the appellant.
Dornhorst (*de Saram* with him) for the plaintiff.
Wendt, in reply.

[The following cases were cited in the argument:—*Ederemanesingam's case*, Vand. 264 ; *D. C. Matara No.* 31,076, 5 S. C. C. 70 ; *D. C. Kalutara* No. 35,985, 5 S. C. C. 162 ; *D. C. Colombo* No. 88,039, 7 S. C. C. 82 ; *D. C. Batticoloa* No. 23,770, 8 S. C. C. 27 ; *D. C. Colombo* No. 2,298, 1 C. L. R. 94 ; *Corner* v. *Shew*, 3 M. & W. 350.]

Cur. adv. vult.

On February 14, 1898, the following judgments were delivered :—

Burnside, C. J.—In my opinion the judgment of the learned district judge of Colombo is eminently sound and should be affirmed. Undoubtedly by the Roman-Dutch Law the surviving wife acquired a right to one-half of the property held in community during the marriage, but this general proposition is materially qualified by the fact that the surviving wife's estate thus acquired is liable in all respects to the payment of the debts of the husband, as is the husband's half of it; and also there was this further qualification, that in case the property was naturally indivisible it would be to the *value* only of such property that the widow's right extended. We have already held that the right of the executor to the immoveable property of the deceased, is, for the purpose of administration, co-extensive, with his right to personal property, for the payment of debts. The Roman-Dutch Law as a mere matter of procedure rendered the wife liable to be sued, in respect of the liability of her share of the intestate estate. Our statute law has engrafted on the Roman-Dutch Law the law of administration providing for the appointment of administrators for the purpose of securing a responsible person liable at law for the due disposal of intestates' estate, both among creditors and next of kin; and it seems to me that we are only walking abreast with the law as it now exists, in holding that the whole estate of the deceased should in the first instance vest in the administrator for disposal among the persons legally entitled to individual shares of it. It certainly would be a gross anomaly if the administrator, although subject to be sued for the deceased's debts, could not realize the property liable for them. Looking at the decision *primæ impressionis*, its convenience, the avoidance of multiplicity of suits and divided administration, which English Law abhors, I cannot doubt that the ruling of the district judge is sound and should be accepted. This very case proves the soundness of the position. The widow is always preferred in granting administration and if the contention of the defendant were allowed to prevail the property of her intestate would be subjected to the expense of several suits by and against the same individual in different capacities--the wife as surviving spouse and the wife as administratrix. This alone would seem to be a good reason to reject the defendant's contention. It is not therefore necessary to refer to the contention of the plaintiff that even if the defendant's objection were well-founded it would only be matter of misjoinder to be rectified by amendment.

The judgment is affirmed with costs in both costs.

Lawrie, J.—I would sustain the order in the special circumstances of the case.

The plaintiff obtained administration of the intestate estate of her deceased husband Eusebius Perera. I understand that it was stated by the widow in the affidavit of the extent and value of the estate and in the appraisement and in the inventory that the deceased was the sole lessee under a lease which did not commence until some months after his death. It is by no means certain that this lease in favour of a man and his heirs, executors administrators and assigns, of which he had no enjoyment or possession during his life, fell under the community. His widow has not chosen to claim any rights under it, and in the absence of any other claim it seems to me that the right of the administratrix of the lessee to administer it is undoubted. I dissent from the general proposition that the administrator of a deceased spouse who was married in community (the other spouse surviving) has right to administer the whole estate which was in communion. On the death of either spouse, the other has right to half of the property lately the subject of the marriage community. All that the heirs or legatees of the deceased have right to is the one-half to which the deceased was entitled. The executor of one spouse cannot realize the whole property for the purpose of paying legacies

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or for distribution among the heirs of the deceased, and if an executor cannot do so, neither can an administrator.

In my opinion it is well-fixed law that the administrator or executor can administer and realize only such estate as the deceased had testing powers over. Here, however, we have to deal with an estate which was not in possession of the spouses at the date of the death, an estate which the surviving spouse who has taken out administration has been content to treat as the exclusive property of her deceased husband. I shall not decide that the widow has right to half when she herself does not claim it. I regard her dealing with the interest created by the lease as practically a renunciation of any right which she had or might have claimed in it, because she has deliberately chosen to treat it as her husband's property.

I see no reason to disturb the order.

Affirmed.

———:o:———

Present:—Burnside, C. J., and Withers, J.

(*October* 21 *and* 25, 1892.)

D. C. Galle, No 1,038. } Elliott v. Podihamy.

Land acquisition—Libel of reference—Award—Tender of amount of compensation—Parties unable to agree as to respective interests—Pleading—Practice—Irregularity—Ordinance No. 3 *of* 1876, *Sections* 8, 9, 10, 11, 13, 34, *and* 35.

In proceedings under the Land Acquisition Ordinance 1876, the Government Agent, after he has made his award as to the amount of compensation, should tender the amount to the claimants, and such tender is a condition precedent to any reference to court and should be averred in the libel of reference.

If the Government Agent agrees with the claimants as to the amount of compensation, he cannot, in making a reference by reason of the claimants not being agreed among themselves as to their respective interests in the land, re-open the question of the amount of compensation, and the sole matter which he can refer and which the court can adjudicate upon is as to the apportionment of the amount determined by the Government Agent among the claimants.

If, however, the Government Agent does not agree with the claimants as to the amount of compensation, then in referring that matter to the court he cannot refer with it any question as to the respective interests of the claimants in the land. But the court may, if a dispute arises among the claimants after it has determined the amount of compensation on a reference solely as to compensation, adjudicate upon the respective rights of the claimants to the amount so determined.

This was a proceeding under the Land Acquisition Ordinance No. 3 of 1876. The libel of reference of the plaintiff, the Government Agent, after setting out the preliminary steps taken for the purpose of acquiring a certain land in the district of Galle, stated that the defendants appeared before him as claimants and that he after a summary inquiry determined the amount of compensation at Rs. 48, and it proceeded to state "but as the said claimants could not agree among themselves as to their respective rights, the plaintiff was unable to record any agreement in writing and make his award in pursuance thereof, and does hereby in conformity with the provisions of section 11 of Ordinance No. 3 of 1876 refer the said matter to the determination of the district court of Galle". The libel further averred that "the amount of compensation tendered by plaintiff for the said land and premises under section 8 of Ordinance No. 3 of 1876 was Rs. 48 and was sufficient and proper compensation to be allowed for the acquisition of the said land and premises, but the first claimant declined to accept the award as sufficient and proper compensation to be allowed for the said land". The libel concluded with the prayer that the court should determine "what is sufficient and proper compensation to be allowed for the acquisition of the said land" and further should "enquire and determine the apportionment of such compensation amongst the respective claimants". The district judge investigated the matter and determined the amount of compensation at Rs. 48, and appointed another date for the apportionment of the amount among the claimants. The first defendant appealed.

Dornhorst for the appellant.

Templer, A. S.-G., for the plaintiff.

Cur. adv. vult.

On October 25, 1892, the following judgments were delivered:—

Burnside, C. J.—These proceedings purport to be a reference of the Government Agent under the Land Acquisition Ordinance No. 3 of 1876, but they are so grossly irregular that we cannot support them. The libel of reference recites that, the Government Agent of the Southern Province having taken the usual steps on a direction to acquire a particular piece of land and having noticed all persons to appear, etc., the claimants appeared, and he then and there determined the compensation, viz., Rs. 48, but, in the words of the libel, "as the said "claimants could not agree among themselves as "to their respective rights, the plaintiff was unable

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"record any agreement in writing and make his "award in pursuance thereof" and again, to quote the words of the libel "in conformity with section "11 of Ordinance No. 3 of 1876," he does refer "the "said matter to the determination of the district court." What is "the said matter" which is referred to? Manifestly, that the claimants could not agree among themselves as to their respective rights to the amount determined on. The libel does not state as a preliminary to the reference that the plaintiff tendered the amount of compensation to the claimants. Now, the first step preliminary to a reference, after the government agent has determined compensation, is to tender the amount to the persons interested who appear (see section 8). Till he has done so, he has no right to refer, and the fact of the tender should be stated as a condition precedent in the libel. (See sub-section (c) of section 13).

Then again, having put himself in a position to refer, the government agent may do so, inter alia, on the following two events: if he is unabe to agree with the persons interested or any of them as to the amount of compensation to be allowed or if any question as to title or of the rights thereto or interests therein arise between the parties therein. Now the reason given by the plaintiff in referring is, as I have shewn, the question between the parties themselves as to their respective rights which prevented the plaintiff making an award. This then being what he should have referred, all that the district judge could decide was "the proportion "in which the persons interested are entitled to "share in the amount". (See section 34 and 35). But, when we go a little further into this libel of reference, we find it alleged that the amount of compensation tendered by the plaintiff was sufficient, but the first claimant declined to accept the award as sufficient and proper compensation for the land. In one paragraph the libel says the parties were agreed as to the sufficiency of the compensation but disagreed as to their respective rights and so prevented an award; in the other, it says one claimant declined to accept the award as sufficient and proper compensation for the land. The district judge has treated the reference as one on both grounds and has fixed the compensation and apportioned it among the claimants, which the Ordinance does not permit him to do. For it is only after the claimants shall have accepted the amount which the government agent shall determine as compensation that a dispute can arise as to their respective rights to it, and if having accepted the amount a dispute does arise as to the disposal of it, the Government Agent cannot in referring such dispute reopen the question of compensation, nor can the district judge adjudicate on it. On the other hand, if the compensation is not accepted and the matter is referred on that ground, the government agent has no authority to refer with it any question as to the division of the amount among the claimants. It is only if a dispute arise among the claimants after the judge has awarded compensation on a reference solely as to compensation that he may ajudicate on the respective rights of the claimants to the amount which he awards. I am satisfied that all this disorder and these abortive proceedings have been occasioned by the proctor who signed the proceedings endeavouring to utilize for the libel of reference the printed form which he has filled up, and which I see is issued by authority, but which I am sure could not have been prepared by any one who had any claim to be an authority on the matter.

The reference and all proceedings on it are quashed with costs.

WITHERS, J.—I agree. A libel with such conflicting elements in it as this is no better than waste paper for the purpose of a judicial enquiry.

Set aside.

———:o:———

Present:—BURNSIDE C. J. and WITHERS, J.

(February 1 and 10, 1893.)

D. C. Negombo, No. 743. } NONOHAMY v. PERERA.

Administration—Right of heirs of deceased mortgagee to sue—Necessity for administration to whole estate—Practice

A mortgagee who was married in the community of property died leaving a widow and children surviving, who sued on the mortgage as his legal representatives, averring that the deceased's moiety of the common estate was worth Rs. 700 only, and the plaintiffs were therefore entitled to sue without taking out letters of administration.

Held, that in determining whether administration was necessary, regard should be had to the entire estate (and not to the deceased's moiety only) and as this exceded Rs. 1000 in value, administration could not be dispensed with.

This was an action brought by the widow and heirs af a deceased mortgagagee, for the recovery of the sum of Rs. 170 and interest due on a mortgage executed in the deceased's favour by the defendant. The plaint averred that the mortgagee died intestate on March 30, 1892, leaving the plaintiffs as his heirs and legal

representative in possession of his estate which was of the value of Rs. 700. The defendant in his answer denied that the intestate's estate was worth only Rs. 700, and averred that it was worth over Rs. 1,500, and that letters of administration of the intestate's estate were necessary for the maintenance of the action. At the trial it was admitted that the whole estate was worth about Rs. 1,400, but it was contended that as the widow represented one-half of the estate by virtue of her marriage in community of property, only the other half must be considered in determining whether the estate was a "small estate" or required letters of administration. The District Judge upheld the defendant's objection and dismissed plaintiffs' action.

The plaintiffs appealed.

Wendt for the appellants.

Dornhorst for the defendant.

Cur. adv. vult.

On February 10, 1893, the following judgments were delivered:—

BURNSIDE, C. J.—For the reasons which I have already given in a case Colombo District Court No. C 715*, I am of opinion that administration is necessary on the whole estate of which an intestate may die possessed and not simply on the value of the deceased's share in the community.

The appeal will be dismissed with costs.

WITHERS, J.—I understand the Chief Justice to have ruled in the case referred to that on the death of a husband, who was married in community of goods, intestate the whole of the common effects vests in the surviving spouse if she takes out letters of administration to his estate, or indeed in any one to whom they may be committed, for the purposes of administration. This is consonant with the tendency of decisions of this Court in later days, and not inconsistent I believe with modern practice. It cannot, I venture to think, be reconciled with Roman-Dutch Law pure and simple, according to which the community of estate between two spouses was dissolved instantly upon the death of either of them, and upon such dissolution the common estate was equally apportioned between the heirs of the deceased and the survivor, with the consequence that after the apportionment the creditor could sue the husband and his heirs for the whole, or the wife and her heirs for the half of the debts contracted during the marriage, as the case might be. That ruling, however, it seems to me is just and convenient, even if it is not the expression of what has been the law uniformly laid down by this Court. I should be sorry to say that it is not. I have once before had with regret to confess my ignorance of the exact state of the law in Ceylon in regard to executors and administrators, and I repeat what I said before, that for the sake of the community I am ready to subscribe to any proposition of law on this important matter which is clear and precise and cannot be possibly mistaken, so long of course as I do not think it to be fundamentally vicious as law.

I therefore humbly agree with my Lord's judgment in this case.

Affirmed.

* *Ante*, p. 150.

———:o:———

Present:—LAWRIE and WITHERS, JJ.

(February 10 and 14, 1893.)

D. C. Kegalla, No. 85. } DINGIRIHA II. v. KALU MENIKA.

Practice—Costs of appeal—Taxation.

Costs of appeal include costs incurred in the court below for the purpose of forwarding the appeal to the Supreme Court, and which costs the taxing officer of the court below is competent to deal with.

This case had come up in appeal a first time, and the Supreme Court had set aside the judgment of the District Court and remitted the case to the lower court for decision on the issues raised in the pleadings. The order as to costs was to the following effect:—"The plaintiff is entitled to the costs of this appeal."* When the case was sent back the Secretary taxed the costs, but the defendants objected to the taxation on the ground that the decree being for costs of appeal the bill of costs must be taxed by the Registrar of the Supreme Court and not by the Secretary. The District Judge set aside the taxation of costs by the Secretary holding that the order of the Supreme Court referred to appeal costs only and that they should be taxed by the Registrar. The plaintiff appealed.

Grenier for the appellant.

There was no appearance of counsel for defendants upon the appeal.

Cur. adv. vult.

On February 14, 1893, the following judgments were delivered:—

* *Ante*, p. 76.

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LAWRIE, J.—In an appeal by the plaintiff against a judgment dismissing the action, counsel appeared for the plaintiff appellant and for four defendants respondents. On June 21, 1892, the judgment of the court below was set aside and the case was sent back for trial and it was ordered that the plaintiff do have his costs of the appeal.

The Secretary by order of court issued a notice to the defendants that he would on September 1, 1892, tax the plaintiff's bill of costs payable by them. On taxation a few charges were struck out. The respondents then filed an objection to the taxation, from which it appeared that they did not object to the charges but that they maintained that the decree of the Supreme Court casting them in costs referred only to costs in the Supreme Court which by use and wont are taxed by the Registrar. The plaintiffs maintained that all the items in the bill of costs taxed on September 1 were costs of the appeal—costs incurred subsequent to the judgment appealed from —and that the bill did not include any costs except those of the appeal. The learned District Judge did not deal with the items of the bill. He held that the words of the Supreme Court "costs of this appeal" meant only the costs incurred after the case reached Colombo including counsel's fees. In this construction of the decree of this court I cannot agree. The costs of an appeal include the costs of the petition of appeal, of the finding security, notices to respondents, etc., and all the stamps which an appellant is required to furnish with and subsequent to the filing of the petition. These costs having been incurred in the District Court were properly taxed by the Secretary of the court. The learned District Judge further held that the decree of this court was bad from uncertainty as against whom it was directed. There is no dubeity, the respondents to the appeal, the four defendants, were decreed liable to pay the costs.

The order of the learned District Judge setting aside the taxation cannot be supported and it is set aside. The costs of this appeal to be paid by the first, third, and fourth defendants and the case sent back to be proceeded with according to law.

WITHERS, J.—I agree. Costs in appeal mean costs of and incidental to the appeal, and naturally include those incurred in the court below in laying the foundations of the appeal which only the taxing officer of that court is competent to deal with. The order appealed from must be set aside with costs.

Set aside.

Present: WITHERS, J.

(*March* 9 *and* 14, 1892.)

P. C. Puttalam, No. 1,959. } SALT INSPECTOR OF PUTTALAM v. NONIS.

Salt Ordinance—Possessing salt without license—Possession contrary to tenor of license—Weighing—Ordinance No. 6 *of* 1890, *sections* 5, 6, 16, *and* 17.

Upon a charge of possessing 5¼ cwts. of salt without a license under s. 16 of the Ordinance No. 6 of 1890, it appeared that the defendant had lawfully purchased a quantity of 280 cwts. for the possession of which a license was issued to him, and that upon the salt being re-weighed shortly afterwards there were found 285¼ cwts., the charge being laid in respect of the excess—

Held, that the offence disclosed was not that charged, but the offence of possessing salt contrary to the license.

Defendant was charged with unlawfully possessing a quantity of 5¼ cwts. of salt without a license in breach of sections 5 and 6 of the Ordinance No. 6 of 1890, being an offence punishable under sections 16 and 17. The evidence disclosed that the defendant had purchased from the Government salt store at Puttalam a quantity of 280 cwts. of salt for the removal of which he had obtained a license. Shortly after the issue of the salt to the defendant it was seized in his possession by the Assistant Government Agent, who caused the salt to be re-weighed, when there were found, it was alleged, 285¼ cwts., and the charge related to the excess of this quantity over the 280 cwts. covered by the license. The Magistrate convicted the accused and sentenced him to pay a fine of Rs. 300 or in default to undergo six months' rigorous imprisonment, and also confiscated the padda boat in which the salt had been found.

The defendant appealed.

Dornhorst for the appellant.

Cur. adv. vult.

On March 14, 1892, the following judgment was delivered :—

WITHERS, J.—I might in a few words set aside this conviction on the simple ground that the accused has been convited of no offence whatever. But this is too important a case to deal with so summarily.

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The accused was charged with possessing a quantity of 5½ cwt. of salt without due authority by license, contrary to sections 5 and 6 of Ordinance No. 6 of 1890. This is an offence, but he has not been found guilty of that, nor could he have been found guilty of possessing that quantity without license, when it appears that he had authority to possess at least 280 cwt. of salt. The offence which the evidence pointed out was possession of a certain quantity of salt, otherwise than in accordance with a license or permit on that behalf granted, and if I thought the evidence warranted the charge of such an offence, I would content myself with quashing the conviction, and remitting the case back for the accused to be charged with, and tired for, that offence.

The license to possess salt, granted to the accused, should have been produced or proved by the prosecution. For my purpose I take it as assumed that the accused had a license to buy and remove, under certain conditions a quantity of 280 cwt. of salt from the Puttalam stores.

It appears that on December 19, last salt was issued to the accused from the Puttalam stores in 161 bags, purporting to contain 280 cwt. of salt which were removed to his padda boat. Later on the same day, in consequence of information received, the local authorities caused those bags to be taken out of the accused's boat and reweighed. On being reweighed it is said the bags were found to contain 285½ cwt. *i. e.*, 5½ cwt. in excess of the permit.

Now, considering the smallness of the difference between the quantity of salt weighed out in the earlier part of the day, and weighed in later in the day; considering the peculier circumstances under which the authorities were moved to take this unusual course; considering the grave nature of the penalties which properly attach to the deliberate violation of the revenue laws, it became incumbent on the majistrate to require the very strictest proof of the conditions under which the weighing out and the weighing in of the salt was conducted, so that he might be satisfied that every reasonable precaution had been taken to guard against the risk of error.

Now, we have no information on such elementary points as these: Were the scales tested on the two occasions to see if they were nicely balanced? Were the same weights used on the second occasion as on the first, and were the weights according to the standard required by law? On the second occasion (as the same scales appear to have been used) was the salt put in the opposite scale to that in which it was put when the salt was weighed out? Were the atmospheric conditions later in the day different from those earlier in the day?

I observe that one witness deposes to the fact that a man named Paulis de Silva declined to have his salt weighed that day because it was a rainy day.

Now, if the interval between the first and the second weighing the air became charged with moisture that would at once account for the difference in weight.

Those who took part in the actual weighing in of the salt were not called to prove that they took all pains possible to see that there was no disturbance of the scales during the process.

It is in evidence that gross carelessness or irregularity marked the issue of salt from the stores, and for the prosecution it was attempted to make out that this accused had bribed the cangany employed in the weighing to manipulate the scales in his favour. Whatever truth there may be in the testimony of the man Abdul Cader, I do not believe a word of his evidence against this particular accused. If, in fact, 5½ cwt. were issued in excess, from the carelessness of those who issued it, is the accused to be punished? His account of the possession of the salt is *prima facie* quite satisfactory. "If I had that "quantity in excess of what I should have, you gave it time." If he was unconscious of the excess until it was disclosed at the second weighing, then he cannot be pronounced guilty. Of course if he procured the excess by a bribe he deserves the utmost punishment under the Ordinance quite apart from what he should receive for bribery. But of this there is no sort of evidence.

I would go further and say that if he was present at the weighing and saw and approved of the carelessness which would give him an advantage and took and kept what he gained by the carelessness, then he should be guilty of an offence under the Ordinance. I am so little satisfied that there was an excess, in point of fact, and more than satisfied that the accused is not accountable for the excess, if any, that I set the conviction aside, as well as the order of confiscation of the property and acquit the accused.

Set aside.

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Present :—LAWRIE and WITHERS, JJ.

(*February* 10 *and* 14, 1893.)

D. C. Kalutara, No. 521. } WIRARATNE v. ENSOHAMY.

Civil procedure—Action in ejectment—Adding of parties—Adjudication of questions involved in the action—Irregularity—Form of order to add parties—Practice—Appeal—Revision—Civil Procedure Code, sections 18 *and* 19.

In an action in ejectment, where the defendants pleaded title in themselves and others whom they referred to in the answer, the court when the action came on for trial considered that the presence of the persons named in the answer was necessary to enable the court to adjudicate upon all the questions involved in the action and ordered the case to be struck off the trial roll for the purpose of adding them as defendants:—

Held, that no parties other than the original parties were necessary to enable the court effectually and completely to adjudicate upon and settle any questions involved in the action, and that the order to add the persons named in the answer was improper.

Held further, that, when an order is properly made to add new parties as defendants, the form of such order should be one directing the plaint and summons to be amended by the addition of their names as defendants and directing the plaintiff to cause those parties to be duly served with copies of the summonses and of the plaint further amended as plaintiff might be advised within a certain time from the date of the order, and that it is irregular to order the case to be taken off the trial roll for that purpose.

The plaintiff averring title to a certain field sued the defendants in ejectment, complaining of a trespass committed by the defendants. The defendants, while denying the plaintiff's title and the alleged trespass, in the sixth paragraph of their answer averred title in themselves and certain others whom they named as their co-heirs. On June 18, 1892, when the case first came on for trial, the learned district judge *ex mero motu* recorded the following minute:—"To enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, it is necessary that those persons designated as co-heirs of defendants in the sixth paragraph of the answer should be made added parties. The case is therefore taken off the trial roll for that purpose."

The persons in question being minors, the plaintiff took steps to have a guardian appointed over them and subsequently on his application they were added as parties defendant on the record. The plaintiff, however, did not make any amendment in the plaint, but on his motion the case was entered on the trial roll and was fixed for hearing on a certain day, of which notice was given to the defendants and the added parties. The case ultimately came on for trial accordingly on December 16, 1892, when the plaintiff, the defendants, and the added parties were present. But the defendants objected that the case had been irregularly fixed for trial, as the added parties had not been served with summons or copies of any amended plaint.

The learned district judge considered that he was bound by his previous order which had not been vacated or appealed against and that the plaint should be amended and copy thereof served on the defendants and added parties, and as in his opinion the case had been irregularly fixed for trial he ordered plaintiff to pay defendant's costs.

The plaintiff appealed.

Sampayo, for the appellant, cited *D. C. Kurunegala No.* 20, 2 C. L. R. 84.

Cur. adv. vult.

On February 14, 1893, the following judgments were delivered:—

WITHERS, J.—The plaintiff in this action appeals from an order of the learned judge minuted on December 16, 1892, condemning the plaintiff to pay the defendants' costs of the day for which the trial had been fixed "irregularly", as the order pronounces. I take leave to doubt whether such an order is open to appeal and I should be inclined to reject it, though not of course without hearing counsel on that point, but we cannot close our eyes to a wrong and embarrassing order of the learned judge which has brought the action more or less to a deadlock and has been the occasion of the particular order complained of. The respondents to the petition of appeal are the four original defendants, and they were not represented before us. I propose to deal with the case as if it were before us in revision, in order to remove what may be called a blot upon the record and reform the record for the sake of justice to all the parties concerned, though in doing so I recognise a source of possible mischief in expanding our ordinary powers in appeal in cases which have not been brought before us in revision in due course.

I think it, however, just and convenient to take this exceptional course in this case. The order which I have termed a blot upon the record was the embarrassing order made without motion on June 18, 1892, bringing in third parties as defendants whom the learned district judge advised himself to be necessary parties. The order unfortunately was not a proper one to be made, all the necessary parties to the suit being at that date before the court and the one step required to be taken being to fix a day for trial. The form of the order was moreover faulty. It should have named the parties to be

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added by directing the plaint and summons to be amended by the addition of their names as defendants; it should have directed the plaintiff to cause those parties to be duly served with copies of the summonses and plaint further amended as plaintiff might be advised within a certain time from the date of the order; and it certainly should not have directed that the case be taken off the trial roll for that purpose.

Plaintiff, who now complains of the order, submitted to it and took no steps to have it vacated. I propose to vacate it now and to restore the action to the state it was in at the date of that order.

The record will now be returned to the court below for the court to appoint a day for the hearing and determination of the action, giving notice thereof to the original parties therein. I do not know why the plaintiff was condemned to pay the defendants' costs of the day—December 16, 1892—for which day the trial of the case had been fixed by the court—See minute of November 11, 1892. Further, on October 3, 1892, the case had been restored to the roll and set down for trial on November 11, with the express sanction of the court on plaintiff's motion. I set aside the order in appeal of December 16, 1892, condemning plaintiff to pay defendants the costs of that day, and direct that the costs of that day be costs in the cause. Vacate the order of June 18, 1892, minuted in these terms:—"To enable the court effectually and completely to adjudicate upon and settle all the questions involved in this action, it is necessary that those persons designated as co-heirs by defendants in paragraph 6 of the answer should be made added parties, and the case is therefore taken off the trial roll, for that purpose." Remit the case to the lower court for trial in due course—no costs in appeal.

LAWRIE, J.—I agree.

Set aside.

———:o:———

Present:—LAWRIE, J.

(*March* 2 *and* 7, 1893.)

P. C. Gampola, No. 13,750. } MARIKAR v. DIAS.

Forest Ordinance—Removing "timber" without a pass—Forest produce—Ordinance No. 10 of 1885, sections 44, 46—Ordinance No. 1 of 1892, section 27.

Since the passing of the Ordinance No. 1 of 1892 removal of timber without a pass as distinguished from forest produce is not an offence.

The facts material to this report sufficiently appear in the judgment of the Supreme Court.

The defendant appealed against a conviction.

There was no appearance of counsel upon the appeal.

Cur. adv. vult.

On March 7, 1893, the following judgment was delivered:—

LAWRIE, J.—The conviction could not stand even if I had been of opinion that the evidence was sufficient to warrant a charge being framed. I should have been obliged to have quashed the proceedings subsequent to the closing of the evidence for the complainant and to have sent the case back because the police magistrate did not frame a charge. But I think it unnecessary to send the case back. The prosecution has not made a *prima facie* case against the accused. The man was accused of removing eleven pieces of timber without a pass. It is not alleged that the timber was forest produce or that it had been grown on crown land. For ought that appears, it was timber that was grown on the accused's own land or it was foreign timber from abroad. Section 45 of Ordinance No. 10 of 1885 prohibited the removal of timber, but that section was repealed by section 27 of Ordinance No. 1 of 1892. The regulations which the Governor and the Executive Council have power to make and publish under section 44, and which when published have the force of law, are regulations regarding forest produce. Any doubt on this point is removed by the amending Ordinance No. 1 of 1892, which is careful to substitute "forest produce" for "timber" whenever the word "timber" occurred alone in section 44. It is my opinion that since the passing of the Ordinance No. 1 of 1892 "timber" as contradistinguished from "forest produce" may be removed without a pass, and though the regulations of 1887 may not have been amended they must be read in conformity with the amended law. The prosecutor has not proved that the accused was guilty of an offence.

I set aside the conviction and acquit the accused.

Set aside.

———:o:———

Present:—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(*January* 24 *and February* 28, 1893.)

D. C. Galle, No. 994. } UDUMA LEBBE v. SEGO MOHAMMADO.

Registration—Usufructuary mortgagee—Lease—Mortgagee's interest seized in satisfaction of previous judgment—Fiscal's conveyance—Priority in regis-

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tration—Real property, conveyance of by fiscal—Ordinance No. 8 *of* 1863, *sections* 38 *and* 39.

A mortgagee with right to possession of the mortgaged land in lieu of interest can legally lease the property to third parties.

Where an usufructuary mortgagee leased the mortgaged property to a third party for a certain term, and subsequently his right title and interest in the property as such mortgagee was seized under writ against him and sold to a purchaser who registered the fiscal's transfer prior to the registration of the lease—

Held (BURNSIDE, C. J., *dissentiente*) that the purchaser at the fiscal's sale, by reason of prior registration of the transfer to him, had a right to the possession of the property preferent to that of the lessee.

Ejectment.

The plaintiff was the purchaser at a fiscal's sale of the right title and interest of one Kadija Umma upon a mortgage bond granted to her by one Hamidoo Umma. Kadija Umma, who under the bond had right to the possesson of the mortgaged premises in lieu of interest, had leased them to the defendant, who registered the lease on December 7, 1891. The conveyance to the plaintiff by the fiscal was registered on June 12, 1891. In an action brought by the plaintiff against the defendant the learned district judge gave plaintiff judgment on the ground that his conveyance being prior in registration was entitled to succeed over the lease to the defendant which though prior in date was registered after the conveyance. The defendant appealed.

Dornhorst, for the appellant.

There was no appearance of counsel for the respondent.

Cur. adv. vult.

On February 28, 1893, the following judgments were delivered:—

BURNSIDE, C. J.—I do not think any doubts exist that an usufructuary mortgagee, having a right to the possession of the mortgaged estate, has the power [illegible] or a ssign such right to a third party. My brother Lawrie has shown that by express Civil and Roman-Dutch Law such power does exist, but the important question for our decision is whether Kadija Umma's lease to the first defendant of her usufructuary possession in the mortgaged premises, being unregistered, was defeated by the subsequent purchase of her right title and interest as mortgagee in the mortgaged property, and for myself I am of opinion it clearly was not. The decisions on the effect of the Registration Ordinance on the question, "what are such adverse interests as obtain priority by prior registration of the instruments intended to create them?" are of such varying authority and effect as in my opinion not to be binding except as to the isolated proposition that a deed prior in registration voids a deed prior in date by the same party and of the same estate, they being deeds which, it is said, embrace the identical estate and consequently deal with adverse interests. However I may have dissented from this decision I am bound by it. Beyond this I can find no sufficient authority that a lease can be held to be an interest adverse to the title on which it is certainly dependent and out of which it is created. This court has held that where the manifest intention of the party executing a second conveyance is to create an estate subject to an existing interest the Ordinance does not apply, although the instruments purport to create adverse interests, and the second interest cannot be extended by the mere fact of registration. It seems to me that this is sound and good law, and at the same time it reasonably conserves the object and intention of the Ordinance, which were, by giving priority to registered deeds, to meet adverse interests when they could not exist together and one would be a fraud on the other. I am sure the Ordinance could never have been intended to facilitate the commission of fraud by means of registration. The lease in this case was a good one for valuable consideration, it bound Kadija Umma in contract and in estate and her right title and interest was in all respects subject to it. The two estates, those of lessee and lessor, could and could only exist together. The fiscal could sell no more than the right title and interest of Kadija Umma, and the plaintiff, on the other hand, could get no more than what the fiscal sold, viz., an estate on which the lease was dependent and which secured to him any benefits to which Kadija Umma was entitled. He certainly was not entitled to say "I will accept the tenancy" or "I will defeat it." It is said that had Kadija Umma created a second lease which had been registered it would have def ated the defendant's lease. I may grant that proposition and yet it does not affect the question before us. Such a second lease would be decidedly adverse because it affected the same estate, and the deeds being fraudulent the one to the other the law gives effect in the interest of registration to prior registration. But there can be no fraud as against this plaintiff. He should on the one hand have guarded himself by covenant or otherwise against undisclosed encumbrances, and if he bought with full knowledge of this encumbrance intending to defeat it by registration he would make this court a party to his intended fraud.

In my opinion judgment should be for the defendants, reversing the judgment of the district judge with costs in both courts.

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Lawrie, J.—Kadija Umma was the creditor on a mortgage bond over a garden and eight boutiques. The bond gave her the right to possess in lieu of interest for six years. Being in possession she leased the land and boutiques for a term of four years. I think that it is not doubtful that she had right to lease.

In treating of *antichresis* (which is the same as a usufructuary mortgage) the Digest (*Dig.* 20. 1. 11. 1.) says of the creditor "*cum in usuras fructus percipiat, aut locando aut ipse percipiendo habitandoque*" and Voet (*Pand.* 20. 1. 23.) recognises the right of the mortgagee to lease to others: *sive ipse ædes inhabitando seu fundo colendo percipere fructum aut utilitatem velit seu aliis elocare.*"

In this case a special right to lease might be inferred from the nature of the subject mortgaged. It is impossible for one person personally to occupy eight boutiques. The lessees from Kadija Umma paid three years' rent in advance and entered into possession. After this lease a judgment passed against the lessor and in execution of that judgment her right title and interest in the mortgage bond was sold and was purchased by the plaintiff. He registered his certificate of sale. He then instituted this action in ejcetment against the lessees. In this case I apprehend that the plaintiff who purchased Kadija Ummas' interest at a judicial sale is in the same position as if he had purchased from Kadija Umma herself, with this difference, that in a sale or assignment by her she would have warranted her title and the purchaser would on that warranty have had an alternative right to sue her for damages. At the date of this sale to the plaintiff Kadija Umma had already parted with a valuable part of the rights given to her by the mortgage. She had leased the land for four years. That lease was binding on her, but as the lessees had not registered she might have defeated it by giving a second lease to third parties, provided they took the lease and registered it without fraud. The continuance of the lessees' rights under the unregistered lease depended on whether a party apperead claiming an interest adverse to their lease on valuable consideration by virtue of a subsequent deed which had been duly registered. The plaintiff alleges he is such a party. He holds a registered assignment of the mortgage bond which gives a right to possess. The question seems to be: Has a purchaser of lands and interest adverse to those who hold a lease from the vendor?

It was held by Cayley, J., in *C. R. Negombo*, No. 23,748, Gren. Rep. (1874) p. 29. that a conveyance having been registered was entitled to priority over an unregistered lease. It was held by Dias, J., and by myself in *D. C. Chilaw*, No. 23,614, reported in 7 S.C.C. 111, that the vendee's interest is adverse to a lessee's. I adhere to that judgment. I keep in mind the judgment of Phear C. J., and Dias J., in *D. C. Kandy*, No. 70,020, reported in 2 S.C.C. 79, which affirmed a judgment of mine in the district court of Kandy; but in that case there was no question of registration. In my opinion the lease is an interest adverse to an owner of land inasmuch as it prevents his having possession of it and full rights over it. If the lease did not exist the purchaser would have right immediately to turn out all squatters and tenants-at-will and thereafter to occupy personally or to choose tenants on his own terms. I conceive that a tenant under an unregistered lease is with regard to a purchaser who has registered his deed in no better position than a tenant-at-will.

It has been argued that if the interest created by a lease be adverse to that created by a subsequent sale and is made void by the prior registration of the sale, then the converse is true, that a lease granted by one who has previously sold the land makes the prior sale void, if the lease be first registered. This is not, to my mind, a sound argument. A lease is adverse to a sale because it prevents the purchaser from having complete possession; but a sale is not adverse to a lease, because it merely changes the party to whom the rent is to be paid. The estate of the tenant is unaffected.

I do not attach importance to the fact that the lessees have paid a part of the rent in advance, because, I take it, if the unregistered lease were binding on the purchaser, he would not be bound by the payment of rent in advance because such payment is in law only a loan by the tenant to the lessor, as was decided in *Nicolls* v. *Saunders*, L. R. 5. C.P. 58.

On the ground of the prior registration of the sale or assignment of the mortgage bond I am of opinion that the plaintiff is entitled to prevail and I would affirm the judgment with a slight variation, referring to the mortgage as his title.

Withers, J.—If this was a case of first impression I am certainly not prepared to say that I should propose to affirm the judgment. But the previous decisions of this Court on the policy of our Registration Ordinances are too hard for me. They have established a principle, if I may so call it, which has been recognised and acted upon too long for us to disturb.

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The principle I refer to is this, that the policy of our Registration Ordinance requires that the estate of a person in immoveable property affected by an instrument of the kind aimed at in section 38 of Ordinance No. 8 of 1863, whether executed by that person himself, his assign in law, or the fiscal, shall, if not otherwise expressed, be deemed to be the highest estate which at any time during his ownership the owner was capable of alienating, so that the instrument first and alone registered, though last in date, which purports to dispose of the right title and interest of the party affected, shall, if for value and without taint of fraud, prevail over all prior unregistered instruments affecting the same immoveable property, whether they purport to dispose of the same interest or create an incumbrance or carve a small estate out of a fee simple, and shall, like Aaron's rod, swallow them up with their charges, incumbrances, leases and interests whatsoever affecting the property. This interpretation of the Ordinance seems to drown almost every question as to what adverse interests are in section 39 of the Ordinance.

According to those decisions the dispositions of a person's interest in immoveable property by an instrument, however otherwise well executed is but conditional on the party who takes the instrument being first at the registry. All virtue by no means goes out of the executant, who signs away his property for valuable consideration, if the instrument is not registered. I am too much impressed with what has gone before to do otherwise than affirm the judgment of the court below.

As to Mr. Dornhorst's point about the character of the fiscal's assignment, I think the judgment-debtor's right to hold and enjoy the mortgaged premises in lieu of interest was a real right and appropriately assigned, to say nothing of the contract of hypothec.

Affirmed.

———:o:———

Present:—LAWRIE, J.

(March 2 and 7, 1893.)

P. C. Hatton, No. 12,011. } MATHES V. SAMSEEDIN.

Criminal procedure—Charge not summarily triable—Acquittal—Powers of police magistrate—Ceylon Penal Code, section 317—*Criminal Procedure Code, section* 168.

In a case not summarily triable an order of acquittal recorded by a police magistrate amounts only to a discharge under section 168 of the Criminal Procedure Code and is appealable.

On a complaint against a person for committing grievous hurt under section 317 of the Penal Code, the police magistrate investigated the case and, holding that though the defendant did cause the hurt complained of he acted in self-defence, recorded an order of acquittal—

Held, that the police magistrate had no power to deal with the question of self defence and determine the prosecution, for in a case not summarily triable though he might discharge an accused person if he considered there was no evidence to go to a jury, yet if he found there was such evidence he could not adjudicate upon the worth of any suggested defence but should proceed with the case with a view to committal to a higher court.

The police magistrate investigated a charge of voluntarily causing grevous hurt under section 317 of the Ceylon Penal Code, being an offence not summarily triable in the police court. The defendant in his statement said "I am not guilty", but called no evidence. The police magistrate held that the defendant did voluntarily cause the hurt charged (a stab with a knife, falling within the description of "grievous hurt" under the Code) but "acquitted" him on the ground that he acted in self-defence. Against this acquittal the complainant appealed.

Wendt, for the appellant. It is submitted that, although the magistrate's order purports to be an "acquittal," against which an appeal lies only at the instance of the Attorney-General, the order is in effect a discharge from the prosecution under section 168 of the Criminal Procedure Code, the magistrate not having had the jurisdiction to acquit. It is therefore appealable. The order is wrong on the materials before the police magistrate. He has found that defendant inflicted the injury charged, but has held a defence established, viz., that the act was done in self-defence, which only a court competent to convict or acquit could adjudicate upon. The defendant should have been committed for trial by the district court or supreme court.

Cur. adv. vult.

On March 7, 1893, the following judgment was delivered:—

LAWRIE, J.—The police magistrate investigated a complaint that the accused had voluntarily caused grievous hurt with a knife, an offence punishable under section 317 of the Penal Code.

Although he had no power to try the accused summarily, the magistrate acquitted him. Against an acquittal no appeal lies except at the instance of the Attorney-General, but this appeal may be entertained because the order is not and cannot be an acqaittal, but only a discharge under section 168 of the Criminal Procedure Code; and an order of discharge in a case not triable summarily is an appealable order. *P. C. Galle*, No. 7,135, 8 S. C. C. 136. In the present

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case the magistrate has, I think, exceeded his powers. He finds it proved that the accused voluntarily caused hurt with a knife, and his reason for not charging him is that the accused used the knife in self-defence. The accused did not say so to the magistrate. He only said: "I am not guilty."

But even if he had put in the plea of private defence, such a plea when stated in a case not triable summarily cannot be dealt with by the magistrate. A magistrate does right to discharge a man when he thinks that there is no evidence to go to a jury; but if he finds there is abundant evidence to go to a jury, he may not adjudicate on the worth of a probable defence which he has not yet heard. He is bound to frame a charge, to inform the accused of his right to make a statement, and to take the evidence the accused may adduce.

I set aside the order and remit the case to the police magistrate to proceed with it according to law.

Set aside.

———:o:———

Present:—WITHERS, J.

(January 26, *and February* 2, 1893.*)*

P. C. Rakwana, No. 7,984. } MADUWANWALA v. FREDERICK.

Forest Ordinance—" Cut"—Felling and removing trees—Ordinance No. 10 *of* 1885, *sections* 40, 45, *and* 46*—Ordinance No.* 1 *of* 1892, *section* 27.

In section 40 of the Ordinance No. 10 of 1885 the word "cut" means the act of simply cutting and not actually cutting down, and therefore evidence proving the felling of a tree will not support a charge of cutting the tree.

Charges under sections 40 and 46 of the Ordinance No. 10 of 1885.

The defendants appealed against a conviction.

Dornhorst for the appellants.

Drieberg for the complainant.

Cur. adv. vult.

On February 2, 1893, the following judgment was delivered :—

WITHERS, J.—The accused are charged firstly with cutting a reserved tree, namely a *kina* tree, on land at the disposal of the Crown, in breach of section 40 of Ordinance No. 10 of 1885. It is a nice point whether that section was not virtually repealed at the date of the alleged offence, namely, July 4 or 5, 1892; but it need not be considered, as the evidence goes to show that this *kina* tree was felled and removed and not merely cut. The word "cut" in that section means "cutting" simply and not "cutting down".

The second charge is that the accused removed the said tree and other timber from the said land without a permit, etc., whereby they committed an offence punishable under section 45 of Ordinance No. 10 of 1885. Section 45, however, merely says that the breach of a regulation made under Chapter V. shall constitute an offence, but what rule, if any, has been offended by these accused is nowhere disclosed in the proceedings. The language of the charge suggest that section 45 is a mistake for section 46, but then section 46 of Ordinance No. 10 of 1885 has been repealed by section 27 of Ordinance No. 1 of 1892.

In the result I must set aside the first conviction and quash the second.

Set aside.

———:o:———

Presnt :—LAWRIE and WITHERS, JJ.

(February 17 *and* 21, 1893.*)*

In the matter of the application of ALUTWELEATCHARIGEY DON ELIAS DE SILVA.

Insolvency—Lying in jail for debt—Residence previous to petition for sequestration—Jurisdiction—Application for order to prosecute petition in a particular court—Procedure—Ordinance No. 7 *of* 1853, *sections* 16, 17, 20, *and* 26.

Section 16 of Ordinance No. 7 of 1853 directs the petition for the sequestration of the estate of any person as insolvent to be made to the district court of the district in which the debtor shall have resided or carried on business for six moths next immediately preceding the time of filing such petition.

Section 17 empowers the Supreme Court to order any such petition to be prosecuted in any District Court without reference to the district in which the debtor resided or carried on business.

In an application to the Supreme Court under section 17 of the Ordinance for an order to prosecute a petition in the District Court of Kandy by a person who had resided in Kandy but who had been arrested under a civil writ issued from the District Court of Colombo and had lain in jail in Colombo upon committal thereunder for over 21 days—

Held, that the proper court for a petitioner, who has lain in prison for more than 21 days under a writ in execution of a judgment, to submit a petition for the sequestration of his own estate, is the court of the district in which he resided or carried on business for six months immediately prior to his incarceration, and that, the District Court of Kandy thus already having jurisdiction, the application could not be entertained.

Held further, that to an application under section 17 of the Ordinance must be annexed the petition, the declaration of insolvency, the account and affidavit, intended to be submitted by the petitioner for the sequestration of his own estate, so that the Supreme Court might be satisfied of the *bona fide* intention of the petitioner to initiate insolvency proceedings.

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The petitioner in this matter, who was a resident of Kandy, was arrested in Kandy on December 12, 1892, under a writ against person issued from the District Court of Colombo in execution of a judgment. Having been produced before the District Court of Colombo, he was on December 13, 1892, committed to prison, and he lay in jail at Hultsdorp, Colombo, under that commitment until the date of the present application, which was made on February 17, 1893. The petitioner, setting out the above facts, which were supported by an affidavit, and stating his desire to petition for the sequestration of his own estate and for his adjudication as insolvent, prayed for an order under section 17 of the Ordinance No. 7 of 1853 allowing him to prosecute such petition in the District Court of Kandy, the ground of his application being that the District Court of Kandy would not otherwise have jurisdiction in the matter inasmuch as he, having been in jail in Colombo since December 13, 1892, would not have resided in Kandy for six months next immediately preceding the time of the filing of his intended petition.

Sampayo for the petitioner.

Cur. adv. vult.

On February 21, 1893, the order of the Supreme Court was delivered by:—

Withers, J.—If we had advised ourselves that we could entertain this petition, we should have felt bound to reject it for want of sufficient material. It wanted proof of incarceration in a prison for more than 21 days under a civil writ against person in execution of a judgment, and to it should have been annexed the petition, declaration of insolvency, the list and affidavit intended to be submitted by the petitioner in a District Court for the sequestration of his own estate, that we might have been satisfied of the *bona fide* intention of the petitioner to initate insolvency proceedings. But we do not think we can entertain this application.

Our opinion, after perusal of the Insolvent Estates Ordinance No. 7 of 1853, and more particularly sections 16, 20, and 26 of that Ordinance, is that the proper court for a petitioner, who has lain in custody in prison for more than 21 days under a writ against person in execution of a judgment debt in the civil courts, to submit a petition for the sequestration of his own estate, is that in which he has resided or carried on business for six months immediately prior to his incarceration in any local prison.

Lawrie, J., concurred.

Present:—Burnside, C. J., and Withers, J.

(*October 25 and November 8, 1892.*)

D. C. Chilaw, No. 401. — Mohammado Umma v. Cader Mohideen.

Civil Procedure—Action by minor—Appointment of next friend—Application by way of summary procedure—Defendant to the action—Respondent—Civil Procedare Code, sections 375, 377, 478, 481, 492, 494, *and* 502.

In an application for the appointment of a next friend of a minor for the purpose of instituting an action on behalf of the minor, the intended defendant need not be made respondent to the petition, notwithstanding the provision to that effect in section 481 of the Civil Procedure Code, which only applies to cases where a petition for a minor to be represented by a next friend is made in the course of or as incidental to an action.

When an action is brought on behalf of a minor without the due appointment of a next friend, the proper course for the defendant is not to file answer but at once to move the court to have the plaint taken off the file.

This was an action in ejectment by a minor represented by Tangachchi Umma as next friend of the minor. There did not appear to have been any appointment of Tangachchi Umma as next friend for this particular action, but with the proceedings was filed an order on a petition entituled in another action—D. C. Chilaw, No. 25,641—whereby Tangachchi Umma had been appointed next friend of the present minor for the purpose of instituting an action to set aside the decree in that action on the ground of fraud.

The defendant filed answer in the present action, and at the same time moved that the plaint be taken off the file on the ground that the provisions of section 481 of the Civil Procedure Code had not been complied with, there being no application by way of summary procedure for the appointment of the next friend, naming the defendant as respondent. The district judge disallowed this motion and fixed a day for the trial of the action.

The defendant appealed.

Wendt for the appellant. The order appointing a next friend in *D. C. Chilaw*, No. 25,641, was irregularly accepted here. There must be a special application for the purposes of each particular case, which must be accompanied by the plaint in the action intended to be brought (*D. C. Kalutara*, No. 68, 2 C. L. R. 82). Under section 481 of the Civil Procedure Code, application for the appointment of a next friend must be by way of summary procedure to which the defendant must be made a respondent. By "defendant" in section 481 must be understood, it is submitted, the defendant in the

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intended action. The defendant is of course interested in having a solvent person as next friend, who will be liable for the defendant's costs. There being no proper appointment of a next friend, the defendant rightly moved under section 478 to have the plaint taken off the file, and his application should have been allowed.

There was no appearance of counsel for the plaintiff.

Cur. adv. vult.

On November 8, 1892, the following judgments were delivered :—

BURNSIDE, C. J.—The order of the district judge in this case must be set aside. Our ruling in the case reported in 2 C. L. R. 82 governs the case.

I incline to the opinion of my brother WITHERS as to the practice which should be observed on applications for the appointment of a next friend to enable a minor to institute a suit. The Code is certainly perplexing on the question, and it is as well that some indication of our opinion should be given for the guidance of practitioners pending an authoritative decision if it should become necessary.

WITHERS, J.—According to the plaint this purports to be an action in ejectment by one Mohamadu Umma a minor, by her next friend Tangachchi Umma. The plaints itself purports to be that of the plaintiff by her proctor James Lemphers.

The plaint was improperly accepted by the court and would, no doubt, not have been accepted if attention had been called to our judgment reported 2 C. L. R. 82. Not but that the acceptance of the plaint at all is matter for great surprise, for there is really no order herein sanctioning the appointment of a next friend. There is an order on a petition at page 22 of this record allowing the application therein, but that petition is entituled in a separate suit—No. 25,641 of the District Court of Chilaw —and the ground in that petition for the appointment of a next friend was the intention to institute an action on behalf of the present minor to set aside the judgment in No. 25,641 as one recovered by deceit against the minor and others, whereas the object of this suit, as I have said before, is to eject certain people from certain lands.

The defendants in the present action appeared and by their proctor filed answer on August 18, and then and there moved the court to take the plaint off the file, for the reason, among others, that the provisions of section 481 of the Civil Procedure Code had not been complied with. The motion was disallowed by the learned judge, and it is from his order of September 6, that this appeal is taken.

Section 481 was not brought to our notice during the argument of the case reported in 2 C. L. R. 82 before referred to, and though we think the plaint must be taken off the file for the reasons hereinbefore indicated, it behoves us to deal with this particular point.

The sections in Chapter XXXV. of the Civil Procedure Code, with the exception of sections 492, 494, and 502 and the section in question, 481, are borrowed from the Indian Civil Procedure Code. Section 481, down to the words "in the action" with which the fourth line commences, corresponds with the provisions of section 445 of the Indian Civil Procedure Code; the rest is entirely new matter, and very embarrassing matter too.

This section provides that the appointment of the next friend of a minor shall be made after application by way of summary poocedure, supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor, and that to such application the defendant shall be made respondent.

In Chapter XXIV, relating to summary procedure, is laid down how a petition by way of summary procedure shall be framed. Such a petition has to contain, *inter alia*, the name, description and place of abode of the respondents, and thereupon the court is empowered to make an alternative order of the nature indicated in section 377 of the Code.

Now, the word "defendant" implies its co-relative "plaintiff", but in a case like the present where there is no action instituted and the object of the petitioner is to obtain leave to institute one by a next friend, there can be no plaintiff at the time the petition is presented, and consequently no defendant.

It was suggested by Mr. Wendt that to meet such a case a defendant must be taken to mean an intended, as well as an existing, defendant. To make the new and added matter in this section sensible, either that suggestion must be given effect to, or we must hold that this section is intended only to apply to cases where a petition for a minor to be represented by a next friend is made in the course of an action, or as incidental to an action, to adopt the language of section 375 of the Civil Procedure Code.

Hitherto, and as I believe it is still the practice in our courts at home, an application by a minor for the appointment of a next friend to institute a suit on his behalf has been made *ex parte* on the usual well-known materials, it being open to a defendant

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to apply to have the order vacated on the ground that the proposed next friend is not a fitting and competent person. For my part I think that that practice should still be maintained, section 481 notwithstanding.

In any event, this order must be set aside with costs arising out of and incidental to the application. The defendant must pay the costs of and consequent on his answer which he filed in bold disregard of the judgment of this court reported in 2 S. C. C. 48.

Adjudged and ordered accordingly.

Set aside.

---:o:---

Present :—LAWRIE and WITHERS, JJ.

(*March* 7 *and* 16, 1893.)

D. C. Colombo, No. C 868. } ABDUL ALLY v. CADERAVALOE.

Sale of goods—Warranty—Misrepresentation—Eviction—Repetition of price.

By Roman Dutch Law there is implied in every contract of sale of goods a warranty by the vendor that the purchaser shall have the absolute and dominant enjoyment of the goods. But before the purchaser can recover damages for breach of such warranty, or claim back the price, he must suffer eviction by the judgment of a competent court that the goods were the property of some third party. Such judgment is not binding on the vendor unless he is called upon to warrant and defend the purchaser's title.

The plaintiff sued to recover a sum of Rs. 499·31, being the price paid by him to defendant for a quantity of cocoanut oil sold by defendant to plaintiff, who averred that at the time of sale the oil was not defendant's but the property of a third person. The additional district judge gave judgment for the plaintiff. The defendant appealed.

The facts are fully set out in the judgment of LAWRIE, J.

Ramanathan S.-G. (*Grenier* with him) for the appellant, cited *Clarke* v. *Dickson*, E. B. &. E. 140; 27 L. J. Q. B. 223.

Wendt (*Loos* with him) for the plaintiff, cited *Eichholsz* v. *Banister*, 34 L. J. C. P. 107.

Ramanathan, in reply.

Cur. adv. vult.

On March 16, 1893, the following judgments were delivered :—

LAWRIE, J.—A contract of sale was perfected between the plaintiff and the defendant. The oil was delivered and the price was paid. The plaintiff alleges that he purchased that oil because the defendant represented that he was the true owner, and that that same oil was afterwards taken out of the plaintiff's possession by the police; that it was sold by order of the police court and that that court refused to give the proceeds of sale to the plaintiff but awarded these to Mr. Dias who, the plaintiff says, was the true owner of the oil. The plaintiff prays for repayment of the price as for money had and received by the defendant to the use of the plaintiff.

In the answer the defendant is silent as to the alleged representation, and it must be taken that he admits that he represented to the plaintiff that he was the lawful owner. He denied that the oil he sold to the plaintiff belonged to Mr. Dias or that the police magistrate had jurisdiction to dispose of the proceeds of the sale.

The learned district judge (Mr. Templer) sustained the action as one for repetition of money had and received by the defendant to the use of the plaintiff as for a consideration that failed, and he gave plaintiff judgment on the ground that there was a total failure of consideration for the payment of Rs. 499 31 made by the plaintiff to the defendant for the oil in question. Assuming that there was a failure, we must determine who was to blame; who is responsible for that failure of consideration. The action in my opinion cannot be maintained on the allegation of representations because it is not alleged that these representations were false to the knowledge of the defendant who made them. I apprehend that it is well settled law that injury caused by a statement false in fact, but not so to the knowledge of the party making it or made with intent to deceive, will not support an action. (See *Evans* v. *Collins*: *Shrewsbury* v. *Blount*: *Rawlings* v. *Bell*: *Ormrod* v. *Huth*: and other cases collected in 2 Sm. L. C. p. 97.)

Then, I hesitate to say that this can be regarded as an action on the warranty of title implied in every sale of property of which the vendor was in possession at the time of the sale. In the first place, the action is not laid on warranty. The plaintiff does not declare on a contract express or implied—that he was bound to do, if he relied on it, and that he did not rely on or found on the warranty is further shown by the absence of a prayer for damages for breach of warranty; but if it be an action for damages for breach of warranty it was brought too late, more than two years after the alleged eviction. It may be that, in addition to an action for damages for breach of warranty, the purchaser on eviction had a legal claim for restitution of the price. This claim was not prescribed, being of the nature of an action for money had and received. Now, in considering this aspect of the case, it is most important to remember that the plaintiff

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does not charge the defendant with any fraud or deceit. In considering their respective positions we are bound to hold that the defendant, if mistaken in fact, was innocent of any deceit and intention to deceive. The cases of *Robinson* v. *Anderton*, Peake p. 94, and *Cripps* v. *Reade*, 6 Term Rep. 606, may be in point, and to quote the words of Lord Kenyon in the former case, "though the action imputes nothing criminal to the defendant, his title is disaffirmed, for it appears that he received money which he had no right to and which he must therefore return"; or from Lord Kenyon's judgment in the latter case, "the money was paid under a mistake......an action for money had and received will lie to recover it back".

These decisions are in conformity with the general rule that an act done or a contract made under a mistake or ignorance of a material fact is, to use the words of Story (Equity Jurisprudence, section 140), voidable and relievable in equity. He illustrates this thus: "A buys an estate of B to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts unknown at the time to both parties, that B has no title (as if there be a nearer heir than B who was supposed to be dead but is in fact living). In such a case equity would relieve the purchaser and rescind the contract"; and Story adds (section 142): "In cases of mutual mistake going to the essence of the contract it is not necessary that there shall be any presumption of fraud; equity will often relieve, however innocent the parties may be."

Indeed, no proposition seems capable of being more amply illustrated and supported than that money paid in ignorance of the facts is recoverable—*Kelly* v. *Solari* 9 M.& W. 54, *Townsend* v. *Crowdy* 8 C. B. N. S. 477. This is certain, that before the plaintiff can succeed on the ground of mistake or on the grounds of breach of warranty or of representation he must prove (1) that the oil which he purchased from the defendant did not belong to the defendant but did belong to Mr Dias, (2) that he (the plaintiff) was deprived of that oil, was evicted from possession by the order or decree of a court of competent jurisdiction in that behalf.

Now, it may be taken to be proved that on January 11 or 12, 1889, Mr. Inspector Jonklaas received instructions to search for two tons of oil and that he seized two pipes containing oil in the plaintiff's store. The proof that the oil which was then seized was the oil which the defendant sold to the plaintiff depends on the credit to be attached to the testimony of Suppaya. I shall only say that the evidence is open to doubt. But it is not proved by evidence recorded in this civil case that the oil so seized belonged to Mr. Dias. It is impossible to import into this the evidence and verdict in the criminal case. Further, the police court probably exceeded its powers in ordering that oil to be seized and sold. It certainly exceeded its power in ordering the price to be paid to Mr. Dias. The plaintiff here submitted to what appear to have been orders and proceedings *ultra vires* of the police court, and if from want of skill he failed to convince the police magistrate that the oil ought to be restored to him or that the price ought to be paid to him, the loss must rest on him and not on the defendant.

I would set aside the judgment and dismiss the action with costs.

Withers, J.—This may be briefly described as an action for the breach of warranty of title to oil sold and delivered by the defendant to the plaintiff at Colombo in January, 1889.

As an action on an express warranty, namely, that at the time of the contract of sale and delivery the defendant warranted the oil to be his, it quite fails; there is no evidence to that effect. And as to the allegation that the plaintiff was induced by this representation to buy the oil, that is pure fiction.

By Roman Dutch Law every contract of goods sold and delivered implies a warranty from the vendor to the purchaser that he shall have the absolute and dominant enjoyment of the goods. Before, however, a purchaser can recover damages for a breach of such warranty or for the recovery of the price paid with interest, he must be evicted therefrom by the judgment of a competent court, in an action between him and a third party, that the goods belonged to that third party. Nor is a judgment of that kind binding against the vendor unless he is called upon to warrant and defend the purchaser's title.

I confess I think that on the pleadings the defendant was really entitled to judgment. The circumstances alleged in the libel do not disclose such an eviction as will support the plaintiff's action.

To my mind the evidence led to identify the oil sold and delivered by the defendant to the plaintiff with the oil taken from the plaintiff's stores and ultimately disposed of by an order of the magistrate is quite insufficient. The identity unproved, the whole case for the plaintiff falls to pieces.

I am for setting aside the judgment and dismissing plaintiff's action with costs.

Reversed.

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Present:—LAWRIE and WITHERS, JJ.

(*December* 16 *and* 20, 1892.)

D. C. Galle, No. 1,020. } SEYADORIS *v.* HENDRICK.

Receiver—Civil Procedure—Appointment of receiver—Action for land between co-owners—Right to or interest in land—Preservation of property—Protection of pecuniary interest of owners—Civil Procedure Code, section 671.

Plaintiff and defendant became purchasers of a crown land at an auction sale. After the purchase the defendant dug certain plumbago pits in the land and began to take out plumbago, and the plaintiff instituted this action, claiming his share of the plumbago and praying for a writ of sequestration. Subsequently, but before the summons was issued to defendant, plaintiff applied under Chapter L of the Civil Procedure Code for the appointment of a receiver, alleging that defendant was continuing the mining operations and appropriating the plumbago to himself and that the defendant not being possessed of property the plaintiff would not be able to recover the value of his share of the plumbago. The court granted the application. At the date of the action the crown had not made any grant to either plaintiff or defendant, but at the date of the order of the court appointing a receiver a grant had been made out in favour of the plaintiff and defendant, though not delivered.

Held that the order appointing a receiver was improperly made—

By LAWRIE, J., on the grounds (1) that summons not having been issued the action had not commenced at the date of the order and therefore the land in question was not the subject of an action, in respect of which a receiver could be appointed under the Civil Procedure Code, (2) that a receiver could be appointed for the protection of the property itself and not of the pecuniary interest of the applicant, and it not being shown that the defendant was mismanaging the property, the reason for the appointment of a receiver did not exist, and (3) that in the case of co-owners a receivership ought not to be allowed any more than an injunction, except in the case of waste, which was not shown here.

By WITHERS, J., on the ground that the application being one incidental to the main action and not a separate independent matter of summary procedure, it was incumbent on the plaintiff to shew that not merely at the date of the order but at the date of the institution of the action he had a right to or interest in the land within the meaning of section 671 of the Civil Procedure Code, and as at the date of the action the crown grant had not been made the plaintiff had then had no such right to or interest in the land.

On the filing of the plaint on February 5, 1892, the plaintiff obtained a writ of sequestration under which the plumbago dug out by defendant was sequestered. Thereupon the defendant made an application to dissolve the sequestration, which the district judge disallowed. Upon appeal, however, the order of the district judge dissallowing the application for dissolution of the sequestration was set aside by the Supreme Court on July 1, 1892, by its judgment reported *supra* p. 69.

The present application for the appointment of a receiver was made on October 4, 1892 (summons not having yet been issued to defendant), the plaintiff alleging that the defendant had resumed the mining operations in August, 1892, and was digging plumbago from the pits in question and daily removing the plumbago so dug without giving any share to plaintiff, and that defendant was preventing the plaintiff from entering upon the land. The plaintiff further alleged that by the time the transfer was granted by the Crown the plumbago in the land would have been dug and removed by defendant and the land which was rich in plumbago would then become useless to the plaintiff, that the defendant was under agreement to sell his share in the land to a third party as soon as the Crown grant was obtained, that defendant was not possessed of property to enable plaintiff to recover the value of his share of the plumbago, of which a quantity to the value of about Rs. 96,000 had already been dug, and that unless a receiver was appointed the plaintiff would suffer great and irremediable damage and loss.

The circumstances of the sale of the land by the Crown and the purchase of the same by plaintiff and defendant are fully set out in the judgment of WITHERS, J.

The district judge allowed the plaintiff's application and by his order of October 26, 1892, appointed a receiver. The defendant appealed.

Ramanathan, S.-G. (*Dornhorst* with him) for appellant.

Wendt, for the plaintiff.

Cur. adv. vult.

On December 20, 1892, the following judgments were delivered:—

LAWRIE, J.—I am of the opinion that the order of appointment must be set aside. In the first place, the land was not then the subject of an action. True it is that, more than ten months ago, the plaintiff filed a plaint, but on October 28, when this order for a receiver was made, summons had not issued. Section 671 of the Code gives jurisdiction to a court to appoint a receiver only in the course of an action, and there is no action until summons is issued. See *D. C. Kalutara* No. 34,092, 8 S. C. C. 158 and *D. C. Matara* No. 32,282, 6 S. C. C. 93.

But in view of the opinion of the Chief Justice in the case last referred to, this first ground on which I rest my judgment may be doubtful, and I rely, secondly, on this, that the plaintiff has not shewn that the appointment of a receiver is necessary for the "restoration, preservation, or better custody or management of the property". It is not alleged

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either in the plaint or in the application for a receiver or the affidavit thereto annexed, that the first defendant is mismanaging the land. So far as appears, he is carrying on the same operations in the same way as a receiver would do. There is here no question as to the restoration, preservation, better custody or management of the property. The reason, why a receiver is asked for, is to protect the plaintiff's pecuniary interests, to ensure that half of the profits derived from the digging of plumbago shall be reserved for him in neutral hands. As I read section 671, the court is not authorized to appoint a receiver to protect the pecuniary interests of one of two joint owners but only to protect the property itself, and when there is no reason to think that the property is in danger or that a receiver would deal with it otherwise or better than the co-owner in possession, then the court ought to refuse to interfere. The observations of Clarence, J. in the Corbet case, 4 S. C. C. 147, are in point: "It is not shewn in support of the application, and in fact there has been hardly the attempt to shew—that the estates are being impaired or mismanaged *ad interim* * * * Plaintiff in asking for a receiver * * does so upon the merits of his case and nothing else, and to ask the court to grant a receiver upon such grounds is in effect to ask the court upon a motion for a receiver, an *interim* matter, to prejudge the whole case."

Lastly, assuming the defendant to be what the plaintiff alleges he is (and the plaintiff cannot ask us to regard the defendant in any other way), the defendant is jointly entitled to the property with the plaintiff. The relative rights and remedies of co-owners of land from which one is removing plumbago were fully considered by this court in *D. C. Galle* No. 41728 reported 2 S. C. C. 166. There Sir John Phear held that if one co-owner was wasting the common property in excess of his co-proprietary rights the proper course for the injured co-proprietor was to ask for an injunction and for an account of the plumbago already raised and if he desired it, for a partition of the land. Injunction would be granted only to restrain waste or the exercise of powers in excess of the co-owner's rights. An injunction, I apprehend, would not be granted to restrain one co-owner from the exercise of the usual rights of ownership, but only to prevent destruction or waste. In the present case, from the application for a receiver and from the powers granted to him by the district court on the motion and with the approval of the plaintiff, it is plain that the plaintiff desires that the plumbago be dug and sold. He does not complain that such digging and selling is waste. It is, according to him, a proper management of the estate, the only question is as to his share of the profits, and for the reasons I have given I think he is not entitled to remove his co-owner at this stage from managing the common property in a way which, both are agreed, is the right way.

I would set aside the appointment with costs.

Withers, J.—As it is a condition precedent required by section 671 of the Civil Procedure Code that a party to an action who applies to the court for the appointment of a receiver of property, the subject of that action, shall establish a *prima facie* right to or interest in such property before he can secure the desired order, the first and principal question for us to decide is whether the plaintiff has shown himself entitled to the order he has obtained. The subject of the action, which was instituted on February 5, 1892, is two parcels of land in which plumbago has been found, and though the prayer of the action as originally framed was limited to an order of "sequestration" and judgment for damages against this appellant and others it was extended by leave of the court on September 28, so as to embrace a declaration of title in a moiety of the two parcels and a decree for possession.

These are the facts upon which the plaintiff bases his alleged "*prima facie* right to or interest in" the two parcels of land:—The parcels were crown lands. On September 9, 1890, the plaintiff and first defendant signed printed forms of conditions of sale acknowledging, in the one, to have that day purchased one parcel for Rs. 60, and, in the other, to have purchased the other parcel for Rs. 205. A condition of both purchases was that one-tenth of the price should be paid the day of purchase and the balance (*sic*) within one month from that day. That condition unfulfilled, the terms were that "the purchase shall be considered void" and the one-tenth deposit and certain sums and fees forfeited. In neither case was the required condition fulfilled. Accordingly, so the learned judge finds, the parcels were advertised for re-sale on September 1, 1891, but they were not put for sale a second time. What happened instead was this. On September 16, 1891, the Government Agent of the Southern Province caused this, amongst other entries, to be made in his register of Government land sold in the district of Galle in the column entitled "name of purchaser": "Let original purchaser pay balance with

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"interest up to date; Siyadoris (*i. e.* plaintiff) to "waive his rights in favour of Hendrick (*i. e.* defend- "ant)—present the other man." Hendrick accordingly did pay up the balance with interest due on the original sales. Previously to this record in the register just referred to Crown lands sale slips N and O in the said Government Agent's office relating to the parcels in question were filled in on September 1, 1891, with the numbers of the lots and the name of W. A. Hendrick as purchaser. On October 11, 1892, two grants of these two lots were made out in favour of plaintiff and defendant jointly, but they have never been delivered to the grantees therein named because, according to Mr. Macleod, the grantees have not attended to receive them, as, he says, they should do. The appellant appears to have paid the deposit money on account of both parcels at the date of the original sale. Neither was let into posession of the parcels by competent authority. The appellant says he was put into possession but he does not say by whom; so I suppose it was by himself, not that I wish to imply that he did so *mala fide*, for I think he had fair ground to consider himself the sole purchaser of the two parcels in September, 1891.

It may be as well here to answer the appeal made to us to interpret the words—"on the application of any party who shall establish *a prima facie* right to or interest in such property," which are introduced into Chapter L. of our Civil Procedure Code, which, with the exception further of section 672 in the same Chapter, are borrowed from the provisions of Chapter XXXVI. of the Indian Civil Procedure Code. The words just recited were, I imagine, put in *pro abundanti cautela*, for no party to an action could very well apply for the appointment of a receiver who had no right to or interest in the property which is the subject of the action.

I presume that, at the time when the order is asked for, a party must have a right to the immediate possession of the particular class of property or a vested interest in it sufficient to entitle him to have it protected in circumstances which appear to the court to necessitate the protection of the property by an independent and competent person. A party may have a right to the immediate possession of property without any estate in or title to it, or he may have an estate in or title to property without the right to immediate possession of it, such as a usufructuary mortgage or lien-holder on the one hand, or a remainderman on the other.

Again, whether the party has such a present right to or interest in any particular kind of property will depend on the nature of the property. If immoveable property, there must be a crown grant, notarial instrument of agreement or assigment or a duly executed will followed by the death of a testator or an intestacy with next of kin in a recognised degree. I say it with diffidence, and should prefer not to say so at all for fear of prejudging the case, but I feel bound to express an opinion on the point, that at the date of the order the plaintiff had disclosed a *prima facie* interest in these two parcels of land and my authority for this opinion is the judgment of the Privy Council in *Hutton* v. *Lippert*, 52 L. J. P. C. 54.

This, however, by no means concludes the matter. In the first place it is to be remembered that this application is one incidental to the main action and not a separate independent matter of summary procedure, and before this application could be allowed I think it was incumbent on the plaintiff to show that at the date of the institution of his action he had a right to or interest in the property in question. In the absence of the completed crown grants at that date I cannot say that he has established as at that time a *prima facie* right to or interest in the lands, and I can only repeat my regret that I feel bound to express any opinion on the matter at all.

For this reason, I am of opinion that the order appointing a receiver should be set aside and the plaintiff's application dismissed with costs in both courts.

Set aside.

———:o:———

Present:—Withers, J.

(January 19 *and* 26, 1893.*)*

P. C. Galle, No. 8,614. } Tatham v. Uga.

Criminal law—Unlicensed digging for plumbago—Forest Ordinance No. 10 *of* 1885—*Breach of rules framed under section* 41—Mens rea—Bona fide *mistake—Crown land—Evidence.*

Section 41 of Ordinance No. 10 of 1885 provides for the making of rules, *inter alia* for regulating or prohibiting the digging for plumbago in any forest not included in a reserved or village forest.

A rule framed under the above section enacted that "no person shall dig plumbago on any land at the disposal of the Crown except on permission granted under licence" in a prescribed form.

Held that the condition of the mind of the accused person is not an element in the offence created by the above enactments, and therefore a *bona fide* mistake that a Crown land in which plumbago is dug is private property affords no defence.

Held also that in a charge for breach of the above rule it must be proved that the land is forest land at the disposal of the Crown and not included in a reserved or village forest, and that the deposition of a witness that the land is "Crown land" does not amount to such proof.

Three defendants were charged in this case with having "dug plumbago on land at the disposal of the

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Crown without permission in breach of rule 47 of the rules passed under the provisions of Chapter IV. of Ordinance No. 10 of 1885, and published in the *Government Gazette* on January 28, 1887, and thereby committed an offence punishable under section 42 of the Ordinance No. 10 of 1885".

Their defence was that they *bona fide* believed that the land belonged to one Kadiravaloe, whose permission they had to dig. The police magistrate, however, convicted them, and they appealed.

Dornhorst, for the appellant.

Nell, C. C., for the Crown.

Cur. adv. vult.

On January 26, 1893, the following judgment was delivered :—

WITHERS, J.—The defendants have been convicted of the offence of breaking the following rule prescribed under section 41 of Ordinance No. 10 of 1885 :—"No person shall dig plumbago on any land "at the disposal of the Crown except on permission "granted under license in form G annexed." The main defence was, that it was a *bona fide* mistake: that the defendants believed they were digging plumbago on one Kathiravalu's land, for which they said they had his license. Granted that it was a *bona fide* mistake, the condition of mind is not an element in this offence, and, in my opinion, this plea would not avail them. But, in this case, there is a defect of proof in an essential matter of a negative character, which the prosecution is bound to adduce. The rule in question could only apply to forest land not included in a reserved or village forest, and it should have been shewn that the land from which the plumbago was dug was forest land at the disposal of the Crown and not included in a reserved or village forest. As Mr. Dornhorst observed, there was really no evidence of the nature of the land led by the prosecution, and the defendant's witness nearly but not quite supplied the defect. He deposed that the land on which the plumbago was dug was Crown land, but that is not enough.

The conviction is set aside and the accused acquitted.

Set aside.

———:o:———

Present :—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(March 3 and 24, 1893.)

D. C. Colombo, No. C 1,143. } ABUBAKER v. PERERA.

Civil Procedure—List of documents relied on by a plaintiff--Requisites of such list--Admissibility of documents—Civil Procedure Code, section 51—Pleading—Action in ejectment—Particulars of title—Plaint.

The list of documents relied on by a plaintiff in an action and required to be annexed to the plaint by section 51 of the Civil Procedure Code should succinctly state the names of the parties, dates, and nature of the instruments and other particulars sufficient to enable the defendant to understand what is going to be proved and to make necessary inquires relating to them, and there must also be shewn a clear connection of the documents with the plaintiff and the subject matter of the action. Otherwise the documents referred to in such list are not admissible in evidence.

So *Held* by LAWRIE and WITHERS, JJ.

In an action for title to land and recovery of posession—

Held by BURNSIDE, C. J., and WITHERS, J., that where the plaintiff has a present fee simple absolute in the premises it is sufficient to state that fact in the plaint and it is not necessary to plead all the steps in the title.

But *Held* by WITHERS, J., that if a plaint alleges that the estate once in another has now vested in the plaintiff, it must state the name of that other and the date and nature of the conveyance. If the plaintiff has only a particular estate as distinct from one in fee simple, or if in the case of an estate in fee simple it is not yet in possession, the steps in the title must be indicated and the nature of the instruments passing it must be stated.

D. C. Batticaloa, No. 108, 9 S. C. C. 185, 1 C. L. R. 75, referred to and commented on.

Ejectment.

Plaintiff sued the defendants in respect of two allotments of land. With regard to one he pleaded : "On or about the 10th day of February, 1883, by virtue of a fiscal's conveyance dated the 10th day of February, 1883, the plaintiff became the lawful owner and proprietor and was put in possession of the following property," which he described. With regard to the other, he pleaded : "On or about the 16th day of May, 1885, the plaintiff became the lawful owner and proprietor of the land [which was described] by virtue of a notarial instrument of transfer No. 1,911 dated 16th May, 1885, made in his favour by Mahallum Ibrahim Saibo Alim Saibo Ahamado, who was then the lawful owner of the said land." He also pleaded prescription and complained of a trespass committed by the defendants.

To the plaint was annexed a list of documents relied on by the plaintiff, which was as follows :—

"1 A fiscal's conveyance dated 10th February, 1883.

2 A notarial instrument date 11th December, 1856, in favour of Ossen Lebbe Audoo Lebbe Markar and attested by F. J. de Saram of Colombo, Notary Public.

3 A notarial instrument bearing No. 28, dated 24th August, 1852, in favour of M. L. M. Cassim Lebbe Markar.

4 A fiscal's conveyance bearing No. 3043 and dated 16th June, 1852.

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5 Fiscal's conveyance bearing No. 202 dated 20th November, 1838.

6 A notarial instrument bearing No. 2,153 dated 20th April, 1830, and attested by G. J. J. Stork.

7 A writing bearing No. 137 dated 9th October, 1805.

8 A writing dated 5th October, 1805."

&c. &c. &c.

The answers of the defendants categorically denied the averments in the plaint as to title, and also denied the plaintiff's possession and the alleged trespass. The second defendant claimed the lands himself.

At the trial the plaintiff tendered in evidence the documents referred to in the list annexed to the plaint. But the defendants objected to their reception, and the learned district judge relying on the authority of *D. C. Batticaloa, No.* 108, 9 S. C. C. 185, 1 C. L. R. 75, rejected the documents, except those pleaded in the body of the plaint, on the ground that no title was set out in the pleadings to which they were shewn to have any relation. Upon the evidence the district judge dismissed the plaintiff's action.

The plaintiff appealed.

Layard, A.-G. (*Ramanathan*, S.-G., and *Wendt* with him) for appellant.

Dornhorst, for first defendant.

De Saram, for second defendant.

Cur. adv. vult.

On March 24, 1893, the following judgments were delivered :—

Burnside, C. J.—If this case is to be decided on the pleadings and proofs in support of them the plaintiff is in my humble opinion entitled to judgment.

The action is one in ejectment. The plaint alleges that on February 10, 1883, the plaintiff was lawful owner and in possession of lot A, I will say for brevity, and he says this was by virtue of a fiscal's conveyance of that date. Secondly, that on May 16, 1885, he was also the lawful owner of lot B, by virtue of a notarial transfer No. 1,911 dated May 16, 1883, made in his favor by Mahallum Ibrahim Saibo Alim Saibo who was than the lawful owner of the said lot. Thirdly, that the plaintiff and his predecessors in title had been in quiet and undisturbed possession of those two lots by adverse title for a period of ten years and had acquired a prescriptive title thereto when the acts of which he complains were committed by the defendants. He complains that in the month of March, 1887, the first defendant entered on a portion of these lands, for which act he brought an action, and that in the month of June, 1889, these defendants entered upon other portions of A and ousted him and have remained in possession, and that in February, 1891, the defendants ousted the plaintiff from the lot B. This plaint seems to me to be singularly clear and well pleaded. The plaintiff prays ejectment and damages.

Now, how have the defendants answered this libel? As to lot A, the first defendant denies that the plaintiff became owner of the lot A, he denies the plaintiff's possession of it, he says that the second defendant is the owner of lot A, he denies the ouster, the retention of possession, and the damage. As to lot B, he denies that the plaintiff was owner or that he and the second defendant trespassed. The second defendant, as to lots A and B, denied that the plaintiff became the lawful owner of A or of B, or that the plaintiff was ever in possession of either A or B, or that he took unlawful possession, and he claims to be the owner by paper title and prescriptive title.

The learned district judge in stating the issues for decision omitted the crucial issue raised by the pleadings, viz., who was in the actual possession of this land when the ouster complained of took place. If the plaintiff was in actual possession, that was sufficient to support the action irrespective of the question whether the plaintiff had acquired prescriptive title or not. If the plaintiff had not been in actual possession, then of course no question of prescription could arise, and before the plaintiff could recover he would have been compelled to prove his right to the possession by good paper title, but being in actual possession put the defendants to the proof not only of better title than his but of good and sufficient title. Looking at the evidence in the case, it is beyond doubt that the plaintiff was in the actual possession. The learned district judge has put it thus :—"The second defendant has been asserting rightfully or assuming wrongfully title to the lands which the plaintiff tried to hold and enjoy." This holding puts the defendant out of court. If the second defendant had rightfully asserted title he was bound to prove good title, and he has not done so; if he had wrongfully assumed title, he committed a wrong; and in neither case was he justified in disturbing the plaintiff's possession of the lands which the plaintiff was holding and enjoying. There will, I presume, be no doubt in this point. Our time was unnecessarily consumed at the argument with the construction which the learned district judge has placed on a judgment of this Court by my late brothers Clarence and Dias. I confess I am not able to follow the *ratio decidendi* of the learned district judge or of its applicability to this case.

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LAWRIE, J.—I am of opinion that the district judge was right in refusing to admit the title deeds tendered in evidence.

In the first place, the list appended to the plaint did not sufficiently disclose the nature and contents of these deeds. Take the first as an example: " A fiscal's conveyance dated 10th February, 1883." Which fiscal? Under what writ? Of what land? Of whose interest? In whose favor? And so on through the list. A few are more fully, but some are even less fully, described than the first, such as: "A writing dated 5th October, 1805", " A notarial instrument bearing 2055 dated 14th April, 1850." The list does not fulfil the requirements of section 51 of the Code. I agree that it must be treated as worthless.

In the second place, the list was meaningless because of the absence from the plaint of averments disclosing that the deeds in the list refer to the plaintiff's alleged title.

In the third place, the documents could not have been received in evidence at that stage. They were not produced by the plaintiff or his witnesses at the trial. Not one of them (except perhaps No. 9, dated May 26, 1885) was proved or admitted in accordance with the law of evidence under section 114 of the Code. They were all properly rejected.

WITHERS, J.—The contest of counsel was mainly over the question whether the learned judge was right in rejecting the documentary evidence relied on in support of plaintiff's title to the premises which he claims by this action to recover.

The decision of this Court, reported 9 S. C. C. 185, was pressed upon us in support of the learned judge's refusal to entertain that evidence. The English case therein referred to of *Philipps* v. *Philipps*, L. R. 4 Q.B.D. 127, as I understand it, relates to a state of things quite dissimilar to what is presented here. The principle of the English decison seems to me to be this, that in an action for recovery of land of which the plaintiff has never been in possession the statement of claim must allege the nature of the various instruments on which he relies in deducing his title from the person under whom he claims.

It is a well known rule in cases relating to the ownership of property that "pleadings must show title". But not every case requires the same degree of particularity. If the plaintiff has a present fee simple absolute in the premises, he need say no more. If he says in his plaint that the estate once in another has now vested in him, he must state in his plaint the name of that other and the date and naure of the conveyance. If the party pleading has only a particular estate as distinct from one in fee simple or where the latter estate is not yet in possession, the title must be fully and particularly alleged—the steps in the title must be indicated and the general nature of the instruments passing it must be stated.

This is not a well drawn plaint, and as to the fiscal's conveyance under which plaintiff claims title to one of the premises, it no doubt should have been stated in the plaint whose estate and what estate was thereby conveyed to the plaintiff by the fiscal. The answer, however, cures that defect.

If a plaintiff intends to rely on a document in support of his title to property which he is not bound to set out in his plaint, he may do so only if he gives the defendant due notice of it by describing it in a memorandum at the foot of his plaint. The names of the parties, dates, and nature of the instruments so relied on should be succinctly expressed, so that defendant may understand what is going to be proved and be able to make such enquires and investigations relating to them as he may be advised. But a document or documents relied on must not only be clearly indicated in the memorandum: they must also show a clear connection with the claimant and the special subject matter of the action.

I doubt if this is more than what was laid down in the decision of this Court before referred to.

The list at the foot of this plaint of documents intended to be relied on gives no sort of information of their contents or of their connection with the claimant and his claim, and should be treated, I think, as worthless. This memorandum, it must be remembered, is not a part of the plaint and is not like a schedule of particulars required to complement a plaint, so that it is not open to the defendant to apply for further and better particulars or to have the memorandum otherwise amended. The conclusion I come to is that the documents referred to at the foot of the plaint were properly rejected by the learned judge.

The facts of the case were hardly, if at all, discussed, but on the merits I am for setting aside the judgment and decreeing the plaintiff possession of the premises. I may say at once that he has shown no legal title in either land. He has failed to establish any interest in the premises either in the execution-debtors under the fiscal's transfer or in the vendor under his private conveyance.

On the other hand, the defendants have not attempted to justify their occupation of the premises. They are mere wrong-doers. If then the plaintiff can prove prior actual occupation of the two premises, he

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is in my opinion entitled to a decree of possession against them. I do not understand the learned judge entirely to disbelieve what the plaintiff has said about his entry and occupation of the premises under his two purchases. At page 41 plaintiff deposes that after his purchase he lived on one of the lands; that after that one M. M. Meera Lebbe occupied both properties for two years and paid rent to him as a tenant; that after that again his father-in-law took possession of the property under plaintiff's power of attorney; then some five or six years before action brought began a steady interruption of plaintiff's proprietory rights on the part of these defendants which led to this action and a previous one now pending. The plaintiff further declares that ever since these purchases he has paid tax to the municipality on account of these properties.

In the face of this evidence I do not see why he should not recover judgment for the premises.

Reversed.

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Present:—LAWRIE and WITHERS, JJ.

(*December* 9 *and* 15, 1892.)

D. C. Kandy, No. 5,312. } KEPPITIPOLA v. BANDARANAYAKE.

Settlement—Fidei-commissum—*Deed of gift—Life rent—Joint property—Survivorship—Ordinance No.* 21 *of* 1844—*Construction of deed.*

A deed of gift granted by owners of land to their daughter and son-in-law by way of dowry on the occasion of their marriage purported to "gift and make over to the said two persons in paravani" certain lands and houses. The deed proceeded to provide that the donees "are empowered to possess up to the end of their lives" and that after the death of the donees "the heirs, descendants, executors, and administrators of both of them are empowered to possess for ever and do anything they please with them", and that the donors, "their heirs, descendants, administrators, or executors cannot hereafter exercise any power or lay any claim with respect to" the lands gifted.

Held, that under the above gift the donees took only a life estate in severalty with remainder to the children to be born of the marriage.

The daughter, one of the doneees, having died intestate and without issue of the marriage—

Held, that on her death a half share of the property reverted to the donors, and that neither her administrator nor the surviving donee had any interest in that half.

Keppitipola Ratemahatmaya and his wife on the occasion of the marriage of their daughter Loku Menika with the defendant settled on them a number of lands as dowry. The deed, which was in the Sinhalese language and bore date June 2, 1885, purported to "gift and make over in *paravani*" the lands numerated therein to Loku Menika and the defendant, and it then provided that the donees "are hereby empowered to posses the above mentioned high and low lands, houses, and plantations from this day up to the end of their lives", that after the death of the donees "the heirs, descendants, executors, and administrators of both of them are empowered to possess all the abovementioned for ever and do anything they please with them", and that the donors, "or their heirs, descendants, administrators, or executors cannot hereafter exercise any power or lay any claim with respect to the abovementioned high and low lands, houses, and plantations".

Loku Menika died intestate and without issue on January 25, 1886. The plaintiff in this action having taken out letters of administration to her estate sued the defendant to recover an undivided half share of the lands and mesne profits, alleging that the defendant had remained in possession of the entirety of the lands since the death of Loku Menika. The defendant pleaded that he was entitled to the lands jointly with his wife Loku Menika under the deed of gift, that on her death her interest survived to him, and that the plaintiff as administrator of her estate had no right to the possession of any share of the lands.

The district judge gave judgment for the plaintiff, and the defendant appealed.

Dornhorst for the appellant.

Seneviratne (*Wendt* and *De Saram* with him) for the plaintiff.

Cur. adv. vult.

On December 15, 1892, the following judgments were delivered:—

LAWRIE, J.—I construe the deed as giving to each of the two donees no more than a life-rent of one-half of the lands with remainder to the children to be born of the marriage. On the death of the wife her life-rent came to an end, and she had no estate in these lands which she could have dealt with by will, and no estate in them passed to her heirs *ab intestato* on her death or to the administrator of her intestate estate when he obtained letters of administration.

Whatever be the rights of her surviving husband and of the donors respectively, it is, in my opinion, clear that on Loku Menika's death all her interest in the land came to an end, and that the administrator has no title to possession or to a declaration of title, and that this action by the administrator must be dismissed.

The question, whether the deed of gift provides that the survivor of the spouses shall have a life-rent of the

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whole of the lands, is probably one of more difficulty than I feel it to be. My construction of the deed is that there is no gift of the life-rent of the whole to the survivor. I read the deed as providing that on the death of either spouse without issue of the marriage the right to posses that half of the lands life-rented by the deceased reverted to the donors, who then became entitled to posses jointly with the survivor, and that when in course of years the survivor himself shall die the half now possessed by him will also revert to the donors or to their heirs, executors, or administrators.

I am of opinion that the Ordinance relied on by the learned district judge is not applicable. The Ordinance No. 21 of 1844, section 20 (repeated in No. 10 of 1863, section 18), refers to property which shall belong to two or more persons jointly. Here the lands did not belong to the husband and wife jointly: they had but a life-rent with remainder to the children.

Whether the life-rent of either spouse survived to the other must depend on the terms of the deed of gift, and after repeated consideration I cannot read it as expressly enlarging the gift of a life-rent of a half to the gift of life-rent of the whole to the surviving spouse, nor do I find words which imply that such was the intention of the donors.

On the ground that the administrator of the deceased Loku Menika has no title to the lands, I would set aside the judgment and dismiss the action with costs.

Withers, J.—I agree that the action should be dismissed, on the ground that plaintiff as administrator has no *locus standi*. As my brother points out, the plaintiff as administrator is pursuing a shadow; for, with the death of the intestate, her interest in all the lands perished. Hers at the most was an estate for life, and assuming the estate for life to be a common estate in Loku Menika, the fee at the expiration of that estate, dying as she did without issue of the marriage, reverted to the settlers.

Reversed.

———:o:———

Present:—Lawrie and Withers, JJ.

(*March* 14 and 22, 1893.)

D. C. Badulla, No. 27,776. } Pitche Bawa v. Mesra Lebbe.

Civil Procedure—"Summary procedure"—Petition—Civil Procedure Code, sections 91, 282.

The "summary procedure" provided by Chapter XXIV. of the Civil Procedure Code can only be adopted in cases to which it is expressly made applicable by the Code.

An application by an execution-creditor for an order confirming a sale, under section 58 of the Fiscals Ordinance, 1867—

Held to have been properly made by motion, under section 91 of the Civil Procedure Code.

The defendant appealed against an order confirming, on plaintiff's motion, an execution sale of defendant's land held on December 2, 1885. The application was made on December 19, 1892, by motion supported by affidavit, and was allowed by the district judge, after hearing the defendant.

Peris (*Bawa* with him), for the appellant, contended that the application should have been by petition of summary procedure under chapter XXIV. of the Code. (*D. C. Colombo*, No. 56,886, 1 S. C. R. 187.) They relied on the analogy of an application under section 282 of the Code to set aside an execution sale, and argued that the mention in that section of a "petition", in which "respondents" were to be named—terms proper to "summary procedure"—indicated an intention that the procedure provided by Chapter XXIV. should be followed.

Wendt (*VanLangenberg* with him), for the plaintiff, submitted that the application had been regularly made by motion. Wherever the Code intended that the "summary procedure" should be followed, it was careful to say so, as in section 478, 481, 491, 493, 524, 530, 537, and many others; and the mere mention of a "petition" and "respondents" did not render the really cumbersome process of the "summary procedure" obligatory.

Cur. adv. vult.

On March 22, 1893, the following judgments were delivered:—

Lawrie, J.—I think the order confirming the sale is right. While I am of opinion that it was competent for the plaintiff to make this application under section 91, I think it would have been better had he proceeded by summary procedure under Chapter XXIV. and had in a petition set forth the facts on which he based his application. The motion of December 19, 1892, was bald and unsupported by statement or affidavit, but these defects were cured by the subsequent proceedings, and the district judge ultimately had now sufficient materials before him to justify the order which he made.

Withers, J.—I think the order declaring plaintiff entitled to the fiscal's conveyance is right and should be affirmed. As to the merits, the defendant has shown no good cause why such an order should not

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be made. As to the procedure, that was in accordance with section 91 of the Civil Procedure Code, which I think applies to a case of this kind. Petitions by way of summary procedure are proper only in cases expressly provided for by this Code.

Affirmed.

———:o:———

Present:—LAWRIE, J.

(*March* 16 *and* 29, 1893.)

Municipal Court Colombo, No. 5,104. } AKBAR v. SLEMA LEBBE.

Public street—Encroachment—Obstruction in street —Verandah—Ordinance No. 7 *of* 1887, *section* 175 *—user by public—Evidence—Survey—Ordinance No.* 4 *of* 1866, *section* 6.

The Municipal Councils Ordinance No. 7 of 1887, section 175, makes it an offence to set up any obstruction or encroachment in any street.

In a charge under the above enactment against the owner of a house by the side of one of the streets in the Pettah of Colombo, where the alleged obstruction consisted in the defendant having closed up with walls the two sides of the verandah along the side of the street—

Held **that, the verandah *prima facie* being private property, no obstruction to a street within the meaning of the Ordinance was proved in the absence of evidence of the user of the verandah by the public as a thoroughfare.**

An old survey of 1844 made by a person described as Town Surveyor and since deceased, in which the verandah in question was marked as an encroachment, having been received in evidence—

Held **that, even if the survey was admissible without proof of its genuineness or correctness, under section 6 of Ordinance No. 4 of 1866, though it did not purport to be signed or made by the Surveyor-General or an officer acting on his behalf, it did not prove that the verandah was an encroachment on the street, inasmuch as a survey, though it might prove the position and size of roads, buildings, and other objects delineated thereon, was not proof of any matters beyond the special skill or knowledge of the surveyor, such as that any particular part was a "reservation" or an "encroachment".**

The facts of the case sufficiently appear in the judgment of the Supreme Court.

The defendant appealed from a conviction.

Dornhorst for the appellant.

Wendt (*De Saram* with him) for the complainant.

Cur. adv. vult.

On March 29, 1893, the following judgment was delivered :—

LAWRIE, J.—Section 175 of the Ordinance No. 7 of 1887 enacts, "whoever after this Ordinance comes into operation builds any wall or erects or sets up any fence, rail, post, or other obstruction in any street *** shall be liable to a fine not exceeding one hundred rupees".

The charge against this accused is that "he did in or about the month of August, 1890, in the Pettah, Colombo, within the Municipality of Colombo, erect or set up an enclosure or obstruction in the street called Third Cross Street, Pettah, and adjacent to premises Nos. 1, 2, 3, and 4 in the said road, and thereby encroached on the said street to the extent of 33 perches and thereby committed an offence punishable under section 175 of Ordinance No. 7 of 1887".

The proof led in support of this charge by the complainant is meagre. However, I think I may take the following facts as established :—That the houses Nos. 1, 2, 3, and 4, Third Cross Street, Pettah, belong to the accused, that the roof of these houses always extended some distance beyond the wall, and that the space between the wall of the houses and the outside pillars is under a roof, which the accused keeps in repair, and that he maintains the space below it between the walls and the road. Mr. Martinus, a witness for the prosecution, says, "to all appearance the verandah is private property". It seems that about five years ago the accused built a low wall at either end of this space, and that in or about August, 1890, he raised these low walls and converted the space under the roof into rooms.

This is the obstruction complained of. The accused's defence is that the walls are built on his own ground. The complainant says they are built on the street. It lay on the conplainant to prove that the walls were an obstruction to the street.

I do not believe that the Municipality ordered this prosecution without having at command ample evidence, that up to a comparatively recent time the public used this verandah space as a thoroughfare. With such a use of verandahs we are familiar in Colombo, especially in the Main Street of the Pettah, and evidence of members of the public that they had constantly walked over and used this particular verandah would not have been rejected as improbable.

But the Municipality did not adduce this kind of evidence of user by the public. It preferred to rest the prosecution on proof of a survey and of the extent of the land conveyed by the accused's title deeds, whereas the real question was—Had the accused obstructed the public in the use of part of one of the streets of the town? Only one witness gave evidence as to any user by the public of this space. Mr. Martinus said that he had known Third Cross Street, Pettah, from his childhood; that in 1886 the veran-

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dah opposite Nos. 1, 2, 3, and 4 was open—it is now enclosed. He said he recollected the time when the whole verandah was open to foot passengers. Counsel for the accused cross-examined Mr. Martinus, and the witness said: "About five years ago the verandah opposite Nos. 1, 2, 3, and 4 was open to the public, and I have walked through." No one else says that he ever walked in or over that verandah. There is no other evidence of this apparently private property having been used as the street. The Municipality founds on a survey said to have been made in 1844 by Mr. Pickering, Town Surveyor. It is not necessary that I should reject that survey as inadmissible, though I find no proof of its genuineness or of its correctness, which warrants its admission. The surveys, which are admissible in evidence, if signed by the Surveyor-General, under the Ordinance No. 4 of 1866, are surveys made by the Surveyor-General or his officers. The survey does not bear that Mr. Pickering was a member of the Surveyor-General's Department.

Assuming that the survey is admissible, it may prove the position and size of the roads and buildings delineated thereon, but it does not prove matters beyond the special skill or knowledge of a surveyor. If on a survey I find certain conventional figures, such as a circle filled with blue, or a number of dark lines or parellel lines red or blue, and if I find on the margin that the surveyor states that he means thereby to represent a well or a marsh or a rock or a road or a river, I take the survey to prove that the well or marsh, the rock, the river or road, was there when the survey was made; but if I find such notes as "East, Don John's property" or "reservation" or "encroachment", the survey does not prove the truth of these allegations. These are not records of the observation of the surveyor. They are statements of hearsay or the results of calculations made by him, and until we know the grounds for his opinion we cannot take that opinion as of probative value.

Even if we admit not only the surveyor, but Mr. Pickering's opinion as to encroachment, it would appear that as early as 1844 he thought that the verandah opposite Nos. 1 and 2, Third Cross Street, was an encroachment, and if the owners of these houses have successfully encroached for the 46 years from 1844 to 1890, the Municipal prosecutor is a little out of date. I acquit the accused, because there is not sufficient evidence that the verandah of the house was ever used by the public as part of the street.

Set aside.

Present:—Withers, J.

(*February* 9 *and* 16, 1893.)

P. C. Kandy, No. 15,118. } Ranghamy v. Bodia.

Criminal law—Mischief—Cutting and wounding a trespassing animal—Ceylon Penal Code, section 408—Evidence.

Cutting a bull with a katty while trespassing on a man's land, even when coupled with the fact of ill-feeling existing between the accused person and the owner of the animal—

Held, not necessarily to amount to the offence of mischief within the meaning of section 408 of the Ceylon Penal Code.

The facts of the case are sufficiently disclosed in the judgment of the Supreme Court.

The defendant appealed from a conviction.

Wendt for the appellant.

Cur. adv. vult.

On February 16, 1893, the following judgment was delivered:—

Withers, J.—The evidence for the prosecution discloses the fact that plaintiff's bull was trespassing in accused's garden; that he chased it to drive it out of his garden; and that he made a cut at it with his katty as it jumped over the fence into the adjoining garden. Even the additional fact found by the magistrate, that the accused at the time was on bad terms with the complainant, does not necessarily prove that he committed the offence of mischief. The cut either maimed the animal or rendered it uselesss no doubt, but it does not follow that the accused slashed at the animal with intent to cause or knowing that he was likely to cause damage to any person.

This case falls within the principle of a class of cases which have come before this court for decision. In Grenier's Police Court Reports there are at least three cases where it was held not to constitute the offence of cruelty, under Ordinance No. 7 of 1862, to severely cut an animal which was trespassing on the land of the person charged with the offence.* Again, it was held in *P. C. Chilaw, No.* 1,307, 9 S. C. C. 109, that to shoot a cow trespassing on your land is not necessarily mischief. I do not of course mean to say that in no circumstances could a man not be found guilty of commiting mischief to a trespassing animal. I do not think it proved in this case. The conviction must be set aside and the accused acquitted.

Set aside.

* *P.C. Galle, No.* 82,377, Gren. (1873) p. 4.
P.C. Panwila, No. 14,454, Gren. (1873) p. 62.
P.C. Galle, No. 85,328, Gren. (1873) p. 85.—Ed.

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Present:—LAWRIE AND WITHERS, JJ.

(*March* 7 *and* 14, 1893.)

D. C. Galle, No. 549. } PUNCHI APPU *v.* BABANCHI.

Civil Procedure—Assignment of judgment—Substitution of assignee as plaintiff—Discretion of Court—Non-service of summons—Practice—Civil Procedure Code, section 339.

Under section 339 of the Civil Procedure Code the Court has a discretion to grant or refuse the application of an assignee of a decree to have his name substituted in the record of the decree for that of the original plaintiff and to have the decree executed, but such discretion should be exercised reasonably and on sufficient material.

Non-service of the original summons and decree *nisi* on the defendant is not of itself a good cause for disallowing such an application.

In this case judgment by default had been entered against the defendant for a certain sum of money. Afterwards, one Babanis de Silva as assignee of the judgment applied by petition, under section 339 of the Code, to have his name substituted as plaintiff on the record and to have the decree executed. An interlocutory order appointing a day for the consideration of the application having been made, the defendant opposed the application on the ground that he had not been served with the original summons or the decree *nisi* and that he had no information of the pendency of the action till service of the interlocutory order in the present proceeding. Evidence was thereupon heard in support of the defendant's allegations, and the District Judge not being satisfied that the summons and decree *nisi* had been served refused the application of the assignee, who thereupon appealed.

Dornhorst for the appellant.

Cur. adv. vult.

On March 14, 1893, the following judgments were delivered:—

LAWRIE, J.—A District Court has a discretion to grant or to refuse a motion by an assignee of a judgment to be substituted plaintiff in lieu of the original judgment-creditor, the assignor. This was the law prior to the passing of the Procedure Code (see *D. C., Galle*, No. 53.288, 8 S. C. C., 100) and it still remains the law. Section 339 of the Procedure Code provides that the motion shall be allowed only if the Court thinks fit. But this exercise of judicial discretion must be founded on sufficient material and on sound and intelligible reasons.

Here the learned District Judge has given a reason for refusing to substitute the applicant, which I venture to think is a bad reason. It is that he entertains doubt whether the summons and notice of decree *nisi* were served on the defendant. It is not disputed that a judgment was pronounced, that the judgment-creditor assigned that judgment to the applicant, and that the judgment is not yet satisfied. It is not said that the judgment is stale or that the assignee comes too late. There is no averment of fraud in taking the assignment, and no equitable consideration has been submitted to the Court which would lead to the conclusion that the defendant would be prejudiced by the substitution of the one judgment-creditor for the other. All that is stated against the application is that the debtor received no notice of the proceedings which preceded the entering of judgment against him. If that be so, he has his remedy under section 87. This is a good decree, but being a decree by default the defendant has right to apply to have it set aside. Clearly the burden of showing that he was prevented from appearing to shew cause against the notice for making the decree absolute lies on him and not on the judgment-creditor or his assignee. This case differs from one which we decided a few days ago, in which we refused execution on a decree though the decree still subsisted and had not been set aside. There, on the face of the judgment itself, it was a bad decree. It expressly stated *in gremio* that it had been pronounced on a public holiday, and it reserved a right to the defendant to appear and be heard without affidavit. Here the judgment is on the usual terms and contains no internal defects. It is assignable, and the law permits the assignee to enjoy the rights of the assignor. And just as I would say that it is no answer to an application for execution by a judgment-creditor of a subsisting judgment, that the defendant had received no process, so I hold that it is no better answer to this application by an assignee.

I would set aside the order and send the case back to the District Court with liberty to the defendant, within ten days after the receipt of the record by the District Court, to move to set aside the decree in the manner provided by section 87. If the defendant fails to make or to succeed in such an application, the District Court will thereafter of new consider the application of the assignee.

The appellant is entitled to the costs hitherto incurred by him, both in the District Court and this Court.

WITHERS, J.—I agree. I think it a proper discretion in this case to let the assignee's name be substituted as plaintiff on the record. If defendant fails

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to avail himself of the liberty allowed him or, exercising it, fails to induce the court to set aside the decree, the plaintiff-assignee will take out execution in the usual course.

Set aside.

———:o:———

Present:—LAWRIE, A.C.J., AND WITHERS, J.

(*May* 26 *and* 30, 1893.)

D. C. Ratnapura, No. 267. } SOYZA V. WIRAKOON.

Civil Procedure—Realisation of assets—Seizure of money due to judgment-debtor—Several decree-holders—Claim to concurrence—Civil Procedure Code, section 352, *and sections* 230, 279.

The mere seizure by the fiscal of money due to a judgment-debtor in the hands of a third party is not "realisation" of the asset within the meaning of section 352 of the Civil Procedure Code, and it is open for other creditors who have applied at that stage for execution of money decrees against the same judgment-debtor to claim in concurrence.

The defendant in this action was also defendant in action No. 1,004 of the Court of Requests, Ratnapura, in which one Wickramasinghe obtained judgment against him for a sum of Rs. 35·14, issued writ, and on December 2, 1892. seized in the hands of the Government Agent of Ratnapura a sum of Rs. 35·14 out of a larger amount due from the Government Agent to the judgment-debtor. The plaintiff in this action obtained judgment for Rs. 146·50 against the defendant on December 12, 1892, and issued writ to the Fiscal for execution on December 18, with intructions to seize the same money in the hands of the Govenmeat Agent. On December 14, on the application of the judgment-creditor in some other action, the Court ordered the execution of the writ in this action to be suspended, but in the meantime the Fiscal appeared to have also seized the money under this writ. On January 28, 1893, neither writ having been proceeded with further, the plaintiff obtained a notice on the judgment-creditor in the C. R. case No. 1,004 to shew cause why he should not be allowed to concur in the amount seized under writ in the latter case. The matter having come on for consideration, the District Judge dismissed the plaintiff's application, on the ground that the asset had been realised before the plaintiff applied for execution of his decree.

The plaintiff appealed.

Dornhorst for the appellant. The asset in question, viz., the debt due to the common judgment-debtor by the Government Agent, was not realised when plaintiff applied for execution of his decree. Seizure of a debt is not "realisation" of it, as contemplated by section 352 of the Code, and the debt cannot be said to be realised until the amount is received by the Fiscal or paid into Court. The plaintiff is therefore entitled to share in the amount seized, and his application for concurrence should have been allowed.

Sampayo for the decree-holder in C. R. No. 1,004. In the case of a distinct sum of money in the hands of a third party seizure amounts to realisation, and is covered by the expression "or otherwise" in section 352. If, however, the asset in this case was not thus realised, then the plaintiff's application was premature, because a claim in concurrence can only be to funds in Court or under the control of the Court. This is also shewn by the expression "the Court by which such assets *are held*". The asset in this instance is not yet held by the Court. Further, the execution of the plaintiff's writ had been suspended by Court, and this application being one in process of execution the plaintff was out of Court.

Dornhorst in reply.

Cur. adv. vult.

On May 30, 1893, the judgment of the Court was delivered by :—

WITHERS, J.—The judgment-creditor in *C. R. Ratnapura No.* 1,004 was summoned herein to shew cause against the claim of the District Court judgment-creditor to concurrence in a sum of Rs. 35·14 seized apparently under both writs (see Fiscal's return to opponent's writ in the C. R. case No. 1.004) in the hands of the Government Agent. He succeeded in opposing the District Court execution-creditor's claim on the ground that this asset had been already realised and that consequently the aggrieved claimant was too late in preferring his claim. But in what sense can this asset be said to have been realised? It is only prior to realisation of assets "by sale or otherwise", according to section 352 of the Civil Procedure Code, that a claim in concurrence can be preferred. It certainly has not been realised by sale in the manner in which *choses in action* of this nature are to be sold according to section 279 of the Code; nor has it been realised in the way provided by section 230 of the Code. To shut out a judgment-creditor who applies to the Court by which an asset is held for execution of a money decree against a common judgment-debtor (to use the words of section 352 before referred to) realisation must have reached the stage of appropriation to another decree-holder, a stage which has clearly not been reached here. The parties cannot have this asset divided because it is not realised. Regarding this as a contest about the right to claim a share of the asset when realised,

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I think the District Court executor-creditor has proved as good a right as the Court of Requests execution-creditor.

I would set aside the order appealed from and declare the District Court execution-creditor entitled to a share *pro rata* as between him and his opponent when the time is come for the amount to be divided on realisation. He will have his costs in appeal.

LAWRIE, A. C. J., concurred.

Set aside.

———:o:———

Present :- LAWRIE, A. C. J., AND WITHERS, J.

(*May* 26 *and* 30, 1893.)

D.C. Colombo, Testamentary, No. C 218. — In the matter of the estate of S. L. M. AHAMADO LEBBE MARKAR deceased. MAHAMADO ALLI v. SELLA NATCHIA.

Civil Procedure—Administration—Rights of widow to administration—Next of kin—Conflict of claims —Enquiry as to assets—Costs—Civil Procedure Code, section 523.

A widow is, under section 523 of the Civil Procedure Code, entitled to letters of administration to her deceased husband's estate in preference to the next of kin, notwithstanding that the Court is satisfied, on a conflict of claims to administration between her and one of the next of kin, that she has been a party to an attempt to deprive the estate of some of its assets.

Any enquiry as to whether any particular asset is part of the estate and as to the conduct of the widow with reference thereto is premature at the stage at which such conflicting claims to administration are considered.

The petitioner in this matter, who was son-in-law of the deceased, included in the list of property attached to the petition certain goods and fittings in a shop and a horse and carriage as property belonging to the estate. Order *nisi* declaring him entitled to administration having been issued, the widow of the deceased, who had been named as first respondent in the petition, appeared to show cause and objected to grant of administration to the petitioner, and filed a counter petition for a grant of administration to herself. The deceased and all the parties were Mohammedans. In the affidavit in support of her petition the widow denied that the shop goods and fittings and horse, referred to in the original applicant's petition, belonged to her husband and alleged that they were the property of two of her sons, Samsi Lebbe and Abdul Hamid, who were the second and third respondents to the original petition. Upon this the District Judge ordered an enquiry as to the value of the estate, in order to determine what security should be given by the person who might ultimately be appointed administrator, and thereafter framed issues as to whether the property in question belonged to the deceased or to his two sons, and evidence was heard accordingly. In the result the District Judge held that the property in question did belong to the deceased, and being of opinion that the widow had sought to deprive the estate of this property in order to benefit her sons, the second and third respondents, at the expense of her minor children the other respondents, ordered letters of administration to be issued to the original petitioner, and condemned the widow as well as the two sons to pay the petitioner the costs of the enquiry.

The widow and the two sons appealed.

Dornhorst for the widow.

VanLangenberg for the sons.

Wendt (*Morgan* with him) for the petitioner.

Cur. adv. vult.

On May 30, 1893, the following judgments were delivered :--

LAWRIE, A. C. J.—The reasons given by the learned District Judge for refusing to give letters of administration to the widow are insufficient. By law she is to be preferred to the next of kin, much more is she to be preferred to a son-in-law, a stranger in blood and estate to the deceased.

I am of opinion that it was premature to enquire and to decide whether the shop goods and fittings in No. 20, Main Street, and the horse were part of the assets of the deceased. These questions can satisfactorily be tried only between the administrator and those who may hereafter shew an interest to object to the manner in which she may deal with that property.

I would set aside the order of the District Judge and the decree absolute. I would find the petitioner Mohamed Ismail Mohamedo Alli liable in all costs hitherto incurred by the respondents, and I would remit the case to the District Court to appoint the widow administratrix on her finding security and taking the oath of office.

WITHERS, J.—I too think that the widow has a better claim to be declared entitled to take out letters of administration to this estate, and that the order making the order *nisi* in respondent's favour absolute should be dismissed with costs. And so let it be declared.

Before letters are actually committed to her she will have to take the oath of office and file an inventory of the effects verified on oath or affirmation.

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The asset so hotly fought over she omits at her risk, but I venture to think with the Chief Justice that all the evidence on this point was taken in vain because it was not a proper time to determine the question. I find there is a decertal order directing the second and third respondents to join with the widow in paying the petitioner's costs of this contentious enquiry. It cannot be said for a moment that this was an *ex parte* order, and in any event it would be wrong to saddle them with the costs of an enquiry which they never asked for.

The order directing them to pay costs must be set aside, with costs.

Set aside.

———:o:———

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

(*May* 26 *and* 30, 1893.)

D. C. Colombo, No. C 3,677. } Muttiah v. Perumal Chetty.

Civil Procedure—Appeal—Motion to strike out a count in the plaint—Proxy—Proctor's authority to sue.

An order disallowing a motion with liberty to renew it at a future time is not an appealable order.

Where a proxy authorized the proctor to sue on a promissory note, but the plaint, when filed, also contained a money count for the consideration of the note—

Held, by Withers, J., that the proxy was a sufficient authority to introduce the money count in the plaint.

The plaintiff in this action declared upon a promissory note dated July 4, 1892, for Rs. 3,000, payable on demand with interest at 12 per cent. The plaint also contained a count as follows: "The defendant is likewise indebted to the plaintiff in the sum of Rs. 3,000, being money lent by plaintiff to defendant at Colombo on the 4th July, 1892, which the defendant promised to repay on demand with interest thereon at 12 per cent." The plaint then alleged demand of payment and default thereof, and proceeded to state: "There is now due from defendant to plaintiff the sum of Rs. 3,206, to wit, Rs. 3,000 being principal and Rs. 206 being interest thereon from 4th July, 1892, to 30th January, 1893." The plaint concluded with a prayer for judgment for "the said sum of Rs. 3 206, with further interest on Rs. 3,000, &c."

The material portion of the proxy granted by plaintiff to his proctor was as follows: "and by virtue hereof to sue and recover from Ana Perumal Chetty the sum of Rs. 3,000, due on his promissory note dated 4th July, 1892, with interest thereon at the rate of 12 per cent. per annum from 4th July, 1892, until payment in full, and cost of suit."

The defendant appeared to the summons by a proctor, who moved for and obtained 8 days time to file answer. Subsequently this proctor's proxy was withdrawn and a new proxy given to another proctor, who appeared on the last of the 8 days originally allowed for filing answer and moved for a notice on the plaintiff to shew cause why the money count in the plaint should not be struck out on the ground that the proctor who filed the plaint had no authority to sue on such a cause of action. The learned District Judge disallowed the motion, and the defendant appealed.

Wendt (*Sampayo* with him) for the appellant.

Dornhorst for the plaintiff.

Cur. adv. vult.

On May 30, 1893, the following judgments were delivered:—

Lawrie, A. C. J.—The defendant, on February 22, moved for a notice on the plaintiff to shew cause why the fourth paragraph of the plaint should not be struck out and for eight days' time to file answer. The Court took time to consider, and on February 24 it refused *in hoc statu* to allow the motion, but the District Judge intimated that the defendant might renew the motion at the expiry of a week. Against this order the defendant appealed.

This is not an appealable order. Let the appeal be rejected and let the case go back. Defendant to pay costs of the appeal.

Withers, J.—In my opinion this is not an appealable order. Further, I think the motion was made too late. It is a motion that ought to have been made at the very first possible opportunity, an opportunity which had gone by before the change of proctors.

I found and find it difficult to follow the argument addressed to us that the proxy does not authorise the introduction of this count in the fourth paragraph of the plaint. It is the ordinary common money count for the consideration of a bill or note which forms the subject of the special count and which may fail by reason of some defect in the note itself, or otherwise.

I quite agree that the appeal should be dismissed with costs.

Appeal dismissed.

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Present:—LAWRIE, A. C. J., and WITHERS, J.

(*May* 26 *and* 30, *and June* 2 *and* 6, 1893.)

D. C. Colombo, (Testamentary) No. 284 C. } In the matter of the estate and effects of ALEEMA UMMA deceased.
NEYNA v. NEYNA.

D. C. Colombo, (Testamentary) No. 285 C. } In the matter of the last will and testament of FERNANDO deceased.
FERNANDO v. FERNANDO.

Civil Procedure—Probate—order nisi*—Costs—Appeal—Form of objection to decree by respondent—Civil Procedure Code, Chapter* XXXVIII. *and sections* 758 *and* 772.

A respondent to an appeal, who wishes under section 772 of the Civil Procedure Code to take an objection to the decree which he might have taken by way of appeal must furnish to the Supreme Court before the day of hearing a statement of the grounds of objection, set forth in duly numbered paragraphs. It is not sufficient merely to serve on the appellant notice that certain specific objections will be taken.

Upon the day for shewing cause against an order *nisi* made under section 526 of the Civil Procedure Code, the respondent shewed as cause that no copy of the petition had been served together with the order *nisi* as required by section 379. The District Court held that the petition should have been so served, but, without discharging the order, enlarged the time for shewing cause and directed the petition to be served in the meantime, making each party bear his own costs, as the practice of the court had been not to serve the petition, and the question was now raised for the first time.

Held that the court had a discretion to enlarge the time instead of discharging the order, and that such discretion had been properly exercised.

Held also that the respondent having successfully resisted making the order absolute, was entitled to his costs, and there was no sufficient reason for departing from the rule that costs follow the event.

These were applications under Chapter XXXVIII. of the Civil Procedure Code. In *D. C. Colombo, No.* 284 C, the application was made by the father for letters of administration to his deceased daughter's estate, and in *D. C. Colombo, No.* 285 C, the application was for probate, the petitioner being the husband and executor. Order *nisi* under the provisions of the Code was issued and served in both cases on the respective respondents. On the returnable day of the order *nisi* the respondents in the respective cases appeared and shewed cause against the same being made absolute, and among other objections contended that the procedure was irregular inasmuch as copies of the petitions had not been served with the respective orders *nisi*, as required by section 379 of the Code, relative to summary procedure. The District Judge upheld the objection, but extended the time for shewing cause and ordered copies of the petitions to be served on the respective respondents, and also ordered that each party should bear his own costs. Against this order the respondents appealed.

The appeals and the records having been forwarded to the Supreme Court in due course, the petitioner, the respondent on the appeal in *D. C. Colombo, No.* 285 C, acting under the provisions of section 772 of the Civil Procedure Code, served the appellants' proctor with the following notice:—

In the Supreme Court of the Island of Ceylon,

D. C. Colombo, Testamentary, No. 285 C. { In the matter of the Last Will and Testament of HEWADEWAGE RENGINA FERNANDO late of Fourth Cross Street in the Pettah of Colombo deceased.

Manenadewage Magiris Fernando of Fourth Cross Street in the Pettah of Colombo.
Pettioner and Respondent
vs.

1. Hewadewage Theodoris Fernando of Regent Street, Cinnamon Gardens.
2. Hewadewage Denis Fernando of the Pettah, Colombo.
3. Hewadewage Welo Fernando wife of R. J. Fernando of Peliagodde.
4. Hewadewage Siman Fernando of Galkisse.
5. Hewadewage Manuel Fernando of Galkisse.

Respondents and Appellants.

To

CHARLES PERERA, Esquire,
Proctor for the first, second, third, and fifth appellants abovenamed.

Sir,—Please take notice that upon the hearing of the appeal filed by your clients herein on the 22nd day of February, 1893, against the order of the Colombo District Court made in this case on the 17th February 1893, the petitioneer respondent will object to the order appealed against so far as it decides that it is necessary in an application like that of the petitioner to serve upon the respondents copies of the petition or application, and will contend that the petitioner had fully complied with the requirements of the Civil Procedure Code in respect of his application.

Yours faithfully,
JNO. CADERAMAN.
Proctor for Magiris Fernando,
the abovenamed petitioner respondent.

Colombo, May 4th, 1893.

A similar notice was served on the other appellant in the case.

The appeals came on for argument on May 26.

Dornhorst (*Morgan* with him) for the appellant in *D. C. Colombo, No.* 284 C.

There was no appearance for respondent on this appeal.

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Dornhorst (*Sampayo* with him) for the first, second, third, and fifth appellants in *D. C. Colombo, No.* 285 C, after arguing their appeal, objected to the respondent being heard on the points raised in the notice which had been served on the appellants, and submitted that the requirements of section 772 of the Civil Procedure Code had not been complied with. That section enacted that the objection should be in the form prescribed under head (*e*) of section 758, which dealt with the requisites and form of a petition of appeal. The notice must therefore take the form of a petition embodying in it the requirements of head (*e*) of section 758, and must be a matter of record in the Supreme Court and served on the appellants through the Court. These requirements not being complied with the respondent could not be heard on his objection.

Grenier (*de Saram* with him) for the fourth respondent took the same objection.

Wendt (*Morgan* and *Seneviratne* with him), for the petitioner, contended that no petition was necessary. All that section 772 required was that a notice in writing of the objection should be given to the appellant or his proctor, and that the objection should be in the form prescribed under head (*e*) of section 758. Head (*e*) of the latter section made no mention of a petition but only of a plain and concise statement of the grounds of the objection, and he submitted that the notice in question did contain a plain and concise statement of the points intended to be raised. Further, the section required the notice to be given to the party, intending merely to warn him that points of which he had already had full notice in the court below would again be pressed in appeal. There need, therefore, be nothing filed of record in court or served through the court.

Dornhorst in reply. Section 772 of the Civil Procedure Code corresponds to section 561 of the Indian Civil Procedure Code, and it has been held in India that such an objection should be in the form of a memorandum of appeal and should bear the proper stamp.

The court took time to consider this preliminary point, and on May 30, 1893, the following judgments, dissallowing the respondent to be heard on his objections, were delivered :—

LAWRIE, A. C. J.—A respondent who intends to take an objection to the decree which he could have taken, but has not taken, by way of appeal, must before the day of hearing furnish to this court a plain and concise statement of the grounds of objection to the judgment, decree, or order appealed against, such statement to be set forth in duly numbered paragraphs distinctly written in the English language upon good and suitable paper. We cannot hear Mr. Wendt because no such statement lies before us.

WITHERS, J.—On the point reserved for our consideration I am against Mr. Wendt. I have no doubt that the "objection" in section 772 of the Code should take the substance of paper and wear the form prescribed for it.

On June 2 the case came on for argument on the appeal of the respondents.

Dornhorst (*Sampayo* with him) submitted that the District Judge had no power to enlarge the time for shewing cause. The petitioner's procedure having been irregular, and good cause having been shewn against making the order *nisi* absolute, that order should have been discharged. Even if the order had been properly made, the respondents having successfully shewed cause should have got their costs, which should have followed the event (*D. C. Colombo, No.* 491 C, 9 S. C. C. 126). The defect in the procedure was one for which the petitioner was distinctly responsible. (*Landars* v. *Allen*, 6 Sim. 620.)

Grenier (*Pereira* with him), for the other appellant, relied on the same grounds.

Wendt (*Morgan* and *Seneviratne* with him) contended that the court had power to make the order enlarging the time and giving leave to serve the petition. The Code nowhere required the order *nisi* to be discharged on any little defect of procedure, but only where the *prima facie* proof of material allegations of the petition had been rebutted (section 534). The order for costs also was right, as the petitioner had only followed a practice obtaining in the court since the introduction of the Civil Procedure Code, and had only done what was expressly directed by the order on the petition, viz., that the order *nisi* alone should be served. In *D. C. Colombo, No.* 491 C, there had been no settled practice that had been followed. *Landars* v. *Allen* did not apply, as there it was a question of the form of an order of court, which it was said the party should have seen properly drawn up.

Dornhorst in reply.

Cur. adv. vult.

On June 6, 1893, the following judgments were delivered with regard to the appeal in *D. C. Colombo, No.* 285 C :—

LAWRIE, A. C. J.—I am of opinion that the District Judge exercised a right discretion in extending the time for shewing cause and in allowing a copy of the

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petition to be served on the respondents rather than discharge the order *nisi*. I am against the appellants on the first ground of their appeal. I am with them on the second ground. I think they were entitled to the costs of the discussion in which they successfully resisted the making absolute the order *nisi*.

I would vary the order of February 17 by finding the respondents entitled to the costs of that discussion. No costs of this appeal.

WITHERS, J.—Agreed.

On the same day the following judgments with regard to the appeal in *D. C. Colombo, No.* 284 C, were delivered:—

WITHERS, J.—An order *nisi* granting petitioner letters of administration to the estate of one Aleema Umma deceased was passed subject to the usual condition that it should take effect in the event of the respondent not shewing cause against it on the day appointed by the order for that purpose. The day originally appointed by the order was January 26, 1893, and on that day this respondent put in an appearance by his proctor stating that he had cause to shew against the order. The matter was adjourned to February 9, and then February 16 following. The cause shewn on this day was that a copy of the petition had not been served on the respondent. Whereupon the learned judge made order suspending the order *nisi* by extending it time for service on the respondent of copy of the petition on which the order was founded, in accordance with the requirements relating to matters of summary procedure, and he refused to direct the petitioner to pay this respondent's costs.

It is from this order that appeal has been taken. I very much question if this is an appealable order, but as counsel's attention was not directed to this point I shall say no more about it. I think the order was right and should be affirmed. The order *nisi* not having been duly served on this respondent, he was not bound to appear on the day appointed to shew cause against the order. He elected, however, to appear on that day, and having so elected he was bound either to shew cause against the order being made absolute on its merits, or to satisfy the court that the order *nisi* had been improperly granted in the first instance. He did neither the one nor the other, and the utmost indulgence he could expect was to have the service duly completed and time given him to shew cause thereafter. This is in effect what was done.

The case cited by respondent's counsel, *D. C. Colombo, No.* 491 C and No. 492 C (9 S.C.C. 126) does not appear to be in point. There the motion for judgment was successfully attacked. Here there was no direct attack upon the order *nisi* which *prima facie* had been properly made. The objection was limited to this, viz., that the order *nisi* had not been properly served. This is not the same as attacking the order on the ground either of a better claim to letters of administration on the part of the respondent or on the ground that the order was irregularly made in the first instance. Affirmed, costs according to order in *D. C. Colombo, No.* 285 C.

LAWRIE, A. C. J.—Agreed.

—————:o:—————

Present :—WITHERS, J.

(*September* 15 *and* 22, 1892.)

C. R. Panadura, No. 719. } FERNANDO *v.* THEMARIS.

Immoveable property—Interest in land—License to draw toddy—Possession—Notarial instrument—Ordinance No. 7 *of* 1840, *section* 2.

An agreement, by which an owner of land lets the cocoanut trees standing thereon for drawing toddy and which involves a license to enter upon the land for that specific purpose only, is not one affecting an interest in land and need not therefore be contained in a notarial instrument.

The facts are sufficiently disclosed in the judgment of the Supreme Court.

The defendants appealed from a judgment entered against them.

Peiris for the appellants.

Cur. adv. vult.

On September 22, 1892, the following judgment was delivered :—

WITHERS, J.—This is an action for trespass to land, and the defendants attempt to resist the claim for damages arising out of the alleged trespass by saying that they coupled twenty-five cocoanut trees on plaintiff's land under an agreement by which those trees were let to them to be tapped for toddy. The commissioner has held that this defence is not available in law to the defendants, because the agreement pleaded is one affecting an interest in land and was hit by our local statute of frauds. If the agreement was for the exclusive possession of the land, on which the trees stood, to enable the defendants to enjoy this profit *a prendre*, I should be disposed to agree with the commissioner. If, however, the license to enter this land is to extend to

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the purpose of drawing toddy from a certain number of coconut trees growing on it, then I think this license does not pass an interest in land. See this principle discussed in *C. R. Ratnapura, No.* 1,056, Ram. (1860-62) 102.

The judgment is therefore set aside and the case remitted for trial in due course. The defendants must have their costs in appeal.

Set aside.

———:o:———

Present:—LAWRIE, A. C. J., and WITHERS, J.

(*May* 9 *and* 16, 1893.)

D. C. Colombo, No. 2,533 C. } STORK v. ORCHARD.

Landlord and tenant—Action for rent—Misdescription of land demised—Representation as to acreage—Fraud—Reduction of rent—Reform of the instrument of demise—Defence—Counter-claim—Remedy.

In a question as to the defence to an action of covenant for rent arising out of the acreage of land demised being found to be less than that stated in the instrument of demise—

Held, per LAWRIE, A. C. J.—Where there is no fraud on the part of the lessor and the lessee gets the whole estate or *corpus* which he meant to take on lease, an error in the description of the property as consisting of so many acres does not entitle the lessee to a reduction of the rent. But where the lessee does not get the whole estate, he may claim either a proportionate reduction of the rent, or a recision of the contract as founded upon an error *in essentialibus*.

Per WITHERS, J.,—Irrespective of fraud, where a lease is *ad quantitatem* and the extent of land is found to be less than the lease purported to demise, the lessee is entitled to a reduction of the rent. He must, however, claim this relief by bringing the *actio locati* himself, or if he is sued by the lessor, he must affirmatively demand, by way of counter-claim, a reform of the instrument of demise as to the quantity of land and as to the amount of rent payable thereunder, and a diminution of the past and future rent. But in the absence of such counter-claim and the instrument standing unreformed, he has no defence to an action on the part of the lessor for payment of arrears of rent or for re-entry.

The plaintiff, as lessor to defendants of a coconut and tea estate known as Commilla Estate under an instrument of demise dated March 7, 1890, sued defendants for arrears of rent due for the quarters ending September 1, 1891, December 1, 1891, and March 1, 1892, and for declaration of forfeiture of the lease under the conditions of the instrument of demise.

The defendants, admitting the non-payment of the rent claimed, pleaded as follows:—"The defendants say that previous to and at the time of the execution of the said indenture the plaintiff represented to the defendants that the extent of tea under cultivation in the said estate was 80 acres and the plaintiff purported by the said indenture to lease to the defendants 80 acres of growing tea on the said estate, and the rent which the defendants agreed to pay to the plaintiff was calculated and agreed upon on the representation of the plaintiff and belief by the defendants in consequence of such representation, that there were 80 acres of growing tea on the said estate, but the defendants subsequently discovered that the extent under tea cultivation was not 80 acres but only 47 acres 3 roods and 18 perches". They then alleged that on this discovery they applied to plaintiff to reduced proportionately the rate of future rent and to make a proportionate refund of the rent already paid, that plaintiff offered to reduce the future rent by Rs. 800 per annum but refused to refund any portion of the rent paid, and that they therefore declined to accept the offer and, as they lawfully might, refused to pay the rent reserved by the lease for the three quarters in question. They further averred that they were entitled to a refund of the excess of rent already paid, amounting to Rs. 1,200, and to be credited with a sum of Rs. 200 a quarter on the rent now claimed by plaintiff and that there would then be due by plaintiff to defendants a sum of Rs. 300. The answer concluded with the following prayer:—"That plaintiff's action may be dismissed with costs, that it be decreed that defendants are entitled from the date of the said indenture until the determination thereof to a proportionate reduction of the rent payable under the said indenture, that this court do after due inquiry fix the amount of such proportionate reduction if the defendants' estimate thereof be found to be wrong, and that the court do order an account to be taken on the above footing of the rent reserved from March 1, 1890, to May 31, 1892, and defendants be credited with the said sum of Rs. 300, or such other sum as may be found due to them, as against the rent falling due for the quarter from June 1 to August 31, 1892, or the plaintiff condemned in reconvention to pay the said sum of Rs. 300".

The plaintiff in his replication denied the alleged representation, and said that before the agreement for the lease he had put the defendants on inquiry as to the acreage of tea, &c., and that they had inspected the estate and satisfied themselves thereof before the lease was entered into.

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At the trial there was a conflict of evidence as to the alleged representation, but the District Judge came to the conclusion that, during the negotiations for the lease, acreages were mentioned but only approximately and without any assurance of their accuracy. It also appeared that while the deed was being drafted by the notary one of the defendants wrote to the notary that the acres of land under different kinds of cultivation should be put in the lease, but he mentioned no figures himself. In reply the notary wrote: "Dr. Stork (plaintiff) has given me the approximate extent of the several plantations on the estate, as he is not in possession of a general plan shewing the exact extent of each plantation. The extents given, he assures me, are as nearly accurate as possible." As a result of this, the property was described in the schedule to the lease as "all that coconut and tea plantation comprising twelve allotments all lying contiguous to each other and now forming one property called and known as the Comila Estate, containing in extent 310 acres more or less, and consisting of about 180 acres under coconut cultivation, about 80 acres under tea, about 20 acres of paddy land, about 15 acres reserve forest, and about 15 acres chena land."

The District Judge considered that under these circumstances there was a representation by plaintiff as to the acreage under the various kinds of cultivation, and notwithstanding that one of the defendants had visited the estate and informed himself of particulars, as the plaintiff suffered the representation to appear in the agreement, the learned Judge relying upon *Voet* 19. 2. 26 and 18. 1. 7, and upon the case of *Smith* v. *Land and House Property Corporation*, 51 Law Times 718, held that the defendants were entitled to a refund of all overpayments and to a reduction of future rent. He fixed the amount of reduction at ¼ and upon a calculation of the gross yield of all the plantations he reduced the rental by Rs. 525 a year, and as on this basis the defendants had paid all rent due at the date of the action he held they had not forfeited the lease, and dismissed plaintiff's action.

The plaintiff appealed.

Layard, A.-G., (*Morgan* with him) for the appellant.

Dornhorst (*Grenier* with him) for the defendants.

Cur. adv. vult.

On May 16, 1893, the following judgments were delivered:—

Lawrie, A. C. J.—I take the law to be that, in the absence of fraud on the part of the lessor, where lands are leased and there is no dispute as to the lessee having received the whole estate which he meant to take on lease, he is not entitled to abatement from the price on account of a mere error in setting forth the property, by way of description, as consisting of so many acres or yielding such an amount of rental. On the other hand, when the lessee does not get the whole estate, he may either claim a deduction in respect of the part of the subject thus withheld, wherever it is so distinct that its value may be separated, or insist, on the ground of error *in essentialibus*, upon a *restitutio in integrum*. The latter remedy is available in all cases where the contract can be shewn to have proceeded in total misconception, and is available to the lessor equally with the lessee. I am of opinion that the lessees here got the whole estate which they meant to take on lease. They had seen it more than once; it lay within a ring fence; they got all the land they expected to get. If there was an error in the description, the doctrine of *caveat emptor* applies; but I think that there was not an error *in essentialibus*, and the error in setting forth, by way of description, the manner in which the land was planted, the extent under one crop, the extent under another, the quantity of woodland, did not give them a right to abatement or to *restitutio in intergrum*. I would therefore give judgment for plaintiff with costs.

Withers, J.—By an indenture made between him and the defendants on March 7, 1890, the plaintiff demised and leased to the defendants what is described in the plaint as "all that coconut and tea plantation called and known as Comilla Estate" for a term of five years from March 1, 1890, at a yearly rent of Rs. 2,000 payable quarterly on the first day of March, June, September, and December in each and every year. The payment of rent as aforesaid was covenanted for by the defendants. There is a stipulation in the instrument of demise that if the rents thereby reserved shall be behind and unpaid for thirty days after any of the days or dates on which the same shall become due and payable, it shall be lawful for the lessor to cancel and determine the lease and to re-enter and take possession of the premises and to recover the arrears of rent.

The plaintiff under this stipulation claims to recover the premises as well as arrears of rent which were behind and unpaid for thirty days on three successive quarters, *i.e.*, September 1 and December 1, 1891, and March 1, 1892, the breach of covenant to pay rent in terms of the demise being plaintiff's cause of action. The answer to this claim commences with an admission of the plaintiff's legal right to have what he is here suing for, and is

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followed by what is intended as an equitable defence. The second paragraph of the answer contains the case of the defence, the nature of which is not, to my mind, very clear. However, I take it to be this:—"you, the plaintiff, represented that the estate you let to us for a term of years comprised within its boundaries a block of 80 acres in tea which induced us to offer to you the rent appearing in the executed lease; as a matter of fact there was a deficiency of more than 80 acres as regards the block of tea, and we are entitled to have the rent reduced proportionately: and when what we have overpaid you is set off against the reduced rents admittedly in arrear, it will be found that we owe you nothing on account of rent, and you are therefore not entitled to eject us."

What is not quite clear to me is whether the defendants intend to allege in the second paragraph of their answer that the calculation of rent was with the knowledge of the lessor principally and mainly based on the extent of land under tea and that the sum eventually offered, and accepted, was settled by and because of the representation that as much as 80 acres of the land demised was under tea. If this is what is meant by the defence, I will dispose of it at once by saying, as the learned District Judge finds, that the facts proved do not support the suggestion, to put it briefly, that the Comilla Estate was let and hired as a tea estate and little or nothing more. If it is meant as I should construe it, viz., "our offer of rent was as high as it was because of the representation that 80 acres were in tea and we must have our rent reduced proportionately as 30 acres and odd were not under tea", that is another matter. What was demised according to the instrument of demise was "all that coconut and tea plantation and estate comprising 12 allotments of land all lying contiguous to each other and now forming one property called and known as the Comilla Estate.........containing in extent about 310 acres more or less and in the schedule hereto more particularly described"—a schedule to which, in compliance with the request of the defendants during the negotiations for the lease, the following particulars were added:—"and consisting of about 150 acres under coconut cultivation, about 80 acres under tea, about 20 acres of paddy land, about 15 acres of reserved forest, and about 15 acres of chena land."

It is admitted that the plaintiff's misrepresentation as to the acreage under tea was quite innocent, so that no question of deceit is here raised. It was contended, but I think unsuccessfully, that as this was a lease of premises *ad corpus*, fraud must be alleged and proved against the lessor before the price could be reduced on account of a diminished extent short of *enormis laesio*, and the authority was cited of Voet 18. 1. 7. On the contrary, this very chapter of Voet is an authority for the statement that this contract of lease was at least as much *ad quantitatem* as *ad corpus*, and the discrepancy being a "notable" one, the price should be proportionately reduced. Purchases and sales are there being discussed, but letting and hiring was in this respect governed on the same principles. See the authority cited to us in Voet 19. 2. 26; "If the lessor has made out the property to be much larger than it is actually found to be, the rent must also be reduced in proportion to the smaller extent of ground." The vendee in the one case had his relief under the *actio empti*, and the lessee under the *actio locati*. I conceive, then, that in the circumstances the defendants were entitled to a diminution of rent in view of the deficiency of the acreage under tea, but the question remains, to what relief, if any, does this defence set up by the defendants entitle them? It appears to me that the equitable defence set up grows out of a right of counter-claim and exists only because of the right in the defendants to claim a diminution of the rent, past, present and future, a reform of the instrument of demise as to the quantity of land under tea and as to the amount of rent payable thereunder in consequence of the diminution they prove themselves entitled to. They must, in my opinion, successfully establish this affirmative demand to justify the judgment herein dismissing the plaintiff's claim with costs. On the lease as it stands unreformed, they have no defence to the claim for re-entry or the payment of arrears of rent. They do not allege their readiness to hold to the lease, with a rent diminished by the amount found in their favour. It was, be it remembered, open to the defendants, on discovery of the difference of extent of land under tea, to have brought an *actio locati* to have the lease reformed, the rent diminished proportionately, and a declaration that the excess overpaid should go in reduction of the rents accrued due. They did not do so; they held to the land and refused to pay the arrears of rent; they tendered nothing in the way of rent; they have brought nothing into court in satisfaction of rent accrued due, and no doubt they justify this to themselves on the ground that so far from their having anything to pay they are entitled at the date of action brought to recover something from the plaintiff. To my mind the only defence which could extinguish plaintiff's right of action as herein instituted would be a counter-claim of the nature of the claim I have just indicated. I consider the defence a mutilated one, so to speak, and of no avail against plaintiff's legal rights. And for

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this reason I would set aside the judgment and give plaintiff judgment as prayed for with costs.

My inclination would have been to follow the law relating to the *actiones redhibitoria et quanti minoris* for the recision of contracts of sale or a diminution of the price on account of defects (*vitia*) in the subject matter, which did not avail the buyer who had every opportunity, as these defendants had before lease executed, of discovering the defects before buying the article, if I could have found an authority for doing so, but according to Voet 21. 1. 11. neither remedy applied to the contract of letting and hiring. I cannot help expressing an opinion that the learned Judge in the court below has found his estimate of the diminished rent on an erroneous basis. We are not informed what the 30 odd acres consisted of, whether of soil under jungle, or paddy or chena, or bare soil, but I take it, the difference would have to be found in the letting value of the estate with the soil of 30 odd acres under jungle or paddy or chena or bare soil, as the case may be, and 30 odd acres under tea.

Reversed.

———: :o :———

Present :—WITHERS, J.

(*May* 18 *and* 25, 1893.)

C. R. Colombo, No. 4,126. } MORRIS v. DIAS.

Prescription—Amendment of plaint—Addition of a new cause of action—Relation back to writ of summons—Ordinance No. 22 *of* 1871, *sections* 8 *and* 9.

Where after the institution of an action on a promissory note the plaint was amended by the addition of an alternative count for goods sold and delivered—

Held, that this new cause of action related back to the date of the original writ of summons and the period of limitation in respect thereto should be reckoned up to that date and not up to the date of the amendment of the plaint.

The plaintiff in his plaint, dated July 15, 1892, originally declared upon a promissory note for Rs. 100. The defendant took exception to the note on the ground of its being insufficiently stamped, and this objection having been upheld, the plaintiff was allowed to amend his plaint by adding a money count, which the plaintiff accordingly did by pleading that defendant was indebted to plaintiff in the sum claimed for "balance value of a pony sold and delivered by plaintiff to defendant on October 10, 1891." This amendment was made on October 18, 1892. To this the defendant pleaded prescription. The commissioner considered that the facts constituted an unwritten promise contract or bargain within the meaning of section 8 of the Ordinance No. 22 of 1871 and held that the action was not barred and gave judgment for the plaintiff.

The defendant appealed.

Wendt, for the appellant contended that the claim on the money count was distinctly an action for goods sold and delivered and came within section 9 of the Ordinance. The amendment amounted to the institution of a new action, and at that date more than a year had elapsed from the sale, and the action was therefore barred.

Loos, for the plaintiff. The action had commenced at the original institution of the plaint, and the amendment of the plaint by adding a new count for the consideration of the promissory note did not consitute a new action. At all events the claim on the money count must be taken to relate back to the original filing of the plaint.

Cur. adv. vult.

On May 25, 1893, the following judgment was delivered :—

WITHERS, J.—In this action, instituted on July 15, 1892, the cause of action arose on a promissory note, but that was thrown out. The plaint was amended on October 18, 1892, by adding this paragraph—"That defendant is likewise indebted to plaintiff in Rs. 100, being balance due for value of a pony sold and delivered by plaintiff to defendant at his request at Colombo on October 10, 1891." This was met by the defence that this cause of action had not accrued to plaintiff within one year of the date of the claim made by plaintiff, viz., October 18, 1892. But section 9 of Ordinance No. 22 of 1871, which applies to the case, enacts that no action shall be maintainable for goods sold and delivered unless the action be brought within one year after the debt shall have become due. The amendment was allowed and entered on October 18, 1892. This new cause, however, relates back to the date of the original writ in July 1892, and is therefore not barred, as the original writ was within one year from October 10, 1891, when the debt became due.

For this reason the judgment must be affirmed.

Affirmed.

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Present:—LAWRIE, A. C. J., and WITHERS, J.

(May 30 *and June* 6, 1893.*)*

D. C. Colombo, No. 1,473 C. } RUDD v. LOOS.

Mortgage—Mortgagee's decree—Seizure—Claim—Action to set aside claim—Validity of mortgagee's decree as against claimant—Rules and Orders of 1833—*Civil Procedure Code, section* 247.

In an action to recover a mortgage debt, instituted prior to the enactment of the Civil Procedure Code, the plaint prayed for a mortgagee's decree declaring the mortgaged land specially bound and executable for the debt. The summons to defendant, and the rule *nisi* for default of appearance to the summons, only called upon defendant to answer the money claim on the bond, but did not mention the prayer for a mortgagee's decree. Judgment was passed by default of appearance, with a special mortgagee's decree as prayed.

Held, that the mortgagee's decree was regularly obtained, and so long as it remained of record bound the land and could not be questioned by any party claiming the land by title acquired subsequent to such decree.

Action under section 247 of the Civil Procedure Code to have certain land declared executable under plaintiff's judgment.

The plaintiff as mortgagee, having on February 12, 1890, obtained judgment in *D. C. Colombo. No.* 2,938 against his mortgagor for a balance sum, with a declaration that the mortgaged land was specially bound and executable on the footing of the mortgage, which was dated December 14, 1876, seized that land (the Galla Estate) in execution, when it was claimed by the defendants, who were in possession by virtue of a Fiscal's sale of the estate held on January 3, 1891, on the footing of a mortgage to one Siman Fernando dated January 23, 1888. The claim having been upheld and the land released from seizure, the present action was brought. The defendants in their answer "denied that the judgment entered in case No. 2,938, declaring the Galla Estate specially bound and executable for the amount in the said case, was a good and valid declaration, and said that the said declaration was obtained wrongfully and *ex parte*". They justified the claim on the ground of their own title under the Fiscal's sale, and pleaded other defences which are not material to this report.

At the trial, the District Judge tried as a preliminary matter of law going to the root of the action the question whether the mortgage decree in No. 2,938 was good and valid, or obtained wrongfully and *ex parte*. It appeared that the mortgagor alone was sued in that action, which was commenced on December 5, 1889, and which comprised a prayer that the mortgaged property might be declared specially bound and executable for the judgment prayed for; that the summons to defendant called upon him to appear and answer the "claim of the plaintiff to recover Rs. 755·61 due and payable under his bond dated December 14, 1876, and interest thereon at 8 per cent. from November 28, 1888, till payment in full and costs"; that upon defendant's failure to appear a rule *nisi* had issued calling upon him to shew cause why judgment should not be entered against him for default of appearing to the summons; and that defendant not appearing to this rule it was made absolute on February 12, 1890.

The district judge held that the mortgage decree was good and valid and had not been obtained wrongfully or *ex parte*.

The defendants appealed.

Dornhorst (*Bawa* and *Loos* with him) for the appellants. The plaintiff's action is misconceived. He should have proceeded by the ordinary hypothecary action on his mortgage against the defendants, as parties rightfully in possession by title acquired subsequently to the mortgage. The true scope of an action under section 247 is to have it declared, as against a party whose possession and claim of title were *wrongful*, that the land is executable. The possession of the defendants here was perfectly lawful, and the mortgage-decree could only be made effectual as against them by suing them afresh and establishing a valid encumbrance on the land. (*D. C. Matara No.* 29,149, 2 S. C. C. 80.) This construction of section 247 was pressed upon this court in a recent case* and not adopted; but

* *Present*:—LAWRIE and WITHERS, JJ.

(March 17 *and* 22, 1893.*)*

D. C. Negombo No. 574. } ARNOLIS v. ALLIS.

The plaintiff, holding a primary mortgage from second defendant dated April 21, 1884, obtained a mortgagee's decree against him, issued execution on June 26, 1891, and in July, 1891, seized in execution the land mortgaged, when it was claimed by first defendant and the claim upheld by the court. The first defendant made title under a secondary mortgage dated December 24, 1888, upon which he had obtained judgment (prior to the institution of plaintiff's mortgage suit) and bought the property in execution on May 19, 1891.

The District Judge held that plaintiff had failed to establish his mortgage right as against the first defendant;

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we would ask the Court's reconsideration of the point. Then plaintiff's mortgage decree was improperly obtained and does not bind the land in defendants' hands. A mortgage bond comprising in one instrument two different and distinct contracts, the one the debt, the other the charge on the land; and this has been recognized both in the Privy Council and in this court. (*Lindsay* v. *The Oriental Bank Corporation*, 13 Moo. P. C. 426; *D. C. Jaffna, No.* 5,156, 2 S. C. C. 5.) Now, the summons to the defendant in action No. 2,938 merely called upon him to answer a claim for a small balance of the debt and gave him no notice of a prayer for a mortgage decree; else (especially in view of the facts pleaded in our answer) he would have appeared and objected to that part of plaintiff's prayer. His non-appearance could only be construed as a consent to the plaintiffs obtaining the specific relief named in the summons and rule *nisi*. It would have been different under the present Code procedure, where the defendant is served with the plaint as well as summons, and so has ample notice. The defendant might himself have had the mortgage decree expunged as passed without notice to him, and it is submitted the present defendants, third parties purchasing without notice, are in no worse position. Failing the mortgage decree, plaintiff's whole action fails, as defendants were the lawful owners of the land and in possession at the date of seizure.

Wendt (*de Saram* with him) for the plaintiff. The contention as to the proper construction of section 247 has been expressly overruled in the Negombo case cited, and it is submitted will not now be re-opened. Besides, it makes a difference that the defendants' title was acquired subsequently to the decree in plaintiff's favour on the mortgage. They could not have been made parties to the mortgage suit, and cannot go behind the decree therein. This also touches the second point made on the appeal. It is submitted the mortgagee's decree was regularly obtained. It is the debt that is the principal matter, the security on the land is merely an accessory. The defendant was cited to answer to the claim for the debt as due on the bond, and that must be taken to give him notice that plaintiff would avail himself of the security created by the bond. The very motion of the bond was sufficient to put the defendant upon inquiry, if (as now alleged) the bond had been discharged by the arrangement pleaded. The summons and rule *nisi* were in the form usually adopted under the Rules and Orders of 1833, which merely required that the "cause of action" set forth in the libel should be intimated to defendant. But even putting the present defendants in the position of the mortgagor, it is not sufficient for them to point to the defect in the summons. The decree may have been entered up with the full knowledge and concurrence of the mortgagor. Had

a stranger, not having averred or proved that there was consideration for the mortgage, or any part of the debt subsisting. He therefore dismissed the action. The plaintiff appealed.

Dornhorst (*Wendt* with him) for the appellant.

Fernando for the defendant.

Cur. adv. vult.

On March 22 the following judgments were delivered:—

WITHERS, J.—I was not able to appreciate the distinction which Mr. Dornhorst drew between an action by a mortgagee under section 247 of the Civil Procedure Code to have property successfully claimed by a third party sold in execution of a decree in his favour and an ordinary hypothecatory action against a stranger in possession of a mortgaged property, as regards the requirements of proof of matter in support of either claim—requirements to be found in many decided cases, such as 1 S. C. C. 83, 2 S. C. C. 80, 3 S. C. C. 99, &c. As at present advised, I think the allegations and proof should be the same in both cases.

So far then I agree with the learned judge in his construction of plaintiff's plaint in this action, but his dismissal of the action in consequence, a step which would deprive the plaintiff altogether of his security for what is *prima facie* a just claim, is another matter. It was open to the defendant in his answer to object to the defective character of the plaint on the grounds specified by the learned judge and so enforce an amendment or withdrawal. He did not choose to do this but set up a defence in the nature of a confession and avoidance. He said he was master in law of plaintiff's decree now sought to be enforced. He averred that the decree was a covinous decree obtained by consent of parties with intent specially to defraud him, the defendant. He further alleged that the second defendant was not the owner of the premises at the date of the alleged mortgage to the plaintiff, and lastly he put in, or rather suggested, a well known equitable defence to the effect that the priority of plaintiff's mortgage could not avail him in the circumstances of the case. The latter plea is too shadowy to be taken into account, and may be dismissed from consideration.

The plaint was a compendious statement of the fact that plaintiff had a subsisting debt originally created by a mortgage which had passed into a decree against the second defendant and which he sought to satisfy out of the property secured to him therefor. That is the claim in substance. In point of form the plaint is bad, but, as I said before, the defendant did not object to it as he well might have done for its defect of form. He took it as he found it, and he answered it. He knew well enough what he was answering. He endeavoured to resist the plaintiff's claim on various grounds, which have failed.

I would set aside the judgment and give judgment for plaintiff declaring that an undivided half of the premises described in his plaint and claimed by the first defendant herein is liable to be sold in execution of the decree in his (plaintiff's) favour in the suit against the second defendant therein referred to. That was what he should have prayed for, and by a careless piece of pleading did not. His prayer can easily be amended. Set aside with costs.

LAWRIE, J., concurred.

Set aside.

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he himself moved to set aside the decree, he surely must have negatived this. The defendants have not called the mortgagor, nor have they submitted any other material in this behalf. They merely point to the decree purporting to be pronounced by default of appearance. It is submitted that is not sufficient. Further, this point does not dispose of the whole action, for plaintiff has pleaded matter in the nature of an estoppel against defendants, and that has still to be determined.

Dornhorst in reply. The mortgaged decree purports on its face to be one by default, and the record therefore excludes any suggestion of consent. The defendant never appeared at all.

Cur. adv. vult.

On June 6 the following judgments were delivered :—

WITHERS, J.—This is an action within the purview of section 247 of the Civil Procedure Code to have certain property successfully claimed by the defendants declared liable to be sold in execution of a decree recovered by the plaintiff against one John Frederick Drieberg on February 12, 1890. One of the grounds on which this action is resisted is that the judgment referred to in the third paragraph of the plaint declaring this property, which then belonged to the said judgment-debtor Drieberg, bound and executable for the money recovered on a bond in the action in the District Court of Colombo No. 2,938, was invalid and wrongfully obtained. This plea was not taken exception to by the plaintiff, and issue was joined upon it, and this matter of law was isolated from other issues and tried and determined by the District Judge on the day fixed for the trial of the action. The issue so tried was settled by the learned judge as follows:—"Whether the declaration in the action No. 2,938 of this court that the Galla Estate was specially bound and executable therefor was a good and valid declaration." The issue is really a compound of fact and law; and of the facts which entered into it these are proved—the action No. 2,938 against Drieberg was to recover the balance of a principal sum of money and interest due upon a bond and to have a judicial sale of property specially mortgaged in the same bond in satisfaction of the debt due thereunder. Such was the object of the action, and such the prayer for relief.

The Rules and Orders of procedure in force at that time (1889) required the summons which issued on the filing of the libel to "intimate the cause of action set forth in the libel". Now, the summons issued in case No. 2,938 required the defendant Drieberg to answer the claim to recover Rs. 755 and odd with interest at 8 per cent. due and payable under defendant's bond of December 14, 1876. Drieberg did not appear to that summons, whereupon a rule *nisi* was taken out by the plaintiff requiring him on February 12, 1890, to show cause why judgment should not be entered against him for default of appearing. A copy of this rule *nisi* was served on the defendant, and in consequence of the defendant not appearing to the rule *nisi* it was ordered that the rule should be made absolute and that judgment should be entered against the defendant in terms of the libel. Then followed the decree for the payment by defendant to plaintiff of Rs. 755 odd with interest and costs and a decree declaring Galla Estate specially bound and executable for the money decree on the footing of the mortgage.

It was contended on this state of facts that a judgment on a cause of action against a person who has not been cited to answer that cause is so palpably wrong that it cannot operate. No one can have a decree signed against him behind his back without an opportunity of being heard. It was argued that such a mortgaged bond as that on which judgment was recovered against Driebeg comprises two distinct causes of action, one on the debt and one on the contract of hypothec, and reference was made in support of this distinction to *Lindsay* v. *Oriental Bank Corporation*, 13 Moo. P. C. 426. Also reference was made to well-known decisions of our courts holding that a simple money decree obtained in an action instituted both to recover a mortgage debt and realise the security does not bind the security as a special mortgage for the debt, so that a purchaser of the security after that decree would be unharmed by the decree.

It is clear from the summons and the rule *nisi* that no express intimation was given by either to Drieberg of his creditor's intention to foreclose the mortgage as well as recover the debt due by it; but was there not sufficient intimation? The securities of bond and mortgage were in one instrument, and if the mortgage simply secured the payment of the debt due under the bond, was not the debt the one cause of action which gave the creditor the right both to pursue the debtor and his mortgage, and was not the reference to the bond in the summons a sufficient intimation of the cause of action on the mortgage as well as on the bond? I cannot help thinking so. This being so, as long as the mortgage decree stood on the record it bound the land and those purchasing it subsequently to the decree. The bond is not before us, and we do not know its nature, but was it not for Mr. Dornhorst to prove that no cause of action ha

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accrued on the contract of mortgage? I can well understand a conditional mortgage co-existing with a simple bond. The debtor might acknowledge the sum to be due, but it might be agreed that the security should not be liable to be judicially sold until some condition precedent had been fulfilled. This state of things would be much more in Mr. Dornhorst's favour, but there is no proof of this state of things. Holding as I do that Drieberg's summons was sufficient to give him intimation of the two-fold claim arising out of the mortgage bond, I am bound to hold that the mortgage decree remained operative until reversed, and bound the land in the hands of the purchasers who bought it subsequently to the decree.

This being so, it becomes unnecessary to touch other points raised in the interesting argument on this question. I am for affirming the judgment on this issue with costs of the trial thereof in the court below and of the argument in appeal.

Lawrie, A. C. J.—I agree.

Affirmed.

———:o:———

Present:—Withers, J.

(March 9 and April 25, 1893.)

C. R. Matara, No. 1,456. } Grigoris v. Tillekeratne.

Frauds and perjuries—Verbal agreement for lease—Refund of money paid on such agreement—Notarial instrument—Ordinance No. 7 of 1840.

Money paid in pursuance of a contract, which is void under the Ordinance No. 7 of 1840 for want of a notarial instrument but which is not performed, is recoverable by action.

C. R. Panwilla No. 3,713, Gren. (1873-74) Pt. II., p. 34, followed.

The plaintiff agreed with defendant by parol to take on lease from defendant a piece of land for a term of 4 years at a rental of Rs. 240, of which the plaintiff alleged he was to pay Rs. 100 in advance and the balance amount at the execution of the deed of lease. He alleged that he paid to defendant a sum of Rs. 82, that he subsequently tendered a further sum of of Rs. 18, and required defendant to execute and grant a deed of lease, but that defendant refused and failed to do so, and he now claimed a refund of the sum of Rs. 82 paid in advance with interest thereon from the date of payment. The defendant, among other things, pleaded that plaintiff had paid him only Rs. 52 and denied the tender of Rs. 18, and at the trial he further took the objection that, the agreement for the lease not being in writing as required by the Ordinance No. 7 of 1840, the action was not maintainable. The commissioner held that plaintiff could recover the money actually paid by him, and as he found on the evidence that plaintiff had paid only Rs. 52, he gave him judgment for that amount and interest as claimed.

The defendant appealed.

Grenier for the appellant.

Sampayo for the plaintiff.

Cur. adv. vult.

On April 25, 1893, the following judgment was delivered:—

Withers, J.—I think the judgment must be affirmed except in so far as it allows plaintiff interest on the sum of money he has recovered by the judgment. I decline to give him interest by way of damages, for he himself clearly failed punctually to execute his part of the contract referred to in his plaint.

I was certainly under the impression that payment made by a person under a contract with which he could not be charged for want of evidence to satisfy our statute of frauds should be regarded as a voluntary payment and therefore not recoverable in a court of law. Such I understand to be the tenor of English decisions. However, it has beed ruled otherwise by this court. *C. R. Panwilla No.* 3,713, Gren. (1873-74) Pt. II., p. 34. Sitting alone I follow that decision.

Judgment must therefore go for plaintiff for Rs. 52 without interest but with costs.

Affirmed.

———:o:———

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

(June 6 and 13, 1893.)

D. C. Kalutara, No. 626. } Moraes Vedrale v. Andris Appu.

Civil Procedure—Claim in execution—Mortgage decree, enforcement of—Claimant's title acquired subsequent to mortgage—Action under section 247 of the Civil Procedure Code—Hypothecary action—Roman Dutch Law—Practice.

In the case of a mortgage, where a person in possession of the property upon a title acquired under the mortgagor subsequently to the mortgage is not made a party to the mortgage suit, such person can rightfully claim the property when seized in execution under a mortgage decree obtained by the mortgagee against the mortgagor.

An action under section 247 of the Civil Procedure Code, so far as regards an execution-creditor, is limited to the purpose of having it declared that the property seized is liable to be sold in execution of his decree. Consequently, such action is not available to the holder

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of a mortgage decree against a successful claimant, whose title, though derived from the mortgagor, is not subject to or affected by the mortgage decree, but in order to realise the mortgaged property in the hands of such claimant, the decree-holder must bring a distinct and separate hypothecary action as contemplated by the Roman Dutch Law.

Action under section 247 of the Civil Procedure Code by the holder of a mortgage decree.

The facts of the case are fully set out in the judgment of WITHERS, J.

The defendants appealed from a judgment pronounced against them.

Pieris for the appellants.

Sampayo for the plaintiff.

Cur. adv. vult.

On June 13, 1893, the following judgments were delivered :—

WITHERS, J.—This is an action under section 247 of the Civil Procedure Code to have a claim order set aside with damages and for a declaration that three-sixteenths of a garden called Kongahawatte are liable to be sold in execution of the money-mortgage decree obtained by him against the third defendant in a mortgage suit on March 25, 1892. The first and second defendants objected to the sale of three-sixteenths of the garden on the ground that at the date of the said decree they owned a twelfth part of that garden and that that welfth part was included in the three-sixteenths which the plaintiff had caused to be seized in execution of his decree. The execution-creditor, as the party against whom that order was made, seeks, as I said before, in this action to have that order set aside and the three-sixteenths of Kongahawatte declared liable to be sold in execution of his decree. By way of answer to this claim the first and second defendants aver that on January 30, 1892, one-twelfth of this garden was sold by the fiscal in execution of a judgment recovered against the son of the third defendant (the plaintiff's execution-debtor) and that they purchased it, and obtained a fiscal's conveyance of that share on June 15, 1892. The defendant's said son G. M. Moraes Kappurlae, according to the answer, succeeded to a third of one-half of his mother's interest in the premises through the death of his mother who, it is said, was married to the third defendant in community of property and died intestate about one year before action brought. In reply to this answer the plaintiff does not deny that there was community of estate between the third defendant and his wife. He admits that the third defendant was entitled to the premises described in the eighth paragraph of the answer of the appellants and he admits that the third defendant's wife died intestate leaving three children. He does not deny the averment that third defendant's wife died about one year before answer filed. He admits also that the share claimed by the appellants was included in the shares mortgaged to him and decreed to be judicially sold in satisfaction of the debt for which he recovered judgment on his mortgage.

The appellants having denied the money-mortgage obligations to plaintiff of the third defendant, the decree on the mortgage bond, and the debt due under the decree, the plaintiff was bound to prove his allegations about them. But apart from those issues, the vital issue (not very explicity stated by the judge) was whether appellants' purchase of the son's one-twelfth part of the mortgaged premises released that twelfth from the operation of the mortgage decree obtained against the father. It is clear from the admitted facts that appellants' execution-debtor became entitled, on his mother's death intestate, to one-third of one-half of the common estate of the third defendant and his wife in Kongahawatte. What the exact nature of that estate was is not so clear. What was purchased at the fiscal's sale by the appellants was, according to the fiscal's conveyance, one-twelfth of a specific portion of Kongahawatte within certain bounds in extent three roods and nineteen perches, and the question really for us to decide is whether the claim to have that share released from seizure under plaintiff's writ is a good and valid claim.

As the fiscal's sale purports to be confirmed by the court and the conveyance to be executed in pursuance of the sale, the appellants, being grantees in the conveyance, are to be deemed to have been vested with the legal estate from the time of the sale (see section 289 of the Civil Procedure Code). Now, the date of the sale was January 30, which was a little less than two months before the date of plaintiff's mortgage decree, and this being so, can we declare that the appellants' share in Kongahawatte is liable to be sold in execution of that decree ?

In these circumstances it was contended by Mr. Pieris that judgment should have been entered for his clients, inasmuch as it was proved that his clients had a legal title to one-twelfth of the premises through the son of the third defendant and his wife. The judge before whom the objection to seizure and sale of this one-twelfth of the premises was made had found his clients to be in possession thereof

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and for that reason had ordered its release from seizure and sale.

The point counsel pressed upon us with force was that a material distinction is to be observed between an action under section 247 of the Civil Procedure Code, whereby a plaintiff seeks to have certain property declared liable to be seized and sold in execution of the decree held by him, and an action by a person who is owed a sum of money secured by a contract of mortgage or by a decree in which that contract is merged and who desires to realise the mortgaged property in the possession of third parties.

I reminded counsel of our decision in *D. C. Negombo, No.* 574*, which appears to intimate that this is a distinction without a difference. If that decision can be fairly construed to have that effect, then I can only say, and I take the first opportunity of doing so, that I think that decision is erroneous, due to the fact that I did not see the point then so clearly as I do now. It seems to me that the object of an action by a decree-holder under section 247 is to satisfy the Court that property successfully held by a claimant who opposes the execution of a decree is liable to be seized and sold in execution of that decree. If he cannot show that, his action fails. The action is limited to that particular purpose. If the property has been acquired by the claimant subsequent to that decree or subject to that decree, or the defendant be estopped from denying that the property is subject to that decree, then only can the plaintiff succeed in such an action. It is not enough to show that the claimant is privy in estate and that the property which has come to him is burdened with a debt due and payable which can be liquidated by the sale thereof in an appropriate action.

Here the plaintiff has failed to show that the one-twelfth of the mortgaged premises presently owned and enjoyed by the appellants is liable to be seized and sold under his decree. Consequently, in my opinion, the present action fails.

The judgment must be set aside and plaintiff's action dismissed with costs.

LAWRIE, A. C. J.—I agree. It seems to me impossible to grant either of the prayers of the libel.

The order upholding the claim of the first and second defendants was a good order. The land was their own, and they had a right to prevent its being sold. Then, we cannot declare that the land now belongs to the third defendant or that it did belong to him at the date of the mortgage decree: it then belonged to those who had purchased his son's rights. I assume that the purchasers bought a land validly mortgaged and that in a suit properly directed against them they could not resist a mortgage decree declaring the land bound under the mortgage; but until such a suit be brought and until such a decree be pronounced I fail to see how the land purchased by first and second defendants can be sold on the footing that it belongs to some one else.

* See *ante* p. 188, note.—ED.

Set aside.

———:o:———

Present:—WITHERS, J.

(*February* 23 *and March* 2, 1893.)

P. C. Panadure, No. 8,345. } DON SIMAN v. SINNO APPU.

Gaming—Betting—Acts of gaming—Betting for a stake—Evidence—Charge—Ordinance No. 17 *of* 1889, *sections* 3 *and* 4.

To make an act of betting "unlawful gaming" under section 3 of Ordinance No. 17 of 1889 the betting must be for a stake.

In a prosecution for unlawful gaming under the Ordinance the act or acts on the part of the accused, alleged to constitute unlawful gaming, must be particularized in the evidence and should be specified in the judgment of the Court.

The complaint against the defendants, of whom there were four, was that they "had engaged themselves in a game of chance with dice and money" in breach of sections 4 and 5 of the Ordinance No. 17 of 1889. The Magistrate, after hearing evidence, which was directed to show that gaming with dice was going on in a certain shed, at which the defendants were present, acquitted the other defendants, and framed a charge against the first defendant in the form B in the schedule to the Ordinance. The Magistrate convicted the first defendant in the following terms:—"I am convinced the accused Sinno Appu was there and convict him of unlawful gaming and order him to pay a fine of Rs. 20."

The first defendant appealed.

Wendt for the appellant.

Cur. adv. vult.

On March 2, 1893, the following judgment was delivered:—

WITHERS, J.—The appellant K. Sinno Appu has been convicted of the offence of unlawful gaming on a charge expressed in the form prescribed by the Ordinance, as to which I cannot help observing that

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it is as unhappy a form as could well be conceived. The question, however, is,—does the evidence justify the conviction?

To sustain the charge in this case it must be proved that the appellant was engaged in the act of betting or of playing a game for a stake at a common gaming place, that is, a place kept or used for betting or the playing of games for stakes to which the public may have access with or without payment.

Notwithstanding what the witnesses called by the appellant deposed to, the Magistrate expresses so strong a belief in the presence of the accused at the place of the alleged unlawful gaming that I will not venture to say he is wrong as to that. But he convicts the accused of unlawful gaming. It is only right and fair that the Magistrate in cases under the Ordinance No. 17 of 1889 should specify in his judgment the act the accused was engaged in, which constitutes in the Magistrate's opinion "unlawful gaming".

There are three facts which separately constitute this offence: one is cock-fighting anywhere, the other two are betting or playing a game for a stake. In this connection I wish to say that as at present advised I think betting under this Ordinance means betting for a stake, for there is no break by comma or otherwise in the sentence "the act of betting or of playing a game for a stake", and all know that there are two kinds of betting, one on credit, the other for a sum of money or pledge deposited to abide the result of a wager. Now, what is the evidence of unlawful gaming against this particular person? I give extracts:—

"On that day there was betting and gaming with dice, and on the former days it was the same. All four accused were there. I saw the accused all there on previous days, and so can indentify them well." "1st accused gamed three days." "The accused ran out of the shed."

Another witness says:—"Before approaching the shed I heard betting: 'you will win, I will lose', and so on. I heard also the rattling of dice, and there was a great noise going on."

It seems that a very large number of people were in the shed, sitting, standing, and stooping, and that a bamboo box and two dice were found at the spot. I mention these latter facts only to observe that the case does not furnish any presumptive proof either of the accused having unlawfully gamed or of the shed being a common gaming place. Now, this evidence about betting and gaming is of much too general a character to be of any value. The acts which the law says shall constitute "unlawful gaming" must be particularised. No one says that this accused or any other person at the shed deposited a stake or pledged to be handed to another in the event of something happening or not happening, or that he and another laid a wager to be forfeited in such, an event by one to the other.

Playing a game with dice is not itself unlawful gaming: there must be a game for a stake. What was the game played here, and what was the stake for which it was played? I can find no answer to this question in the proceedings. Throwing dice for a stake to be lost or won on the fall is of course unlawful gaming. The accused was not seen doing this or abetting by his presence and encouragement those who were doing it.

The conviction must be set aside and the accused acquitted.

Set aside.

—:o:—

Present:—LAWRIE, A. C. J., AND WITHERS, J.
(*May* 19 *and* 30, 1893.)

D. C. Colombo, No. 1,636. } RAMEN CHETTY v. FERDINANDS

Limitation—Bond payable after notice—Breach of condition—Assignment—Power of assignee to sue—Ordinance No. 22 *of* 1871, *section* 6.

By a bond dated April 29, 1878, the obligors declared themselves "held and firmly bound unto [the obligee] in the penal sum of Rs. 44,000, for the payment whereof we bind ourselves our heirs executors administrators and assigns," and the condition of the bond was as follows: "that if we [the obligors] shall and will well and truly pay or cause to be paid unto [the obligee] and his aforewritten the sum of Rs. 22,000, on receiving from [the obligee] or his aforewritten three months' notice in writing desiring repayment of the said sum and interest thereon at the rate aforesaid (such notice however not to be given until twelve months after the date hereof), then this bond to be void," &c.

By deed dated July 7, 1882, the obligee assigned the bond to two other parties, who were thereby constituted and appointed "my true and lawful attorney and attorneys in the name of me [the obligee] and my aforewritten to ask demand," &c.

No part of the principal or interest having been paid the assignees of the bond sued the obligors thereon in their own names, alleging that they had on January 19, 1889, given notice in writing to the obligors requiring payments three months thereafter. The libel was filed on April 24, 1889, and summons issued on April 25, 1889.

Held that the bond was one with a condition to pay on three months' notice in writing, that limitation began to run only from the breach of that condition, viz., failure to pay on three months' notice in writing, and that therefore the present action was not barred by the provisions of section 6 of Ordinance No. 22 of 1871.

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Held, by WITHERS, J., that, notwithstanding the absence of words in the bond making it payable to the assigns of the obligee, the bond was assignable, and the assignees could by our law sue in their own names, the power given to them in the deed of assignment to sue in the name of the original obligee being only *pro abundanti cautelâ*.

The defendants in this action granted the following bond, which was dated April 29, 1879:—

"Know all men by these presents that we...... are held and firmly bound unto Sayna Soona Suppramanian Chetty in the penal sum of Rs. 44,000, for payment whereof we bind ourselves our heirs executors administrators and assigns.

"Whereas we........have this day purchased from the said Sayna Soona Suppramanian Chetty the Yakdessa Coffee Estate, and we have agreed to grant him a bond for Rs. 22,000, being the balance purchase money of the said estate, and we have agreed to pay the said sum of Rs. 22,000, with interest thereon at 8 per cent. per annum from this date in manner hereafter stated.

"Now the condition of the foregoing bond or obligation is such that if we........shall and will well and truly pay or cause to be paid unto the said Sayna Soona Suppramanian Chetty or his aforewritten the said sum of Rs. 22,000 on receiving from the said Sayna Soona Supparamanian Chetty or his aforewritten three months' previous notice in writing desiring repayment of the said sum and interest thereon at the rate aforesaid (such notice, however, not to be given until twelve months after the date hereof), then this bond or obligation to be void, otherwise to remain in full force and virtue. Provided always that it shall be competent for the said........to pay to the said Sayna Soona Suppramanian Chetty or his aforewritten the said sum of Rs. 22,000 or any part thereof at any time previous to the time of payment mentioned aforesaid, notwithstanding anything herein contained to the contrary.

"In witness whereof" &c.

Suppramanian Chetty, by deed dated July 7, 1882, assigned to the plaintiffs "all that the above recited bond or obligation, and all moneys hereafter to become due and payable thereupon, and all the right title benefit advantage claim and demand whatsoever of me the said Suppramanian Chetty of and in the said premises and every or any part thereof". The plaintiffs were also thereby constituted and appointed his "true and lawful attorney and attorneys in the name of me the said Suppramanian Chetty and my aforewritten to ask demand and receive all and every the sum or sums of money ....and on non-payment thereof to commence and prosecute with effect any actions or suits," &c.

The plaintiffs, on January 19, 1889, gave notice in writing to defendants demanding payment three months after receipt thereof, and now sued the defendants on the bond alleging the giving of the said notice and the non-payment of any part of the principal or interest. The libel was filed on April 24, 1889, and summons issued on April 25, 1889.

The defendants, among other things, pleaded (1) that the plaintiffs could not maintain this action in their own names upon the deed of assignment, (2) that the plaintiffs could not sue for the principal amount of the bond as the said principal sum was not assigned to them, and (3) that the action could not be maintained as it was not commenced within ten years of the date of the bond.

These preliminary objections were first discussed at the trial of the action, and the District Judge having upheld them dismissed the plaintiffs' action, whereupon the plaintiffs appealed.

Layard, A.-G. (*Ramanathan*, S.-G. with him) for the appellants.

Dornhorst (*Weinman* with him) for the defendants.

Cur. adv. vult.

On May 30, 1893, the following judgments were delivered:—

WITHERS, J.—The principal question to be decided is, whether or not the plaintiffs can maintain this action, and the answer to it must be found in section 6 of our statute of limitations (Ordinance No. 22 of 1871) which runs as follows:—"No action shall be maintainable for the recovery of any sum due upon any hypothecation or mortgage of any property, or upon any bond conditioned for the payment of money, or the performance of any agreement or trust, or the payment of penalty, unless the same be commenced, in the case of an instrument payable at, or providing for the performance of its condition within, a definite time, within ten years from the expiration of such time, and in all other cases within ten years from the date of such instrument of mortgage or hypothecation, or of last payment of interest thereon, or of "the breach of the condition". Two classes of securities are here aimed at: first hypothecations or mortgages to secure the repayment of money; secondly, bonds securing the repayment of money, the performance of any agreement or trust, or the payment of penalty. I will paraphrase the section to show how I construe it.

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If the instrument of hypothec or mortgage secures the repayment of money at a certain and definite time, time begins to run from that date. If it secures the repayment of interest, then time begins to run from the last payment of interest. As to the first, if no interest has been paid, and no certain time has been fixed for the repayment of the money secured by the hypothec or mortgage, then time runs from the date of the instrument of hypothec or mortgage. As to the second, if the money for which the bond is conditioned is to be paid at a certain date, or the agreement or trust is to be performed at a certain date, time begins to run from that date. If the bond obliges the payment of interest as well as principal and no time is fixed for the obligation to pay, time runs from the date of the bond or payment of interest, if any. If it is a conditional bond and no time is fixed for what is conditioned, then time runs from the breach of the condition.

One cannot forget the well-known distinction in English law between single and conditional bonds and the law there regarding the limitation of actions thereon. A bond wherein the obligor acknowledges himself to be bound to another in a certain sum of money is a single bond. If this acknowledgment is accompained by a condition that upon the performance of a certain act the bond is to be void or otherwise to remain in full force it is a bond with a condition. In the case of a single bond time runs from the execution of the bond, the cause of action being then complete. In the case of a conditioning bond, time runs from the date of the breach of the condition which constitutes the cause of action.

I venture to think that it cannot be said that any time was fixed for the payment of the money for which the obligors bound themselves. A time was fixed within which the obligor could not recover by legal process. I regard this as a bond with a condition, the ten years commencing from the breach of that condition which alone constitutes a cause of action.

It was urged that a creditor could lie by with an instrument of this kind for any number of years, and that this could never be intended. It is purely a matter of contract, and, besides, this objection is not so serious as it appears at first sight. It is open to the obligor to pay and discharge his obligation on a bond like this at any time, and if a creditor keeps a written obligation for many years without payment of interest or demand, he runs the risk of a presumption that his debt has been satisfied. See *In re Rutherford*, 49 L. J. Ch. 654. In my opinion, time runs from the breach of the condition, *i.e.*, failure to pay on three months' notice in writing, and the action is accordingly maintainable.

I think the bond was well assigned to the plaintiffs, and that as such assigns they could by our law sue in their own name. The power to sue in the assignor's name was given *pro abundanti cautela*. Besides, in my opinion, assignment was contemplated by the bond. To the words "his (*i. e.* the oblig-e's) aforewritten" some meaning must be given, if possible. They surely mean his (as our) aforewritten, *i. e.* heirs, administrators, and assigns.

Set aside with costs, and remit case for trial on the merits.

Lawrie, A. C. J.—This is a bond conditioned for the payment of money. The condition was one favourable to the debtors. It postponed the date of payment. The creditor at the earliest could not recover the money acknowledged to be due to him until fifteen months from the date of the bond, and only then if he gave three months' previous notice in writing. This action was commenced within ten years of the earliest date at which the creditor could have enforced payment. I am inclined to hold that there was a definite time at which the bond was payable, viz., fifteen months after its date. I draw a distinction between the obligation to pay and the right of the creditor to enforce payment.

It is consistent with the spirit of our limitation ordinance to oblige creditors to bring actions within a definite time from the date when they could first have enforced payment or performance. Here, the plaintiffs did not exceed ten years from what, I am inclined to hold, was the definite time when the instrument was payable, viz., the date when first they could have put the bond in suit.

I admit that this is a ground of judgment of the soundness of which I am diffident, because it was not pressed by the Attorney-General in appeal, nor does it commend itself to my brother Withers.

I agree on the other ground on which my brother's judgment rests. The defendants themselves introduced the condition that there was to be no breach of the bond unless they failed to pay within three months after receiving notice, and it is consistent both with law and justice to hold them to the consequence of that condition and to sustain an action against them commenced within ten years of the breach of the condition.

Set aside.

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Present :—WITHERS, J.

(*May* 25 *and* 26, 1893.)

P. C. Nuwara Eliya, No. 7,321. } CRISTIAN v. PEDRIS APPU.

Criminal Procedure—Charge for an offence not summarily triable—Trial for a lesser offence—Riot—Affray—Powers of Police Magistrate—Consent of defendant—Ceylon Penal Code, sections 145, 157—Criminal Procedure Code, section 242.

Where after evidence an accused is charged by a police magistrate for an offence not summarily triable and is not discharged from the matter of the charge, it is not competent for the police magistrate, while such charge is still pending, to formulate another charge for a lesser offence arising out of the same circumstances and to try the accused summarily thereon.

The facts sufficiently appear in the judgment of the Supreme Court.

The accused appealed against a conviction for the offence of affray under section 157 of the Ceylon Penal Code.

Dornhorst for the appellants.

Driebeig for the Crown.

Cur. adv. vult.

On May 26, 1893, the following judgment was delivered :—

WITHERS, J.—The following persons : (1) Pedris Appu *alias* Podi Sinno, (2) Palaniandy Cangany *alias* Arumugam, Conductor, (3) Perumal Cangany, (4) Govinden, (5) Peris Baas *alias* Harmanis Peris, have been convicted of the offence of affray, and sentenced each to pay a fine of Rs. 20 or in default one month's rigorous imprisonment each.

They have appealed on a point of law, which is, that they have been tried and convicted of the lesser offence of affray while they stand undischarged of the more serious offence of riot arising out of the very same circumstances as the affray.

On March 20, according to page 16 of the record, these persons were charged with the offence of riot. The first accused was also charged with rioting with deadly weapons in breach of section 145 of the Ceylon Penal Code. On that day witnesses entered into bonds securing their attendance before the Supreme Court or District Court, when summoned, to give evidence both for the prosecution and the defence. On April 18 following these accused were present and appeared before the magistrate and, with the exception of the first accused, said they were unwilling to be tried by the police magistrate for the offence of rioting. The second count against the first accused, I may here observe, could only be tried by the Supreme Court. On that day, below his record of the refusal of the accused (save the first) to be tried by him, the magistrate makes this note :—

"The instructions of Crown Counsel do not direct "what course I am to pursue. Return the case to "him. Accused to renew bail."

On April 24, on page 22 of the record, this minute appears to have been made :—

"Accused present. They are informed that the "charge against them has been altered. They are "now formally charged under section 157 of the "Penal Code."

Then followed the trial, which, I presume, is recorded from pages 17 to 20 of the record, and which ended in the convictions now appealed from.

I think the appeals are entitled to succeed, and that these convictions must be quashed. The police magistrate, having advised himself that there were sufficient grounds for committing the accused on the charge of riot, framed a charge against the accused and forwarded the proceedings taken by him to the Attorney-General for instructions as to the court to which such commitment should be made. It remained then for the Attorney-General either to make an order in writing directing the accused to be discharged from the matter of the charge of riot (see section 242 of the Criminal Procedure Code) or by his fiat to designate the court before which they should be placed for trial on that charge.

The record discloses no order in writing or a fiat of the kind, and I adhere to the opinion I expressed in the course of argument, that while the charge of riot was pending against these accused it was not competent for the magistrate to try them on the lesser offence of affray arising out of the same circumstances. The convictions are accordingly quashed.

Convictions quashed.

———:o:———

Present:—BURNSIDE, C. J., LAWRIE and WITHERS, JJ.

(*December* 18, 1892, *and January* 24, 1893.)

D. C. Colombo, No. 119 C. } SANDORIS SILVA v. VOLKART BROTHERS.

Sale of goods—Contract—Firm offer—Right of purchaser to accept part—Writing, construction of.

A writing in the terms—"I agree to sell to.......... "the plumbago now at their mills at the following "prices, viz., lumps at Rs. 145 per ton, chips at Rs. 75, "and dust at Rs. 50," and signed by the owner of the goods.

Held (LAWRIE, J., dissenting) to contain a complete contract of sale and not a mere offer to sell.

Held also that, even if it were an offer only, the party to whom the offer was made could only accept or reject the goods as a whole, and it was not competent for him to accept part of the goods and compel the owner to receive back the rest.

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The plaintiff was a trader in plumbago and other produce, and the defendants were a firm of merchants and mill-owners. The plaintiff, who had delivered to defendants a certain quantity of plumbago to be cured at their mills and with whom the defendants subsequently negotiated for the purchase of the plumbago, signed at their request the following document, which the defendants retained, and which was marked A in the present proceedings:—

"Colombo, 9th April, 1890.

"I agree to sell to Messrs. Volkart Brothers the plumbago now at their mills at the following prices, viz.:—

"O. Lumps at Rs. 174 per ton cured.
"Chips at Rs. 75 " "
"Dust at Rs. 50 " "

[Signed] SANDORIS SILVA."

On April 29, 1890, the plaintiff, refrring to his "contract" of April 9, demanded from defendants payment of the money due "in terms of the contract", to which the defendants wrote in reply that they had entered into no contract with plaintiff for the supply of plumbago but that "agreeably with your offer of the 9th instant to sell the plumbago" they had taken over the lumps, and that they had no use for the chips and dust, which they accordingly requested him to remove. By letters of May 2 and of subsequent date the plaintiff insisted that the defendants had purchased the whole lot and requested them to pay the price or to return the whole. The defendants ultimately accounted to the plaintiff for the value of all the qualities of plumbago, but at reduced prices as regards the chips and dust, which the defendants alleged in this action the plaintiff had agreed to.

The plaintiff sued the defendants in this action on the plumbago account as well as other accounts, and claimed the original prices for the plumbago as upon a sale constituted by the document A of April 9, 1890. The defendants denied the contract as set out by plaintiff, but admitting that in April and May 1890 they bought the whole quantity of plumbago, they alleged that the chips and dust were bought at the lower prices which they stated.

The remaining facts appear in the judgments of their Lordships.

The district judge held that the document A of April 9, 1890, was not a contract of sale, and sustaining the defence as regards the prices at which the plumbago was purchased, gave judgment for the defendants accordingly.

The plaintiff appealed.

Dornhorst (*Wendt* and *Sampayo* with him) for the appellant.

Browne (*Layard*, A.-G., and *Loos* with him) for the defendants.

Cur. adv. vult.

On January 24, 1893, the following judgments were delivered:—

BURNSIDE, C. J.—The judgment of the learned district judge has gone wrong with regard to the plaintiff's claim for the price of the plumbago, more perhaps as a matter of law than of fact. He characterizes the document A, upon which much stress was laid at the trial, as merely a memo. of the price which the plaintiff desired to get for his plumbago. This is certainly not so. The wording of the document repels such a construction. It begins: "I agreed to sell," not "I will agree" to sell: the *aggregatio mentium* necessary to constitute a perfect contract is definitely asserted. "I agree" to that which another party as well is proposing or consenting, or has already agreed. But even granting that it did not evidence the *aggregatio mentium*, it certainly operated as a binding offer of the plaintiff to sell to the defendants the quantity of plumbago to which it related, and the moment the defendants by word or deed and within a reasonable time indicated an acceptance of that offer, the writing became the best evidence of the contract between them. Now, what is the best evidence in this case that the defendants accepted that offer? The offer was one as a whole and not in parcels. The defendant could not pick out such part of the "offer" as suited him and then reject the rest. He was bound to reject or accept the proposal as made. Three weeks after the offer had been made, and after the plaintiff had called on the defendants to pay for the plumbago in accordance with "my contract dated the 9th instant", that being the day on which the plaintff's offer to sell was made, the defendants reply: "We entered into no contract with you for the supply of plumbago." Nothing had been said as to "supplying" plumbago, but the writing goes on: "Agreeably with your offer of 9th instant, to sell the plumbago lying at our stores, we have taken over the cwts. 270—8—20 at the price stated by you. The chips and dust however we have no use for." From the moment this letter was written it was no longer open to the defendants to contend that they were at liberty to accept the plaintiff's offer to the extent to which they, the defendants, had attempted to limit it. They say "agreeably with your offer we have taken over". Had they written "we are prepared to take over" it might have been different; but having admitted that it was upon the plaintiff's "offer" that they had taken over part of the goods, they are bound by that offer in respect of the whole. It would be a most dangerous doctrine to permit mer-

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cantile transactions evidenced by such direct written proof to be determined nevertheless by parol testimony, however prejudiced we may be in favour of individual or racial truthfulness. The plaintiff should have judgment for the amount claimed in respect of plumbago.

[His Lordship then dealt with other points in the case, which are not material to this report.]

LAWRIE, J.—I would affirmed the judgment. In my opinion the document A was an offer by the plaintiff to sell plumbago of three sorts at a different price for each sort. I think it is proved that Mr. Scott on 10th April, the day after the document A was writtten, accepted only the offer for the lumps, and that he thought his silence regarding the chips and dust left the defendant firm free to purchase or to refuse these. Mr. Remmers says he too told the plaintiff that he could take the lumps only and not the chips and dust.

On 29th April the defendant firm by letter A2 refused to take the chips and dust. I yield to the opinion of the rest of the court that this refusal to take the chips and dust came too late, and that on 29th April the sale of the whole of "plumbago" was completed.

[His Lordship then dealt with other points which are not material to this report.]

WITHERS, J.—This judgment cannot, in my opinion, be sustained. As regards the first cause of action, I cannot agree with the learned judge in his estimate of letter A of the 9th April signed by the plaintiff at the defendants' office. I hold it to be a contract of sale at the prices named in it of the plumbago then in defendants' stores and not a mere offer to sell the parcels of plumbago at those prices. In his letter of the 2nd May the plaintiff says that those prices were named to him and that he agreed to them with great reluctance and the correspondence between the parties impresses me with the truth of his story. If letter A was a mere statement of what the plaintiff was prepared to take for the different parcels of plumbago, why was the transaction entered in defendants' books and a press copy of the letter formally handed to the plaintiff?

If it was a mere offer to sell the parcels at the prices indicated, why was not the offer at once rejected or closed with, or counter proposals made? It may be answered that the oral evidence led for the defence shows that the terms of letter A were not accepted. To my mind this evidence does not satisfactorily answer that question. On occasions of this kind, what is written at or about the time of events is to be preferred to what is spoken of from memory some time after the events have happened. Mr. Scott says he believes that it was the next day (the 10th of April) that he told the plaintiff the defendants would take the lumps at the price named, but he does not say that the defendants then and there declined to take the other two parcels at plaintiff's prices. Besides, plaintiff's offer—if an offer only—was not to sell his plumbago piecemeal, but *en bloc* at certain prices for each of three parcels of which the lot was composed.

Later on Mr. Scott says he never agreed to buy the chips and dust, but that is not enough. If letter A was an offer, it was for the defendants to accept or reject it as a whole, or else they must distinctly prove separate contracts in regard to each of the three parcels. Mr. Scott admits that A was written after a conversation with plaintiff. Mr. Remmers says that some two or three weeks after letter A was signed by plaintiff at the office he had an interview with the plaintiff, and deposes to this effect: "I purchased the chips and dust from the plaintiff at the prices marked in the answer. * * * After I agreed to purchase the chips and dust I sent in an account with my letter of 15th May to the plaintiff."

But it takes two to make a contract, and nothing positive is said about the plaintiff having been a consenting party to this agreement, and Mr. Remmers confesses that he did not require of the plaintiff his consent in writing, which with letter A in the office would have been a proper precaution. As to Mr. De Abrew's statement that he acted as broker between the parties and settled the prices for the other two parcels, I can only say that I prefer to believe the plaintiff on this point, a belief that is impressed on me by the subsequent correspondence. On April 29 plaintiff wrote letter A1 to the defendants asking them not to delay longer the payment of the balance due him for the prices of the three parcels mentioned in his "contract of the 9th April inst." On the same day he receives an answer from the defendants which looks like an approbation and reprobation of the terms of the contract, as plaintiff calls it, and of the offer, as defendants call it, of the 9th of April. "We have taken over," they write, "the cwts. 270—3—20 at the price stated by you—the chips and dust, however, we have no use for, and we must ask you to remove them. Copy of account will be handed you in a day or two." Not a word about the agreement to take the chips and dust at the lower prices : this is quite ignored on that day.

On May 2 the plaintiff writes a letter of remonstrance to the defendants, and insists on payment of the whole lot, which he points out was purchased by defendants at his prices. Defendants,

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answer to this letter of the 5th of May again ignores any contract as to the chips and dust, and requests him to remove barrels containing these two parcels. On May 9 plaintiff sends letter A5 to the defendants relating to their account in A4 for the lumps and some yarn, and maintaining his right to be paid for the whole lot of plumbago. Then, for the first time in writing (letter A6 of the 15th May) the plaintiff is charged as it were on a contract for the chips and dust at the lower prices indicated in the account which accompanies that letter, an account which plaintiff declined to accept as correct.

With this the correspondence on the plumbago closes, and not a word in it on defendannts' part to suggest a binding contract for the sale of the parcel of chips and dust at the prices put against them in their memo. A6. On this count, plaintiff, in my opinion, is entitled to the judgment he claims.

[His Lordship then dealt with the other points in the case.]

———:o:———

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

(June 9 and 13, 1893.)

D. C. Colombo, No. 3,762 C. } The Singer Manufacturing Co. v. The Sewing Machines Co., Ltd.

Civil Procedure—Action against company—Recognised agent—Power of manager to appoint proctor—Authority of proctor to sign petition on behalf of company—Appealable order—Authority of proctor to sign petition of appeal—Ordinance No. 22 of 1866—Civil Procedure Code, sections 24, 25, 27, 470, 471, 755.

A joint stock company, as a corporation aggregate, cannot appear in an action, and is consequently not entitled to take advantage of the provisions of section 24 of the Civil Procedure Code as to "recognised agents", but its plaint or answer must (under section 470) be subscribed on behalf of the company by any member, director, secretary, manager, or other principal officer thereof who is able to depose to the facts of the case. Where such company appears to an action by an attorney, such attorney must be appointed under its seal, or be appointed by an agent empowered under the company's seal to bring or defend an action.

A joint stock company was sued as defendant in an action, and an *interim* injunction obtained which the company applied to dissolve. The application was made through a proctor appointed by a person professing to be the recognised agent and manager of the company. The District Court ruled that the recognised agent could not appoint a proctor, whereupon the agent himself signed the petition, which was then partly heard.

The company appealing against the above ruling—*Held*, that such ruling once and for all terminated the question before the court and was therefore appealable.

Held also that the company's application and the proxy to their proctor not having been taken off the file or revoked, such appeal was properly filed by such proctor.

This was an action against the defendant company for an injunction and for damages. The injunction prayed for was to restrain the defendant company, their agents, servants, and workmen from continuing to use and maintain suspended on their place of business a certain signboard which the plaintiff company alleged was calculated to deceive, and had in fact deceived, persons desirous of purchasing the machines of the plaintiff company into the belief that there was an agency of the plaintiff company at the defendant company's shop. The District Judge upon *ex parte* application granted an *interim* injunction for the same purpose until the hearing of the action. Mr. Frank Liesching thereafter presented his appointment as proctor for the defendant company, which appointment was signed "Sewing "Machines Co., Ltd., by their recognised Agent and "Manager, J. K. Hormusjee." He afterwards, on that appointment, signed and presented a petition for a dissolution of the *interim* injunction. The petition was supported by an affidavit of J. K. Hormusjee, who, among other things, swore that he was the only agent and manager of the defendant company in Ceylon. The District Judge made an interlocutory order appointing a day for the determination of the matter of the petition. On that day it was objected on behalf of the plaintiff company that Mr. Liesching's appointment was bad, inasmuch as it was not under seal, and that, though signed by Hormusjee, there was nothing to show that Hormusjee was authorised by the company to appoint a proctor. The District Judge upheld the objection, but allowed Hormusjee to sign the petition without prejudice to the defendant company's right to appeal against the order as to the sufficiency of Mr. Liesching's appointment. Hormusjee accordingly signed the petition, and counsel on behalf of defendant company then cross-examined a witness who had made an affidavit filed by the plaintiffs.

The defendant company appealed against the District Judge's ruling as to the sufficiency of Mr. Liesching's proxy, the petition of appeal being signed "F. Liesching, proctor for defendant company," and also "Sewing Machines Company, Limited, by their manager J. K. Hormusjee."

Grenier (*Sampayo* and *Bawa* with him) for the appellants.

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Layard, A-G. (*Dornhorst, Wendt*, and *de Saram* with him), for the respondents, took the preliminary objections that no appeal lay and that the petition of appeal was not that of the defendant company. As to the latter point, section 755 of the Civil Procedure Code requires all petitions of appeal to be drawn and signed by some advocate or proctor; and if a party wishes to appeal in person, the grounds of appeal must be taken down in writing by the secretary of the court and signed by the party and attested by the secretary. It is submitted that "proctor" in that section means proctor on the record (*D. C. Colombo*, No. 2, 73C, 2 C. L. R. 86). Mr. Liesching's appointment being held to be insufficient, he had no right to sign the petition. Again, the petition of appeal not being taken down by the secretary, the signature of Hormusjee cannot be accepted as that of the party appellant himself.

Grenier, contra. It is submitted that the appeal is regularly before the court. The petition of appeal is signed by Mr. Liesching, who appears on the record as the defendant company's proctor. Whether he had the authority to represent the defendant company in the action is the very question raised by this appeal, which has not yet been opened, and it is submitted the court will not dispose of the matter upon the preliminary objection.

The Court intimated that they would hear the appeal argued.

Grenier for the appellants. The question whether the defendant company was properly before the District Court upon their application to dissolve the injunction depends upon the capacity in law of Hormusjee to appoint a proctor for them. It is submitted that Hormusjee is the recognised agent of the defendant company, for his affidavit shews that he is the only agent and manager in Ceylon of the company, which has its registered office in Bombay, and so he comes within subsection (c) of section 25 of the Code. Hormusjee, as the recognised agent both in fact and in law of the defendant company, was entitled to appoint a proctor for the company. Section 24 of the Civil Procedure Code must be construed so as to include the appellants in the description "party to an action", thus entitling their "recognised agent" to appoint a proctor in their behalf. On any other construction of section 24 a company suing or being sued would under no circumstances be a party to an action. Besides, section 24 is very comprehensive in its terms, and embraces "any application appearance or act" made or done by "a party to an action or appeal"; whereas section 470, on the provisions of which the other side rely, relates exclusively to two distinct stages in an action—plaint and answer. The proceedings here have not yet reached the latter stage, and therefore the application under section 24 by the recognised agent of the company through a proctor duly appointed by such agent to represent the company, "a party to an action", was a good appointment. It cannot be said that a corporation when suing or being sued is not "a party to an action", and, therefore, that it cannot have a recognised agent, for such a contention would result in placing corporations in an altogether unique position in regard to their rights and liabilities, for if they are not regarded as "parties to an action" it would be difficult to determine their true legal position when suing or being sued. The remedy sought in this case is an extraordinary one, and as the summons and injunction were both served on Hormusjee as the recognised agent of the company, he had the right to appoint a proctor on behalf of his principals.

Dornhorst for the respondents. The question is whether Hormusjee can be regarded as the recognised agent of the defendant company. The defendants are a limited company, and it is submitted that section 25 of the Code is inapplicable to them. The defendants would then come under section 470 of the Code. Under that section the answer may be subscribed on behalf of the company by any member, director, secretary or manager, but it nowhere says that the manager can appoint a proctor to sign the answer. The proctor's appointment must be under the seal of the corporation (*D. C. Colombo* No. 85,191, 4 S.C.C. 159) or by an agent specially authorised under a power of attorney under seal to so appoint. Eevn assuming Hormusjee was the recognised agent, his affidavit is insufficient, for he does not say that there is no other agent expressly authorised to appear for the defendant company (subsection (c) section 25 of the Code). Again, assuming Hormusjee was the recognised agent, the appointment is bad. If a recognised agent acts under section 25, he must sign the appointment in his own name and not in the name of the company (section 24). Mr. Liesching's appointment purports to be made by the company, and not by Hormusjee acting under section 24. Hormusjee professes to act under a power of attorney, but that power is not filed. Under section 24 the law in respect of corporations is expressly saved—"except when by any such law otherwise expressly provided". If the appointment in favour of Mr. Liesching is given by the company, where is the seal? It is admitted that section 470 cannot be availed of because this is not an answer; then under what authority does Mr. Liesching appear? It is submitted that section 470 was expressly enacted for

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corporations, and under that section only can the present application be made.

Grenier in reply. The case cited from 4 S. C. C. 159 does not apply, as it was decided before the Code, which introduced the principle of representation by a recognised agent.

Cur. adv. vult.

On June 13, 1893, the following judgment was delivered :—

WITHERS, J.—This is an action, by an American company carrying on business in Colombo against a joint stock company registered and incorporated in India and also carrying on business in Colombo, in which it is sought to restrain the defendant company by a perpetual injunction from continuing to use and maintain on their premises in Colombo a sign board which, it is alleged, is calculated to deceive persons desirous of purchasing sewing machines manufactured by the plaintiff company into the belief that the defendant company are authorised agents of the plaintiff company to sell such machines in Colombo.

It appears that soon after the plaint was filed the plaintiffs applied for, and obtained, an interim injunction against the defendant company requiring the company, its agents, and workmen to remove the sign board complained of. On the 9th March last the defendant company purported to present a petition to the court applying for a discharge of the interim injunction. This petition purports to be signed by "F. Liesching, proctor for the petitioning company", and one J. K. Hormusjee. After hearing counsel for the two companies the learned District Judge disallowed the application as made by Mr. Liesching as attorney of the company, on the ground that the company had no status to make such an application through Mr. Liesching.

The company appeal from that order. At the hearing of the appeal a preliminary objection was taken to the appeal by respondents' counsel on the ground that the requirements of section 755 of the Code have not been complied with. It was also urged that the order complained of was not an appealable order.

As to the second point, I may as well say at once that I think the order was an appealable one. The question before the court was once and for all terminated by the decision of the court, that the defendant company as represented by Mr. Liesching had no *locus standi.*

As regards the other point, the attention of respondents' counsel was invited to the fact that the petition of appeal from the order complained of purports to be drawn and signed by a proctor, and so fulfils the requirements of section 755 of the Civil Procedure Code. This difficulty was met in this way. This court, it was urged, has laid it down that a petition of appeal must be signed by a proctor on the record. The Judge having found that the company, as regards the application referred to, was not properly represented by an attorney in Mr. Liesching, it could not be said there was any proctor on the record, and the petition of appeal in consequence could not be received. There is, however, herein filed of record a proxy by which the defendant company purports to empower Mr. Liesching to make the application to dissolve the injunction and to appeal from any order of the court thereon. The learned Judge did not think fit to take the application and the proxy off the court's file. For the purposes then of this contention, I take it, we must consider the appointment of Mr. Liesching as proctor to be in force in view of the provisions of section 27 of the Code. Hence this objection likewise in my opinion fails.

As to the merits, it was strenuously contended by Mr. Grenier that the proxy which vouched the defendant company's application to dissolve the injunction was a good proxy to Mr. Liesching for that purpose, because it was signed by Hormusjee (the person before referred to) as the recognised agent of the company, and as such agent was empowered to appoint Mr. Liesching the company's proctor for the purpose of the application. For his capacity in law Mr. Grenier relied on section 24 of the Civil Procedure Code, and for his capacity in fact he relied on the affidavit of Hormusjee to be found at page 71 of the record, and more particularly in the first paragraph thereof in which Hormusjee deposes as follows:— "I am the only agent in Ceylon of the Sewing Machine Company Limited, the defendant in this case, and have been so since its formation, and am carrying on business for and in the name of the said company, which was formed about 13th February, 1893, and whose registered office is at Bombay."

It was contended on the other side that Chapter V. of the Civil Procedure Code relating to recognised agents and proctors does not apply to joint stock companies, inasmuch as company law is governed by Ordinance No. 22 of 1866, except where provision is expressly made by local law on the subject, and instances of such provisions in the Civil Procedure Code, to which I shall presently refer, were mentioned to us.

It was also argued that even if Chapter V. of the Civil Procedure Code did apply to this case, Hormusjee could not be considered in law and fact the recognised agent for the defendant company for the purposes of this application, inasmuch as it is nowhere stated in Hormusjee's affidavit that there

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was no person in Ceylon expressly authorised by the defendant company to make such appearance and application herein as the law required or authorised to be made or done by a party to an action in the court below—the absence or presence of such a condition of things being peculiarly within the knowledge of Hormusjee. Further, there is no proof of the said J. K. Hormusjee's appointment as agent at Colombo of the defendant company.

In my opinion the contention of respondents' counsel must prevail. A joint stock company is a corporation aggregate which cannot appear in an action, and is consequently outside the provisions of section 24 of the Civil Procedure Code. Its very composition renders its appearance in person as an ordinary party to an action impossible.

To obviate difficulties occasioned by its constitution the law has provided, for instance, that a joint stock company may be compelled to answer interrogatories by a member or officer of such company (section 97 of the Civil Procedure Code). The law thereby creates a mouthpiece for it. Section 470 of the Code creates a hand for it by allowing the plaint or answer to be subscribed on behalf of the company by any member, director, secretary, manager, or other principal officer thereof who is able to depose to the facts of the case. By section 471 it provides for a particular mode of service on the company and for compelling the secretary or other principal officer of the company to appear and answer any material questions relating to the action if so required by summons or special order of the court. By section 655, where an action has been instituted by a company, it permits the principal officer of a company to make affidavit in support of the motion for the arrest of the defendant's person or the sequestration of his property before judgment.

Even if sections 24 and 25 of the Civil Procedure Code do apply to the case of a joint stock company which I have taken leave to doubt, I think J. K Hormusjee's affidavit is insufficient: on the positive side, as to his being the duly appointed agent in Ceylon of the defendant company; and on the negative side, as to there being no other person in Ceylon, competent to appear and make application for the company in a civil suit.

I take the law to be now as before, that except as specially provided—and I know of no such provision —a corporation aggregate like the defendant company can only appear to an action by an authority under its seal or (see case cited in 4 S. C. C. 158) by an attorney appointed in writing by an agent empowered under the company's seal to bring an action or defend one.

For this reason I would affirm the learned judge's order disallowing the application on behalf of the company by Mr. Liesching to dissolve the interim injunction granted to the plaintiff company. No costs.

Lawrie, A. C. J., concurred.

Affirmed.

—:o:—

Present:—Lawrie, A. C. J.

(*July* 6 *and* 13, 1893.)

P. C. Colombo, (Additional) No. 490. } Andree v. Coorey.

Criminal law—Criminal trespass—Charge—Intent to commit an offence—Mischief—Evidence—Ceylon Penal Code, sections 38, 409, 427, *and* 433.

In a prosecution for criminal trespass under section 427 of the Penal Code, where the offence consists in an entry upon property with intent to commit an offence, the offence which the defendant is alleged to have intended to commit must be specified in the charge.

The plucking of such fruits as cocoanuts or jak from trees does not amount to the offence of "mischief" as defined in section 408 of the Penal Code, inasmuch as such plucking does not cause the destruction of the trees or fruits or any such change in them or in their situation as destroys or diminishes their value or utility, or affects them injuriously.

The complainant was in possession of a garden as lessee under certain parties. The defendant also held a lease from a third person who claimed title to a share in the garden, and it was alleged against the defendant that he together with seven or eight others entered the garden with sticks and knives and used threats to complainant, and forcibly plucked and removed a number of cocoanut, some of which were green, and some jak fruits. The defendant justified under the lease which he held, alleging that he entered upon the land and plucked fruits *bona fide* and in assertion of his rights as lessee.

The Police Magistrate after hearing evidence framed two charges against the defendant, viz., for criminal trespass and mischief under sections 433 and 409 of the Ceylon Penal Code respectively. He convicted the defendant on both charges and sentenced him to one month's rigorous imprisonment. The charges were as set out in the judgment of the Supreme Court.

The defendant appealed.

Pereira for the appellant. The first charge is bad, as it does not set forth the offence which the defendant is alleged to have intended to commit. Besides, the evidence negatives the allegation of

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intention to commit any offence, for it is proved and held by the police magistrate that the defendant acted in assertion of his rights as less e. Entry upon land in such circumstances does not cons itute criminal trespass (*P. C. Matara, No.* 1,590, 1 S. C. R. 76). As to the charge of mischief, the conviction is equally bad, because the mere plucking of fruits cannot be said to be destruction of property: it is on the contrary only a mode of enjoyment, and it is submitted that the charge of mischief altogether fails. Further if, as is alleged, the defendant entered upon the land armed and accompanied by seven or eight others with criminal intent, these facts disclose an "unlawful assembly", and the magistrate had no jurisdiction to try the defendant for any lesser offence.

Dornhorst (*Wendt* and *Sampayo* with him) for the complainant. It is sufficient if a charge contains the designation or specific name of the offence. See section 196 of the Criminal Procedure Code. Here the charge states that the defendant committed "criminal trespass", and as the evidence supports the charge, it is submitted that the conviction on that count is good. The evidence also shews that the defendant intended to intimidate and annoy the complainant, and if it were necessary, this Court could alter the charge so as to include such an intent. The allegation of *bona fides* is negatived by the evidence. As regards the offence of mischief, the magistrate holds that the defendant stripped the trees of their fruits, young and green as well as ripe. This is doing wanton damage and comes within the description of mischief. The facts as found by the magistrate do not amount to proof of an unlawful assembly, and the defendant has no reason to complain of being tried for a minor offence.

Cur. adv. vult.

On July 18, 1893, the following judgment was delivered :—

LAWRIE, A. C. J. The police magistrate has given leave to appeal against the conviction and sentence. The first charge framed by the magistrate was that the accused "did commit criminal trespass by entering upon land Katupelallewatte, then in the possession of Hugh Andree, with intent to commit an offence, and that you have thereby committed an offence punishable under section 433 of the Ceylon Penal Code".

This was a bad charge, because it did not set forth what was the offence the accused intended to commit. Section 38 of the Penal Code enacts that the word "offence" in section 427, which defines "criminal trespass", means not only a thing punishable by the Penal Code but also a thing punishable under any law other than the Code, with imprisonment for a term of six months or upwards whether with or without fine; and section 435 and subsequent sections of the Penal Code show that the punishment of criminal house trespass varies according as the accused is convicted of intending to commit one crime or another.

I think it is essential that the charge should state what offence the complainant charged accused with intending to commit. If the intended crime was murder or any crime punishable by long imprisonment, the Police Magistrate would not have jurisdiction to try the charge of criminal trespass. Apart from a question of jurisdiction, the charge should give the accused reasonably sufficient notice of the matter with which he is charged. In this respect I hold the charge of criminal trespass was defective.

The second charge is "that you did commit mischief, to wit, by forcibly plucking and removing seventy-five king cocoanuts and eight green cocoanuts and two jak fruits, value Rs. 9. fruits of the trees standing on the land Katupelallewatte in the possession of Hugh Andree, knowing it to be likely that you would cause wrongful loss to the said Hugh Andree, and have thereby committed an offence punishable under section 409 of the Ceylon Penal Code".

If this charge discloses and sets forth any offence which I doubt, it certainly does not set forth the offence of mischief. Taking cocoanuts or jak from trees is not a destruction of property or any such change in the property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. Neither the trees nor the fruits were destroyed, nor by the removal was their value or utility diminished, nor were they injuriously affected.

The circumstances with which the removal occurred did not reasonably give rise to the belief that the accused committed theft. I find in the evidence sufficient material upon which to amend the first count of the charge by deleting the words "to commit an offence" and by substituting the words "to intimidate, insult, and annoy the said Hugh Andree".

I find the accused guilty on the first count and sentence him to one month's rigorous imprisonment. I set aside the conviction on the second count and acquit the accused of the offence of mischief.

Varied.

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Present :—LAWRIE, A. C. J.

(June 1 *and* 8, 1893.*)*

C. R. Trincomalee, No. 723. } ARUMOKAM v. TAMPAIYA.

Fishing—Right of exclusive fishing—Sea—Custom —Cause of action.

No right of exclusive fishing in any particular part of the sea or at any particular time can be acquired by any custom among fishermen regulating the times and places of fishing.

But where a fisherman has actually begun fishing operations and is prevented by force or violence from exercising his occupation or is disturbed therein by another, then an action accrues to him to recover compensation.

The plaintiff alleged that according to the custom and usage regulating fishing at Trincomlee it was his exclusive right to cast nets for fishing in the sea near Back Bay on November 19, 1892, that in pursuance of such right he on that day cast his net and enclosed a shoal of fish, and that then the defendants, who were also fishermen, forcibly and in violation of the said custom assaulted the plaintiff and prevented him from drawing his net and securing the fish. He claimed Rs. 98 as damages. The defendants, among other things, denied the right claimed, the fact of plaintiff having cast his net and enclosed any fish, and the assault alleged.

One of the issues framed by the commissioner was as to the custom regulating fishing at Back Bay and as to whether according to such custom it was the plaintiff's turn to fish on the day in question. Much conflicting evidence was adduced on both sides on this issue, and the commissioner expressing himself as unable to come to any conclusion as to the exact nature of the custom dismissed the plaintiff's action.

The plaintiff appealed.

Wendt for the appellant.

Sampayo for the defendants.

Cur. adv. vult.

On June 8, 1893, the following judgment was delivered :—

LAWRIE, A. C. J.—In my opinion this case does not turn on the alleged custom regulating fishing but on the averment in the third paragraph of the plaint that the plaintiff's net had been cast and a shoal of fish had been enclosed when the defendants unjustly and forcibly and with intent to cause plaintiff wrongful loss and damage assaulted the plaintiff and some of his men and prevented the plaintiff from drawing his net and securing the said shoal of fish, to the plaintiff's damage of Rs. 98.

The law applicable is that laid down in *Young* v. *Hichens*, 6 Q. B. 606. If a fisherman goes to fish in the high seas and another fisherman comes and fishes beside him and with tempting baits draws away the fish from the lines and nets of the first comer with a view of catching them himself, damage may be done, but there is no tort or wrong, for the one had as much right to fish and to use fair and reasonable means to catch fish as the other. But if the rival fisherman lays hold of the nets of the first comer, violently disturbs the water, and drives away the fish and prevents the latter by force or violence from exercising his occupation and calling, there is then a wrong done to him and he is entitled to compensation in damages.

In a case reported in 2 Lorenz 115, it was decided that a fisherman who had enclosed fish in a *madella* had sufficient possession to entitle him to maintain trespass against one who entered within the circle of the net and disturbed the fish. The decision in Vanderstraaten 247 is to the same effect.

Here the learned commissioner has not given any opinion or judgment on the evidence on the third and fourth issues, whether plaintiff had enclosed fish within his net and whether the defendants wrongfully prevented the plaintiff from drawing his net and securing and landing the fish. The evidence on this point is very conflicting.

The plaintiff and several of his witnesses swear that the plaintiff's net was cast and had enclosed a large shoal of fish, and the defendants and their witnesses say that the quarrel took place before the plaintiff had cast his net and that he did not either cast it or enclose any fish that day.

On carefully considering the evidence I hold that the plaintiff has not proved that he was prevented by the defendants from drawing the net and securing any fish therein, and I affirm the judgment with costs.

Affirmed.

———:o:———

Present :—WITHERS, J.

(June 15 *and* 21, 1893.*)*

D. C. Crim. Puttalam, No. 23. } THE QUEEN v. COSTA.

Criminal breach of trust—Public servant—Duty—Implied contract—Head clerk of the District Road Committee—Ordinance No. 10 *of* 1861—*Ceylon Penal Code, sections* 388, 389, 391, 392.

The offence of criminal breach of trust by a public servant and punishable under section 392 of the Ceylon Penal Code is not committed in respect of monies received by the public servant on account of his employer and misappropriated by him unless it is his duty in his capacity as such public servant to receive such monies.

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But where money is actually received by him there is an implied obligation on his part to pay it, and misappropriation thereof by him comes within the definition of the offence of criminal breach of trust under section 388 of the Ceylon Penal Code and is punishable under section 389.

In this case the defendant was charged under section 392 of the Ceylon Penal Code with having committed criminal breach of trust in his capacity of public servant, he being head clerk of the District Road Committee of Puttalam, in respect of three sums of money belonging to the said Committee.

The monies were amounts paid by a resthouse-keeper as collections made by him. The course of business appears to have been for the resthouse-keepers to take their books to the defendant, who would examine the books, note the amounts due, and give a slip stating the amounts to the resthouse-keepers, who would take the slip to the head clerk of the Kachcheri. The head clerk of the Kachcheri would then enter the amounts in the "Receipt Order Book" and forward the same to the shroff, whose duty it was to receive the money.

It was not shewn that it was defendant's duty as head clerk of the District Road Committee to receive monies from the resthouse-keepers, but it was alleged that he in fact received the three sums in question from a resthouse-keeper and did not pay them in or account for them. Opposite the totals in the resthouse-keeper's book entries were made by the defendant as follows :—"Examined and found correct. Credited."

The District Judge convicted the defendant for the offence as laid in the indictment. The defendant appealed.

Dornhorst for the appellant. The head clerk of a District Road Committee is not a "public servant" as defined in section 19 of the Penal Code. Even if he was, he did not receive the monies in his capacity of public servant, as it was admittedly not his duty to do so, and he could not be said to have committed breach of trust in such capacity. The charge therefore failed, and it is submitted that the defendant was entitled to an acquittal.

Ramanathan, S.-G., for the Crown. It is submitted that the defendant came within the definition of "public servant" in subsection 11 of section 19 of the Penal Code. Even if otherwise, the charge may be amended so as to bring the case under section 391 as breach of trust by an ordinary clerk, the resthouse-keeper being regarded as the agent of the District Road Committee in paying in the money. In any case, the defendant, having in fact received the money, impliedly contracted to pay it in, and the case is therefore covered by the definition of breach of trust in section 388 of the Code. If necessary, the charge may be amended so as to make it an ordinary charge of criminal breach of trust.

Cur. adv. vult.

On June 21, 1898, the following judgment was delivered :—

Withers, J.—The accused had been convicted of committing criminal breach of trust in respect of sums of money entrusted to him on three occasions in 1892 in his capacity of a public servant, viz., clerk of the District Road Committee, Puttalam. These sums were collections of money recovered by the resthouse-keeper, Puttalam, as resthouse charges, for which he had to account to the District Road Committee.

The District Judge believes that the resthouse-keeper, Puttalam, did deliver to the accused a sum of Rs. 13·75 on the 2nd of February, 1892 ; a sum of Rs. 22·87 on the 4th of April, 1892 ; and a sum of Rs. 9·37 on the 3rd of May, 1892 ; collections which he the resthouse-keeper had to account for to the Committee.

If that be so, the accused received this money in trust from the resthouse-keeper under an implied obligation on the part of the accused to pay it to the shroff of the Kachcheri, the proper officer to receive those monies according to the evidence. This was an implied obligation not only to pay the monies to the shroff, but to pay them then and there. It does not appear that those sums have ever been paid by the accused in accordance with this implied obligation, and is a reasonable presumption that he converted them to his own use.

The learned judge, however, has found that he received those sums in his capacity as a public servant. There is, perhaps, just sufficient evidence to support the finding that he was a public servant at the time of the alleged offences, for his duty was to keep books relating to the pecuniary interest of Government. The finding that he received these monies in his capacity of a public servant is clearly against the weight of evidence. As clerk of the District Road Committee it was not his duty to receive those monies, nor was he at any time permitted or required by his superiors to receive those monies. The resthouse-keeper remained just as liable after paying those monies to accused as before. This is what appellant's counsel contended, and I think rightly.

But it was argued that, if the accused did not receive these monies in the capacity of a public servant, he was, if guilty of an offence at all, guilty of conspiring with the resthouse-keeper to defraud

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the true owner of those monies, or of theft, or criminal misappropriation.

But I think, in the circumstances found against him, he was guilty of dishonestly using monies entrusted to him under an implied obligation to apply them to a particular purpose which he has not done. He has committed, in my opinion, a breach of section 388 of the Penal Code.

I set aside the judgment of the learned judge, and in lieu thereof pass the following judgment:—

The accused Simon Leonard De Costa is found guilty of having dishonestly converted to his own use the sum of Rs. 13·75 on 2nd February, 1892, entrusted to him at Puttalam by Amat Pakir, the resthouse-keeper at Puttalam; and having dishonestly converted to his own use a sum of Rs. 22·27 entrusted to him at Puttalam on 4th April, 1892, by the aforesaid person; and having dishonestly converted to his own use a sum of Rs. 9·37 entrusted to him at Puttalam on 3rd May, 1892, by the aforesaid person.

I wish to point out the convenience of setting out a conviction in terms of section 372, paragraph 2, of the Criminal Procedure Code, and then setting out the facts and reasons for the judgment.

Varied.

———:o:———

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

(June 30 and July 4, 1893.)

D. C. Kalutara, No. 571. } Weerawagoe v. Fernando.

Civil Procedure—Assignment of judgment—Action on assignment—Application for substitution of assignee as plaintiff—Cause of action—Civil Procedure Code, section 339.

A judgment obtained against the present defendants in a previous action was assigned to the present plaintiff by the judgment-creditor. An application by the assignee to be substituted plaintiff in the original action, which was opposed by the defendants on the ground of the deed of assignment being a forgery, was disallowed by the court, whereupon the assignee brought the present action on the assignment to recover the amount of the assigned judgment.

Held that the action was well brought—

By Lawrie, A. C. J., on the ground that although the assignee of the judgment could not in the first instance bring a separate action on the assignment, yet he could do so when he had been prevented by defendant's opposition from deing substituted plaintiff in the original action and proceeding to execution therein.

By Withers, J., on the ground that the assignee could sue in a separate action for the judgment debt, subject only to his being deprived of costs or having to pay costs if such action was unnecessarily or vexatiously brought.

In action No. 61 of the District Court of Kalutara one Adrian Sirimane, in December, 1890, recovered judgment upon a mortgage bond for a certain sum of money and a mortgage decree against the defendants. On May 20, 1891, Adrian Sirimane assigned this judgment to one Namasivayam Pulle, who was on his application substituted plaintiff in the said action in the room of Adrian Sirimane on September 15, 1891. By deed dated October 28, 1891, Namasivayam Pulle in his turn assigned the judgment to the plaintiff in this action. On November 30, 1891, the plaintiff in this action applied in the said action No. 61 to be substituted plaintiff. The defendants opposed this application on the ground that the alleged deed of assignment in plaintiff's favour was a forgery. The District Judge in the exercise of the discretion which he held to be vested in him disallowed the application. The plaintiff then brought the present action against the defendants to recover the amount of the assigned judgment and for a mortgage decree. The defendants, among other things, pleaded the order in action No. 61, disallowing the plaintiff's application for substitution, in bar of the action.

The learned District Judge ultimately gave judgment for the plaintiff, and the defendants appealed.

Fernando for the appellants. The plaintiff can only proceed in the original action and cannot sue again for the same debt. *Ram Bakhsh* v. *Panna Lal*, I. L. R. 7 Allah. 457. It is submitted therefore that this action is not maintainable. Even if an action does lie on the assignment of a judgment, the plaintiff having applied under section 339 of the Code to be substituted as plaintiff in the original action is concluded by the order made therein.

Dornhorst (*Sampayo* with him) for the respondent. An action can always be brought on a judgment. (See, for instance, D. C. Galle, 53,288, 8 S. C. C. 100.) An action, it is submitted, is the ordinary remedy, the procedure by way of substitution in the original action being only cumulative. The order in the previous case being due to the defendant's own opposition, there was no alternative for plaintiff but to sue on the judgment. The Indian case cited is itself an authority in plaintiff's favour, for there a regular action was allowed under similar circumstances to those of this case.

Cur. adv. vult.

On July 4, 1893, the following judgments were delivered:—

Lawrie, A. C. J.—The plaintiff prayed for judgment for a sum of money and interest, and that certain lands be declared liable bound and executable

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in satisfaction of the amount. His cause of action against the defendants was that Adrian Sirimane obtained a judgment against them, and that Adrian thereafter assigned that judgment to him, and that the defendants having notice of the assignment had not paid the amount due.

In my opinion the plaint set forth no cause of action against the defendants, nothing which gave the plaintiff the right to sue them. According to the plaintiff's statement one judgment for this debt had already passed against the defendants, and that judgment was still subsisting. As he did not aver facts which took the case out of the operation of the fundamental rule founded on the maxims *Nemo debet bis vexari pro eadem causa* and *Interest rei publicæ ut sit finis litium*, his demand for a second judgment for the same debt against the same defendants seemed unwarrantable. However, instead of standing on the defence of want of cause of action, the defendants in their answer supplied the defect by founding on an order of the District Court of Kalutara in the action in which judgment was given against them.

From that order, dated 25th January, 1892, it appears that the plaintiff had a good cause of action against the defendants. He had filed his assignment, and had moved to be substituted plaintiff in the room of his assignor. It appears that the defendants opposed the motion, and that the District Judge refused to substitute. The answer in this case discloses the ground of the defendant's opposition and the reason why the plaintiff's motion was refused. It was that the defendants alleged that the assignment founded on by the plaintiff was a forgery. I am of opinion that the learned District Judge was right in refusing to try that question incidentally on a motion to substitute, but the assignee could not be without a remedy. He had a right to have that question tried. He brought this action for that purpose. Parties went to trial on the issue whether the assignment was a forgery, and whether the judgment had been satisfied by payment to the assignor. On both issues the District Judge has found against the defendants.

There is no reason to disturb that verdict. In these circumstances the plaintiff is entitled to judgment with costs.

Withers, J.—I am unable to follow Mr. Fernando's contention that plaintiff having, as he put it, elected to apply to be substituted in place of his assignor on the record of the case in which the assigned judgment was recovered against the defendants, and having failed in his application, and not having appealed from the order of the District Judge in that case, is thereby estopped from seeking as assignee of the unsatisfied balance of the judgment debt to recover that debt from the judgment debtors.

A person may sue for a judgment-debt (see 8 S. C. C. 100), but his right to recover costs in the action may, I take it, be defeated by an admission of the judgment debt and the defence that there is a judgment of record for that debt which the plaintiff has not attempted to recover by due course in execution. He may indeed, I also take it, have to pay the costs of an action which can only be considered as vexatious. Here the defendants actually succeeded on grounds, which they have quite failed to justify, in preventing the plaintiff from taking out execution for the unsatisfied balance of the judgment debt found to have been duly assigned to him.

What alternative this plaintiff had but to bring this action on the judgment debt assigned I fail to see.

I would affirm the judgment with costs.

Affirmed.

END OF SECOND VOLUME.

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ERRATA.

Page.		*Column.*		*Line.*		*For.*		*Read.*
15	..	2	..	5	..	*after* "sum"	..	amounts to or
31	..	2	..	30	..	fund	..	found
32	..	1	..	last	..	*after* "mortgaged"	..	it
37	..	1	..	9	..	*delete* "give"	..	
97	..	2	..	51	..	being	..	bring
133	..	1	..	28	.	327	..	424
141	..	2	..	27	..	proving	..	obtaining
do	..	do	..	35	..	*before* "Lorenz"	..	1
do	..	do	..	37	..	*after* "will"	..	*i. e.*
do	..	do	..	39	..	*before* "such"	..	no
179	..	1	..	1	..	executor	..	execution

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